

State of New Hampshire
Supreme Court

NO. 98-383

2000 TERM

AUGUST SESSION

KIMBERLY M. FABICH

v.

ROBERT A. FABICH

RULE 7 APPEAL FROM FINAL DECISION OF SUPERIOR COURT

BRIEF OF PLAINTIFF, KIMBERLY FABICH

By: Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED 1

STATEMENT OF FACTS AND STATEMENT OF THE CASE 2

 I. Facts of the Case 2

 II. Description of the NHRS Disability Retirement Plan 3

SUMMARY OF ARGUMENT 5

ARGUMENT 7

 I. Disability Retirement Benefits are Marital Property Subject to Equitable Division ... 7

 A. Property Division Statute Mandates Dividing Pension Benefits 7

 B. Use of Same Word “Retire” in Pension and Disability Retirement Statutes Shows Intent to Treat Them the Same 9

 C. The New Hampshire Constitution Mandates that Robert’s Disability Retirement Benefits are Subject to Equitable Distribution 11

 D. Ordinary Retirement Benefits are Insurance Against Superannuation .. 14

 E. The Best Policy is that Disability Retirement Benefits are Marital Property Subject to Equitable Distribution 15

 F. Defendant has the Burden of Proof 19

 II. The Property Distribution is Equal and Equitable 20

 A. Robert and Kim Were Awarded Equal Shares of Marital Property 20

 B. Equal Division is a Presumption of Equitable Distribution 21

 C. The Court’s Decree Complies with RSA 458:16-a, III 21

CONCLUSION 22

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION 22

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

1. Pensions are marital property subject to equitable distribution in divorce. Robert's disability retirement benefits are part of his pension because they were purchased with marital assets, are property in which Kim has a legitimate property interest, and which if deemed non-pension would be unconstitutional. Are New Hampshire Retirement System disability retirement benefits marital property subject to equitable distribution?

2. An equal split of property is presumed equitable. The divorce decree awarded Robert substantial assets allowing he and Kim to share equally in the marital estate. Did the court appropriately apply its discretion by awarding Robert and Kim equal shares of marital property?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Facts of the Case

Kimberly Fabich and Robert Fabich were married in October 1980, and separated in July 1995, *Trn.* at 32, soon after Kim filed a libel for divorce. They have one child, Robert Jr. (a/k/a “B.J.”), born in 1984, who was 13 years old at the time of trial and is almost 15 now. After trial (*Abramson, J.*), they were granted a divorce based on irreconcilable differences.

During their marriage, Robert was a firefighter in the towns of Hampton and North Hampton, and then fire chief in Bedford. For the purposes of the New Hampshire Retirement System (NHRS), he was a fireman, RSA 100-A:1, VIII, for 16 years. During his employment he accrued pension benefits through the NHRS. RSA 100-A:20 (towns may participate in NHRS plan).

Robert was retired from the NHRS when an accident rendered him disabled before ordinary retirement age. *Trn.* at 84. Rather than wait until he turned 65 to collect his retirement benefits, he timely applied for and received “disability retirement,” RSA 100-A:6, II, payments as of January 1997, *Trn.* at 14, in the amount of \$2,663.85 per month. *Trn.* at 14.

During trial, Robert claimed that his disability retirement payments were income, not property, and were therefore not to be equitably divided under the property division statute. RSA 458:16-a. The court disagreed, and awarded Kim her equitable portion of the disability retirement benefits.

The court also made an equitable distribution of marital property. As noted by Robert in his brief, the decree awarded Kim her own soon-to-cess workers’ compensation benefit, \$75 per week in child support, and one half of the disability pension benefits to which Robert concedes

she is entitled.

But the decree awarded *Robert* land in Moultonboro valued at \$28,000, a lump sum of \$50,000 from workers' compensation, his new pick up truck in which he has equity of \$15,000, and one half of his disability retirement pension which pays him \$1,331.92 in cash monthly for life tax-free.

Kim was also awarded custody of B.J., the couple's son, but Robert was ordered to pay just \$75 per week in child support.

All the other marital property, such as household items, proceeds from the sale of other household items, bank accounts and funds, and other miscellany, was split equally by the decree.

Robert Fabich appealed.

II. Description of the NHRS Disability Retirement Plan

Several points must be made to characterize the pension plan at issue here.

- It is not disputed that a pension is distributed in divorce. *Trn.* at 88; RSA 458:16-a, I; *Blanchard v. Blanchard*, 133 N.H. 427 (1990); *MacDonald v. MacDonald*, 122 N.H. 339 (1982).
- The New Hampshire Retirement System (NHRS) administers the pension benefit plan for public employees. The plan is comprehensive, and insures against old age, disability, and death. RSA 100-A:1 *et seq.*
- The accident which caused Robert's disability occurred during the marriage. *See, e.g., Cummings v. Cummings*, 765 P.2d 697, 701 (Idaho App. 1988) (disability occurred before marriage); *In re Marriage of Elfmont*, 891 P.2d 136, 142-43 (Cal. 1995) (disability occurred after divorce).
- The entire pension was earned during the marriage. *Trn.* at 44, 93. This fact avoids potentially complex valuation problems. Brett Turner, *Classification, Valuation, and Division of Retirement and Disability Benefits (Part 4 of 4)*, 6 DIVORCE LITIG. 149 (Aug. 1994). *See, e.g., In re Marriage of Bergman*, 214 Cal. Rptr. 661 (Cal. App. 1985) (complicated valuation because husband began civil service career before marriage).

- Membership in the NHRS retirement plan is contingent upon mandatory contributions to it. RSA 100-A:16, I; RSA 100-A:24; *Day v. N. H. Retirement Sys.*, 138 N.H. 120, 125 (1993). Kim and Robert Fabich contributed to the plan throughout their marriage. *Trn.* at 11.
- The NHRS is a “defined benefit plan,” meaning that its value is set according to the defined benefit, not actuarial calculations based upon what the member contributed. RSA 100-A:5, II; RSA 100-A:6, II.
- Robert Fabich’s service retirement benefits, at the time of his retirement from the system, were vested, meaning that a property interest was acquired in them and they could not be taken away. His disability retirement benefits were fully vested as well. *Trn.* at 96; RSA 100-A:5, II; RSA 100-A:6, II.
- Because Robert elected to take NHRS benefits as disability retirement now, and to not defer taking them until he turned 60, his benefits matured at the time of his disability. *Trn.* at 11-12. *See* Lawrence Golden, *EQUITABLE DISTRIBUTION OF PROPERTY*, § 6.14 (1983) (maturity of pension not relevant to determine whether divisible, but may determine method of distribution).
- Because Robert’s disability retirement is currently paying in cash, there are no significant valuation problems. A variety of valuation schemes exist, *Rothbart v. Rothbart*, 141 N.H. 71 (1996); *Hodgins v. Hodgins*, 126 N.H. 711 (1985); *MacDonald v. MacDonald*, 122 N.H. 339 (1982), but there is no need for them here.

SUMMARY OF ARGUMENT

Kim Fabich, the plaintiff in divorce, first argues that New Hampshire's equitable distribution statute is broad, to include all property, and specifically including employment benefits, pensions, and other retirement benefits, and that it must therefore apply to NHRS disability retirement payments.

She then argues that the use of the word "retire" throughout New Hampshire's retirement system statutes is defined as withdrawal from the retirement system upon leaving employment. Disability retirement, using the word so defined, is a type of retirement, and therefore its proceeds must be considered retirement benefits distributed upon divorce.

Kim then argues that accepting Robert's argument would put this court in a constitutional quandary. Declaring that his disability retirement benefits are not based on actual service, but are instead compensation for Robert's disability, would render the disability retirement portion of the NHRS statute, and possibly the entire statute, unconstitutional. This may in turn implicate federal tax and pension law.

Kim points out that any attempt to distinguish a pension from disability retirement benefits on the grounds that one is compensation and the other insurance fails because a pension is nothing more than insurance against the risk of surviving past retirement age.

Kim notes that there are numerous cases treating this issue in many jurisdictions, that they are based on a variety of shaky analyses, and that the consistent way to view disability retirement benefits is as marital property.

Finally on this issue, Kim asserts that the burden of proof is on Robert to prove that Kim should not equally share in the NHRS disability retirement payments.

Kim then addresses the facts of the equitable distribution. She shows that the court awarded each party equal shares, that the split is presumed to be equitable, and that the court adequately explained its property decree.

ARGUMENT

I. Disability Retirement Benefits are Marital Property Subject to Equitable Division

A. Property Division Statute Mandates Dividing Pension Benefits

New Hampshire's equitable distribution statute provides that when a marriage is dissolved, the court may order "an equitable division of property between the parties." RSA 458:16-a, II. Its definition of "property" is extremely broad:

"Property shall include all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes, but is not limited to, employment benefits, vested and non-vested pension or other retirement benefits, or savings plans."

RSA 458:16-a, I. The statute is written in the broadest possible terms so that it is hard to imagine language that would be more inclusive. Specifically to be divided upon divorce are:

- "employment benefits,"
- "pension," and
- "other retirement benefits."

The disability retirement pension benefit at issue here fits in all three categories. It is undeniably an employment benefit: membership in the NHRS system is a mandatory condition of Robert's employment, and it is clearly a benefit. It is a pension: the plan is administered by the New Hampshire Retirement System, and has all the hallmarks of a pension plan. *Day v. N.H. Retirement Sys.*, 138 N.H. 120, 125-26 (1993). If it fails these categories, it falls in the catch-all as an "other" retirement benefit: it is called "disability retirement benefits" by statute, RSA 100-A:6, and if Robert had for some reason been denied the benefit he no doubt would be claiming it as a retirement benefit due him.

In *Blanchard v. Blanchard*, 133 N.H. 427, 430 (1990), this court re-visited its former

policy of excluding military pensions from equitable distribution. Citing the passage of RSA 458:16-a since it had decided that military pensions were separate property, it called the statute “unambiguous” in its breadth and decided that they were now to be considered marital property. *MacDonald v. MacDonald*, 122 N.H. 339, 342 (1982) (pensions are marital property, with citation to language of RSA 458:16-a). *See also* Skoloff *et al.*, 2 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 23.03 at 23-75 (1984) (and cases cited therein) (breadth of statute ensures disability retirement benefits intended to be included in equitable distribution).

This court has recognized the breadth of the statute by holding that marital property includes unvested pensions, *Halliday v. Halliday*, 134 N.H. 388 (1991), and future interests. *Flaherty v. Flaherty*, 138 N.H. 337 (1994).

Even if RSA 458:16-a, I were not written so broadly and did not specifically enumerate pension benefits, they would nonetheless be included because they are generally considered property. *Holliday v. Holliday*, 139 N.H. 213, 215 (1994) (legislature intended “marital property includes any property acquired up to the date of a decree of legal separation or divorce”).

In *Baker v. Baker*, 120 N.H. 645 (1980), before federal law changed the character of military retirement benefits, this court exempted them from equitable distribution. It wrote that “[m]ilitary retirement pay lacks the following characteristics of property: cash surrender value, loan value, redemption value, lump sum value and value realizable after death.” *Baker* at 648. In this case, however, because Robert’s disability pension is currently paying in cash, it has all these characteristics. Even before it matured upon Robert’s accident, it had calculable cash surrender, loan, redemption, and lump sum values. Moreover, disability retirement payments are the consequence of a contractual right, which are ordinary treated as property. *See, e.g., In re*

Marriage of Brown, 544 P.2d 561, 565 (1976); *In re Marriage of Grubb*, 745 P.2d 661, 665 (Colo. 1987); Brett Turner, *Classification, Valuation, and Division of Retirement and Disability Benefits (Part 1 of 4)*, 6 DIVORCE LITIG. 89 (May 1994). NHRS disability retirement benefits are therefore property for the purpose of the equitable distribution statute, even without the specific enumeration.

Accordingly, based on the language of New Hampshire's equitable distribution statute alone, this court is compelled to hold that Robert's disability retirement benefits are marital property to be equitable divided between the parties.

B. Use of Same Word “Retire” in Pension and Disability Retirement Statutes Shows Intent to Treat Them the Same

In his brief, Robert argues that disability retirement benefits are not retirement benefits despite their codification in the retirement benefit statute and despite their being administered by the New Hampshire Retirement System. *Def. Br.* at 15-20. Given the language of the statute creating the benefits, however, disability retirement benefits must be considered retirement benefits.

In its definitions section, the pension statute defines the word “retirement” to mean “withdrawal from active service with a retirement allowance granted under the provisions hereof.” RSA 100-A:1, XXIII. Retirement means *any* withdrawal with benefits, and the statute does not specify that some types of withdrawal are not to be considered retirement. Thus, withdrawal due to a disability is considered “retirement” for the purposes of the statute. The NHRS witness reiterated this understanding at trial, *Trn.* at 11-13, and refused to characterize Robert's benefits under the plan as anything but an “accidental disability retirement pension.”

Trn. at 24.

This definition is in accord with the use of the word “retirement” in the disability retirement statute. At the outset, disability benefits are called “disability retirement” by the statute, RSA 100-A:6, and in the NHRS benefits booklet Robert introduced at trial as an exhibit.

In ordinary retirement, a person may cease his employment upon reaching the requisite age and length of service. When employment ends, he is withdrawn from the NHRS plan, and benefits commence. The NHRS statute calls this retirement:

“Any group II member who has attained [required age and service time] *may retire* on a service retirement allowance.”

RSA 100-A:5, II(a) (emphasis added). In disability retirement, a person ceases his employment upon suffering a disabling accident. When employment ends, he is withdrawn from the NHRS plan. The NHRS statute calls this retirement as well:

“Upon the application of a group II member . . . who has been totally and permanently incapacitated for duty as the natural and proximate result of an [on duty] accident . . . *may be retired* . . . on an accidental disability retirement allowance.

RSA 100-A:6, II(c) (emphasis added).

The statute uses the same word – retire – in both instances. “Retire,” to the drafters of the statute, meant what the legislature said in the definitions section – withdrawal from the system with benefits. The statute does not show any intent to distinguish between the two types of retirement, but rather shows that there is simply more than one way to retire with benefits – by age or by disability.

Any argument attempting to distinguish between the two types of retirement, by calling one retirement and one something else, is defeated by the plain language of the statute.

C. The New Hampshire Constitution Mandates that Robert’s Disability Retirement Benefits are Subject to Equitable Distribution

Article 36 of the New Hampshire Constitution provides that:

“Economy being a most essential virtue in all states, especially in a young one, no pension shall be granted, but in consideration of actual services; and such pensions ought to be granted with great caution, by the legislature, and never for more than one year at a time.”

N.H. CONST., pt. I, art. 36.

The purpose of the article is probably to prevent corruption and the granting of English-style titles. *Opinion of the Justices*, 117 N.H. 409, 411 (1977) (purpose to stop “certain particular abuses of various royal agents (and the committee of safety) . . . evidenced by the practice of awarding ‘boons, bounties and favors’”); *Opinion of the Justices*, 78 N.H. 617, 618 (1917).

Nonetheless, the article has been consistently interpreted to treat a government grant based on service as a pension for constitutional and statutory purposes. *Opinion of the Justices*, 102 N.H. 75 (1959) (cost of living increase); *Opinion of the Justices*, 102 N.H. 123 (1959) (including those employed before existence of state retirement system).

Conversely, the article has been consistently interpreted to treat a government grant *not* based on service as *unconstitutional*. *Opinion of the Justices*, 85 N.H. 562, 563 (1931) (“Clearly a grant of assistance to one merely because he had reached a certain age would be a pension . . . , and its constitutional invalidity cannot be doubted.”); *Opinion of the Justices*, 78 N.H. 617, 618 (1917) (benefit based on age alone unconstitutional).

To prove that a grant is not a pension, it must be shown that the purpose of the grant is to “discharge . . . an existing legal or contractual liability.” *Opinion of the Justices*, 88 N.H. 511,

512 (1937). In this case, there has been no allegation or attempt to show that the NHRS plan is designed for that purpose. Moreover, if the NHRS plan is deemed not a pension, it may run afoul of federal pension and tax law, which provide incentives to participate in pension plans.

Robert has argued that his disability retirement benefits are not calculated with regard to actual service, and therefore not a pension subject to equitable distribution. *Def. Br.* at 15-16; *Trn.* at 23. The problem with this argument, however, is that both disability retirement benefits and standard service retirement benefits are calculated based on the same factors: if the one is not based on “actual service” than the other is not as well. If this is so, both are unconstitutional, as is the entire NHRS plan.

Standard New Hampshire Retirement System service retirement benefits for a group II member are:

“equal to 2-1/2 percent of his average final compensation multiplied by the number of years of his creditable service not in excess of 40 years.”

RSA 100-A:5, II(b)(2).

New Hampshire Retirement System disability retirement benefits for a group II member are:

“equal to 2/3 of his average final compensation at the time of his disability retirement. For any group II member who has more than 26-2/3 years of service, a supplemental disability retirement allowance shall be paid. Such supplement shall be equal to 2-1/2 percent of his average final compensation multiplied by the number of years of his creditable service in excess of 26-2/3 but not in excess of 40 years.”

RSA 100-A:6, II(d).

Robert may make the argument that for employees, such as he, who have less than 26-2/3 years of service, and thus do not receive the supplement, the calculation is made based only on

average final compensation with no years used as a multiplier. The argument fails for two reasons.

First, all the benefits, including Robert's, are based on "average final compensation." "Average final compensation" is defined as "the average annual earnable compensation of a member during his highest 3 years of creditable *service*." RSA 100-A:1, XVIII (emphasis added). Average final compensation is thus directly dependent upon locating the three highest years of service, making the calculation squarely dependent upon actual service.

Second, even if average final compensation is independent of actual service, the calculation of the benefits depends upon actual service by the simple fact that it is based on salary. This is because salary is directly related to years of service. The higher benefits earned during the later years of an employee's tenure are built upon a foundation established by his efforts early in his career. *Lynch v. Lynch*, 665 S.W.2d 20 (Mo. Ct. App. 1983). Thus, basing the employee's disability retirement benefits on an average salary of his highest earning years is implicitly basing it on the length of time he served. The NHRS booklet Robert offered as an exhibit recognizes this. In the book's second paragraph, it says that the NHRS plan

"is a contributory, defined benefit plan to which its participating employers and members make regular contributions. With a defined benefit plan a participant's actual retirement benefit is specifically determined by a formula, which generally considers two variables: the participant's service credit and salary credit. The benefit is not based on the amount of contributions made to the plan."

NHRS book at 3 (emphasis omitted).

If the NHRS ordinary service retirement benefits and the NHRS disability retirement benefits both depend upon "actual service," they are both constitutional plans under Article 36. If they are not based on "actual service," then they are not constitutional pension plans, and the

entire NHRS system tumbles.

Even if NHRS ordinary service retirement benefits and NHRS disability retirement benefits are distinguishable so that service retirement depends upon “actual service” and disability retirement does not, then the disability retirement portion of the plan is unconstitutional.

Because this court must read statutes to avoid an unconstitutional result whenever possible, *Opinion of the Justices*, 88 N.H. 511 (1937), it is compelled to find that NHRS disability retirement benefits are based on actual service, and thus are a pension subject to equitable distribution.

D. Ordinary Retirement Benefits are Insurance Against Superannuation

Robert argues that disability retirement benefits should not be distributed because they are more like proceeds from a health or disability insurance policy¹ and not like ordinary retirement payments.

This argument, however, mis-characterizes retirement benefits.

Disability retirement benefits can of course be characterized as insurance against disability. But ordinary service retirement can be characterized the same way. They are nothing more than insurance against living beyond the age of retirement.

“Judicial efforts to distinguish among wage continuation schemes have been unpersuasive and have generated unnecessarily complex and diverse results in similar cases. Retirement, disability, and workers’ compensation coverage are all forms of insurance against loss of wages. Retirement coverages insure against superannuation, that is, survival beyond the age normatively designated for

¹The cases are split on whether proceeds from a personal injury settlement are property subject to equitable distribution. *See e.g.*, Turner, *EQUITABLE DISTRIBUTION OF PROPERTY* § 6.18 (2nd ed. 1994). The issue has not been addressed in New Hampshire.

gainful employment. Unlike physical disability, superannuation is generally perceived as a desideratum. Nevertheless, it is an event against which we insure. Most retirement plans contain strong group insurance elements, often conditioning receipt of benefits upon survival. Many courts have distinguished, however, between retirement benefits and either disability or workers' compensation benefits on the ground that the former are deferred compensation but the latter are insurance.

“When property interests have mixed characteristics making them equally susceptible to classification as marital or separate property, it is not helpful, as the courts have done, to identify only one salient characteristic and classify accordingly.”

Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis*, 33 UCLA L.REV. 1250, 1279-80 (1986).

Retirement and disability benefits are alike: “Neither interest may ever mature because the triggering event, survival or disability, may never occur.” *Id.* at 1269.

The fact that disability benefits can be reduced or eliminated if the formerly disabled employee recovers, *Def. Br.* at 18, does not change this analysis. They are both still insurance.

Accordingly, this court should not distinguish between service retirement and disability retirement on grounds that one is a pension and the other insurance.

E. The Best Policy is that Disability Retirement Benefits are Marital Property Subject to Equitable Distribution

Courts have decided that disability benefits are, or are not, marital property subject to equitable distribution based on their determinations that the benefits were partial payment for past work; were purchased with marital assets; were or were not analogous to disability insurance, social security, workers' compensation, or other investment or insurance vehicles; replaced, reduced, or accelerated other retirement benefits such as social security or ordinary

pension payments; were in lieu of a pension to which the other spouse had a right; were or were not a windfall for the employee or non-employee spouse; produced a variety of tax benefits or liabilities; and were or were not to be distributed based on other grounds. Some cases use more than one of these methods to reach their decision. *See, e.g., Lookingbill v. Lookingbill*, 483 A.2d 1 (Md. 1984); *Ciliberti v. Ciliberti*, 542 A.2d 580 (Pa. Super. 1988).

There are well over a hundred cases on this issue, and there is no need to review them all here. Numerous commentators have categorized, classified, and analyzed them. *See e.g.,* Thomas Andrews, *Treatment of Disabled Spouse's Disability Pension as Separate Property at Divorce*, 1 DIVORCE LITIG. 2 (April 1989); Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis*, 33 UCLA L.REV. 1250, 1279-80 (1986); Libby F. Jessup, LAW OF RETIREMENT 66-70 (1979); Janet Mesrobian, *Disabling Equitable Distribution: Disability Pension Not Subject to Equitable Distribution as Marital Asset – Thompson v. Thompson*, 29 SUFFOLK U.L.REV. 631 (1995); J. Thomas Oldham, *Divorce, Separation, and the Distribution of Property* (1994); Lori Proudfit, *Family Law: In re Marriage of Elfmont*, 23 PEPP. L. REV. 739 (1996); Virginia Reno & Daniel Price, *Relationship Between the Retirement, Disability, and Unemployment Insurance Programs: The U.S. Experience*, 48 SOC. SEC. BULL. 24 (1985); Skoloff et al., 2 *Valuation and Distribution of Marital Property* § 23.03 (1984); *Disability Retirement*, TAX ADVISER 152 (Mar. 1983); Turner, EQUITABLE DISTRIBUTION OF PROPERTY, 384-387 (2nd ed. 1994); Brett Turner, *Classification, Valuation, and Division of Retirement and Disability Benefits (Part 1 of 4)*, 6 DIVORCE LITIG. 89 (May 1994); Brett Turner, *Classification, Valuation, and Division of Retirement and Disability Benefits (Part 2 of 4)*, 6 DIVORCE LITIG.

109 (June 1994); Brett Turner, *Classification, Valuation, and Division of Retirement and Disability Benefits (Part 3 of 4)*, 6 DIVORCE LITIG. 89 (July 1994); Brett Turner, *Classification, Valuation, and Division of Retirement and Disability Benefits (Part 4 of 4)*, 6 DIVORCE LITIG. 149 (Aug. 1994); *Pension or Retirement Benefits as Subject to Award or Division by Court in Settlement of Property Rights Between Spouses*, 94 A.L.R. 3d 176, §§ 10, 13(d). *See also*, D. Chamberlain & R. Maloney, *Qualified Domestic Relations Orders: Retirement Plans and Divorce in New Hampshire*, 33 N.H. BAR.J. 19 (1992).

The article appended to the defendant's brief does an adequate job of setting forth current law, with citations to many of the cases. *Classifying Disability Benefit*, 14 EQUITABLE DISTRIBUTION J. 97 (1997). There are a group of cases holding that disability benefits are separate property, and another group holding that they are marital property.

Perhaps reflecting the difficulty of classification and lack of clear authority, it appears many recent cases are splitting the difference. While it is difficult to maintain theoretical consistency with this approach, these cases

“separate the benefits into a retirement component and a true disability component. The retirement component is classified as marital, and the disability component is classified as the recipient's separate property except to the extent that the benefits serve to compensate the marital partnership for lost earnings during marriage.”

Id. at 99, *Def. Br.* at 32-33.

As an illustration of the variety of approaches, it is useful to review a case, in a non-community property state², with facts similar to the Fabiches's. The case, *Lookingbill v.*

²*Baker v. Baker*, 120 N.H. 645, 648 (1980) (“Because New Hampshire is a common-law jurisdiction . . . the persuasive value of the holdings in community property states is at best

(continued...)

Lookingbill, 483 A.2d 1 (Md. 1984), is not exceptional in its holding or reasoning, but it does examine the issues in more depth than most.

In *Lookingbill*, the husband, a publicly-employed firefighter, suffered an on-the-job disability shortly before the end of the marriage, and had begun collecting his pension benefits under the disability provision of his plan. As here, the trial court found that the husband's pension was marital property. The court noted that the law in Maryland (as in New Hampshire) is that contributory pensions are marital property, and that whether a pension is matured or unmatured is not relevant because property rights exist in both present and future interests. The court recognized that pensions are often the most valuable asset accumulated during a marriage, are purchased with marital assets, are partial consideration for past employment, are a type of property acquired during the marriage and in which both spouses have rights, and that both spouses have similar retirement goals and expectations with regard to its benefits. The court held that therefore the husband's disability retirement pension payments were marital property distributable by the divorce court.

In his brief, Robert suggests that the reported decisions on this issue are fact-specific and that this case, and by implication the next and the next, should be resolved with close regard for the facts. *Def. Br.* at 24. It is not clear, however, that slight differences in facts among the dozens of cases account for their varying results. Moreover, the sheer number of decision in this area suggests a need for a clear rule.

²(...continued)
limited.”).

F. Defendant has the Burden of Proof

The burden of proof is on the party claiming that disability pension benefits are not divisible upon divorce. *Avallone v. Avallone*, 646 A.2d 1121, 1126 (N.J. Super. Ct. App. Div. 1994) (“the burden of establishing immunity from equitable distribution as to any particular asset will rest upon the spouse who asserts it”) (quotations and citations omitted); *Parrish v. Parrish*, 623 N.Y.S.2d 955 (1995). Thus, Robert’s allegations in his brief that Kim didn’t put on evidence of a particular fact or principle, *see e.g., Def. Br.* at 19-21, prejudices *Robert*, not Kim.

II. The Property Distribution is Equal and Equitable

A. Robert and Kim Were Awarded Equal Shares of Marital Property

In his brief, Robert alleges that the trial court did not equitably distribute the marital property because Kim was awarded her own soon-to-cease workers' compensation benefit,³ \$75 per week in child support, and a half of his disability pension benefits to which Robert concedes Kim is entitled, *Trn.* 88.

Robert neglects to point out, however, that he was awarded significant assets:

- All the real property, ORDER ¶ 19A., *N.O.A.* at 15-16, which is land in Moultonboro valued at \$28,000, *Trn.* at 117;
- A lump sum of \$50,000 from his workers' compensation, ORDER ¶ 15C.I., *N.O.A.* at 14-15;
- His 1997 Chevrolet pickup truck, ORDER ¶ 12B., *N.O.A.* at 13, which at the time of trial was brand new, worth \$25,000 and with equity of \$15,000, *Trn.* at 42, 120;
- One half of his disability retirement pension, ORDER ¶ 14, *N.O.A.* at 13-14, his share of which pays \$1,331.92 per month for life, *Trn.* at 101-02; *Def. Br.* at 27, and which is tax-free for Robert.

Kim, in being awarded custody of B.J., the couple's son, must pay all the costs generally associated with rearing a teenage child, with a child support contribution from Robert of just \$75 per week (reduced from \$150 per week, *Trn.* at 36-37).

All the other marital property, such as household items, proceeds from the sale of other household items, bank accounts and funds, and other miscellany, was split equally by the decree, and is not contested on appeal.

The trial court's "property division determinations will not be set aside unless the

³The record does not reveal Robert ever requested a share of this item.

defendant can show a clear abuse of discretion.” *Grandmaison v. Grandmaison*, 119 N.H. 268, 270 (1979).

In this case, the property division is equal. There is not the egregious inequity alluded to by Robert’s citation of *Hanson v. Hanson*, 121 N.H. 719 (1981), in which the husband got the children but not the house; while the wife got the house, the furnishings, receipt of her car and fuel bills, and receipt of child support payments, but not the children.

B. Equal Division is a Presumption of Equitable Distribution

In its equitable division of property, the

“court shall *presume* that an equal division is an equitable distribution of property, . . . unless the court decides that an equal division would not be appropriate or equitable after considering one or more of [fifteen enumerated] factors.

458:16-a, II (emphasis added). In *McGrauth v. McGrauth*, 136 N.H. 757 (1993), this court noted

“The statute incorporates our decisions which have held that an equal division of property is presumed to be equitable, unless the court finds that certain factors would make an unequal division equitable.”

McGrauth, 136 N.H. at 762. Because the property division here was a half-half split between the parties, the presumption applies, and Robert has alleged no facts to overcome it.

C. The Court’s Decree Complies with RSA 458:16-a, III

The court specified its reasons for its property division in its decree. Most of the assets were split by halves, and the only item of doubt is the disability pension benefits, which are fully explained by the court with citation to law. ORDER ¶ 14, *N.O.A.* at 13-14. To the extent that Robert questioned the court’s explanation of its property division in his Notice of Appeal and brief, the court adequately complied with RSA 458:16-a, III.

CONCLUSION

In accordance with the forgoing, the plaintiff/appellee Kim Fabich requests that this court affirm the decree below.

Respectfully submitted,

Kimberly Fabich
By her Attorney,

Law Office of Joshua L. Gordon

Dated: August 7, 2000

Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Kimberly Fabich requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on August 7, 2000, two copies of the foregoing will be forwarded to John Cameron, Esq.; and Suzan M. Lehmann, Assistant Attorney General.

Dated: August 7, 2000

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225