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Repository Citation
Malone, Linda A., "For Richer or Poorer, 'til Decree Do Us Part - A Spouse's Entitlement to Division of Pension Funds and Professional Degrees as Marital Property" (1984). Faculty Publications. Paper 1196.
http://scholarship.law.wm.edu/facpubs/1196

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For Richer or Poorer, 'til Decree Do Us Part — A Spouse’s Entitlement to Division of Pension Funds and Professional Degrees as Marital Property

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On January 30, 1984, the Arkansas Supreme Court acknowledged that it had “inadvertently failed to recognize the new concept of ‘marital property’ ” created by a 1979 Arkansas statute, and awarded to Sarah Day one half of her ex-husband’s interest in his employer-sponsored retirement plan. The scenario which led to this decision in Day v. Day, 281 Ark. 261, 663 S.W.2d 719 (1984), is certainly not unique. Dr. Stephen Martin Day and Sarah Shinault Day were married for twenty-nine years and had six children. The only contested issue when Sarah Day brought suit for a divorce was the division of the marital property. The divorce decree directed the husband to pay alimony for twenty-four months and child support for the only remaining minor child, with all other property to be divided equally between the parties. Included within this equal division of property was Stephen Day’s interest in a retirement plan sponsored by his employer, the University of Arkansas at Fayetteville.

Under an act passed in 1979 governing the division of marital property, all “marital property” is subject to equitable distribution upon divorce. “Marital property” is defined simply as “all property acquired by either spouse subsequent to the marriage,” subject to certain limited exceptions: (1) property acquired by gift, bequest, devise or descent; (2) property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise or descent; (3) property acquired by a spouse after a decree of divorce from bed and board; (4) property excluded by valid agreement of the parties; and (5) any increase in value of property acquired prior to the marriage. Ark. Stat. Ann. § 34-1214 (Supp. 1983). The Court found, as the parties acknowledged, that none of the designated exceptions were applicable to Dr. Day’s retirement accounts.

Dr. Day’s retirement plan consisted of two annuity contracts — a guaranteed deferred annuity contract (administered by the Teachers’ Insurance Annuity Association) and a variable annuity plan (the College Retirement Equities Fund), known collectively as the “TIAA-CREF” plan. Dr. Day participated in the plan by making monthly contributions of 10% of his salary which the University matched in equal contributions. Earnings on the pension funds’ investments would be credited to his account. His interest in the plan was “vested” only in the sense that it could not be diminished unilaterally by the University and was not dependent on his continued employment by the University. He was not entitled to payments at the time of the decree, so the interest was not “vested” in that sense. He could have elected to receive his periodic benefits at any time but had not done so at the time of the decree. Moreover, he could not withdraw or transfer the funds to his credit, those funds having no loan or surrender value, and he could not receive his benefits in a lump sum. Sarah Day had been awarded half of the accumulated value of his interest in the plan, to be awarded to her when Dr. Day should elect to receive payments. Any contributions made by Dr. Day after the date of the divorce decree would accrue only to his benefit.

In several Arkansas Supreme Court cases decided under an earlier version of the property settlement statute and under the 1979 act, the Court had concluded that similar benefits were not property subject to equitable distribution upon divorce because they were dependent on future contingencies or not yet due and payable. Under an earlier
version of the statute (Ark. Stat. Ann. § 34-1214 (Repl. 1962)), the Court had found that fully vested railroad retirement benefits not yet due and payable (Knopf v. Knopf, 264 Ark. 946, 576 S.W.2d 193 (1979)) and military retirement pay not yet due and payable (Fenney v. Fenney, 259 Ark. 858, 537 S.W.2d 367 (1979)) were not property subject to distribution. Under the 1979 act, the Court had refused to find a military pension being paid but non-transferable to be marital property (Paulsen v. Paulsen, 269 Ark. 523, 601 S.W.2d 873 (1980)). Similarly, in other divorce cases, the Court had rejected property claims to company retirement benefits (Sweeney v. Sweeney, 267 Ark. 595, 593 S.W.2d 21 (1980)), a capital account not fully distributable (Hachett v. Hachett, 278 Ark. 82, 643 S.W.2d 560 (1982)), see also Russell v. Russell, 275 Ark. 193, 628 S.W.2d 315 (1982), and an IRA account not fully distributable (Potter v. Potter, 280 Ark. 38, 555 S.W.2d 382 (1983)). In contrast, however, the Court had held that a profit-sharing trust subject to the retirement plan was an asset of the marriage that could be divided as marital property (Bachman v. Bachman, 274 Ark. 23, 621 S.W.2d 701 (1981)).

What, then, led the Court to conclude that Dr. Day's retirement benefits were marital property, prompting Justice Hickman to remark in dissent that he assumed the "traditional approach" of Hackett, Russell, Bachman, Paulsen, Sweeney, and Knopf was overruled? The Court concluded:

Under the recent holdings of the Supreme Court, spouses must be treated equally in the absence of a valid reason for making a distinction. Our 1979 law was enacted pursuant to that mandate and must be construed in harmony with that intent. It is easy to demonstrate that the legislative purpose will be frustrated if controlling differences are drawn between pensions vested and currently payable and those that are vested but payable in the future. If, for example, Dr. Day had made a monthly deposit in a savings account for 20 years, that money would be marital property in a divorce case. The same rule would apply if, a year before the divorce, he had in good faith decided to invest the money in an annuity payable upon his retirement. His interest in the annuity would also be marital property. That in substance is the situation in this case: Dr. Day has used part of the family's money to buy the annuities he now seeks to exempt from their proper classification as marital property. Under the law, however, we must recognize that Mrs. Day also contributed to the acquisition of the annuities by service as a homemaker and by bearing the six chil-

dren and bringing them up.

To buttress its conclusion, the Court quoted with approval the California Supreme Court decision in Re Marriage of Brown, 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164 (1976), a decision defining community property. In refusing to find "controlling differences" between pensions "vested" and currently payable and those "vested" but payable in the future, the Arkansas Supreme Court was apparently using the term "vested" in the sense used in Brown — that the pension benefits could not be unilaterally terminated by the employer without terminating the employment relationship.

Having concluded that Dr. Day's pension rights were property, the Court went one step further to determine that the pension created rights which were subject to division as marital property, rather than merely factors to be considered in the award of alimony. If the pension benefits had been viewed only as factors militating in favor of increased alimony, Stephen Day would have been obliged to pay alimony in an amount commensurate with income he was not actually receiving. Then Sarah Day would not have been able to retain the option of allowing the benefits awarded to her to continue to accumulate in the fund on a tax deferred basis. The Court was unwilling to reach that result in the circumstances of the case. However, the Court cautioned that it was not setting forth an inflexible rule, and left the characterization of other deferred benefit plans to future cases.

Will the Day case, then, lead to the classification of social security benefits, insurance benefits, and military pensions as "marital property?" The dissent suggests so. The distinguishing features of the TIAA-CREF accounts were that they were: (1) purchased with marital funds; (2) vested from termination by the employer without termination of the employment relationship; (3) subject to election to receive benefits at any time; (4) had a current, ascertainable value, and (5) could be divided easily and equitably. In future cases, any deviations in benefit plans from these characteristics could be used by the Court to refuse division of the plan as marital property.

For example, military retirement pay bears certain similarities to ordinary pension plans for periodic benefits to be dispensed upon retirement but subject to divestment upon prior death or discharge. On the other hand, military retirement pay at no time has any cash surrender, loan, redemption or lump sum value and, more importantly, pensions may be eliminated or reduced by the government. The division of insurance benefits as marital property would be entirely dependent on the nature
of the plan, with the inascertainable current value and dependency on future contingencies inherent in most plans militating against equitable division as marital property, although the present cash surrender value and paid-in cash premiums of some insurance plans may be considered in the property settlement. Social Security benefits as a form of social insurance differ in several respects from ordinary pension plans subject to division as marital property: *inter alia*, the amount of an employee’s contributions does not necessarily determine the amount of benefits received, the amount of benefits is subject to adjustment based upon future conduct having nothing to do with contributions or past labor, and the family portion of benefits is predicated upon the status of the recipient of the benefits rather than the covered worker’s contributions (see, e.g., *In Re Marriage of Kelley*, 64 Cal. App.3d 82, 134 Cal. Rptr. 259 (1976)).

The Pandora’s box which the dissent projects, therefore, may be one that is easily manageable within the criteria of the *Day* case and those of other jurisdictions which also have embarked along this same route. The dissent might view as even more troublesome another potential form of “marital property” the Arkansas Supreme Court has yet to address — the professional degree in a marriage in which there are no other appreciable assets. When there are appreciable assets during a marriage, a spouse’s financial contributions toward the other spouse’s degree may be considered in division of the assets, yet when the only marital asset is a degree in the name of one spouse who has been supported during the earning of the degree by the other spouse, traditional concepts of property may preclude an equitable remedy. In such circumstances, courts frequently will consider the professional spouse’s future earning capacity or the contributing spouse’s contributions as “breadwinner” in determining the property settlement or alimony. Does such an approach assure the contributing spouse a fair return on his or her investment in the degree? What should be done if the statute precludes alimony to a spouse capable of self-support? As can be seen from these questions, the Arkansas Supreme Court has taken only a preliminary step in *Day* toward defining property to assure equal treatment of spouses upon divorce.

**FOOTNOTES**

The author would like to thank Terry Kirkpatrick, counsel for Sarah Shinault Day, for her cooperation in the preparation of this commentary.

1 Dr. Day also urged for reversal based upon the purported negative tax consequences to him of the decree, but he had failed to preserve or develop the issue below. The Court did, however, amend the decree to reserve jurisdiction for any tax problems that might arise.

2 Valuation of pension rights is also a manageable task. The approach of the courts has been: (1) to award the spouse a portion of the employee’s contributions to the fund; (2) calculate the present value of the benefits payable in the future, discounted to present value by the amount of interest to be earned in the future, by the probability that the employee will die before qualifying for full rights or by any other condition which might disqualify the employee; or (3) to determine a fixed percentage for the nonemployee spouse of any future payments the employee receives as was done in *Day*. 

49

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49