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1996 Survey of Rhode Island Law: Cases: Family Law

Michael J. Williams
Roger Williams University School of Law

Renee G. Vogel MD, MPH
Roger Williams University School of Law

Family Law. *Becker v. Perkins-Becker*, 669 A.2d 524 (R.I. 1996). A spouse's enhanced earning capacity from an advanced degree obtained during marriage is not a marital asset subject to equitable distribution.

In *Becker v. Perkins-Becker*,[1] the Rhode Island Supreme Court determined that professional degrees and licenses, and the enhanced earning capacity resulting therefrom, are not marital assets subject to equitable distribution.[2] Consequently, upon the dissolution of a marriage, the value attributable to such a professional degree or license may not be included in the marital asset distribution.[3]

FACTS AND TRAVEL

After five years of marriage, Daniel Becker (husband) and Kleo Perkins-Becker (wife) separated in January 1990.[4] The husband was a licensed chiropractor and had been engaged in the profession for one year prior to the marriage.[5] During the course of the marriage, Dr. Becker received an advanced degree in the field of chiropractic neurology, qualifying him to conduct neurological procedures that he was previously not certified to perform.[6]

At trial, Dr. Becker's annual income was determined to be $126,904 and, based on the testimony of a certified public accountant, the market value of his chiropractic practice was determined to be $134,463.[7] The trial court found that the practice had little or no market value prior to the marriage and that the increased value derived from the joint efforts of both parties.[8]

During the initial divorce proceedings, Mrs. Becker attempted to include Dr. Becker's advanced degree in the division of property. The wife offered expert testimony regarding the value of that degree.[9] Pursuant to the husband's objection and motion in limine, a written order was entered in which the trial judge found as a mat-

1. 669 A.2d 524 (R.I. 1996).
2. *Id.* at 531-32.
3. *Id.*
4. *Id.* at 526.
5. *Id.*
6. *Id.* at 530.
7. *Id.* at 528.
8. *Id.* at 526.
9. *Id.* at 530.

ter of law, that the enhanced earning capacity of the advanced degree was not a marital asset subject to equitable distribution.[10] The wife's proposed testimony was ruled inadmissible.[11] On her cross-appeal, the wife contended that the trial court erred as a matter of law in holding that the husband's advanced degree acquired during the marriage was not a marital asset.

BACKGROUND

Rhode Island General Laws section 15-5-16.1(a), currently governing the distribution of marital assets, provides:

> [T]he court may assign to either the husband or wife a portion of the estate of the other . . . . [T]he court . . . shall consider . . . the length of the marriage, the conduct of the parties during the marriage, [and] the contribution of each of the parties . . . in the acquisition, preservation, or appreciation in value of their respective estates, [and] the contribution and services of either party as a homemaker . . . . The court may not assign property or an interest therein held in the name of one of the parties if the property was held by the party prior to the marriage, but may assign income which has been derived therefrom during the term of the marriage, and the court may assign the appreciation in value from the date of the marriage of property or an interest therein which was held in the name of one party prior to the marriage which increased in value as a result of the efforts of either spouse during the marriage.[12]

Section 15-5-16.1(a) was amended in 1992, and as a consequence, a court may now consider "the contribution by one party to the education, training, licensure, business or increased earning power of the other."[13] However, since the Beckers filed for divorce in 1989, the 1992 amendment did not apply.[14] Faced with an issue of first impression, the Rhode Island Supreme Court reviewed the case law of other jurisdictions in order to interpret the instant case in light of section 15-5-16.1.[15]

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10. *Id.*
11. *Id.*
12. R.I. Gen. Laws § 15-5-16.1(a) (1988), *as amended by* 1992 R.I. Pub. Laws ch. 269, § 2.
13. 1992 R.I. Pub. Laws ch. 269, § 2(a)(9).
14. *Becker*, 669 A.2d at 528 n.2. The amended statute applies to cases filed on or after July 7, 1993. *Id.* at 528.
15. *Id.* at 530-32.

A majority of courts addressing this issue have held neither a professional degree, nor the resulting increased earning capacity, is a marital asset subject to equitable assignment.[16] In *Drapek v. Drapek*,[17] the Supreme Judicial Court of Massachusetts held that the husband's medical degree received during the marriage and his enhanced earning capacity were not marital assets subject to equitable assignment.[18] In so holding, the court cited the impracticability of determining the present value of future earned income for the purposes of division because of the amount of speculation required.[19] Furthermore, the inflexibility of present assignment of value eliminates consideration of the possible effect of future events on the earning capacity of the professional.[20]

Similarly, in *In re Marriage of Graham*,[21] the Colorado Supreme Court held that an educational degree, such as a master's in business administration, is not "property" subject to division in a divorce proceeding.[22] The court stated that an educational degree possessed none of the attributes of property, and recognized a degree as "simply an educational achievement that may potentially assist in the future acquisition of property."[23] A degree has no exchange value and no objective transferable value on an open market.[24] It is not inheritable, and it terminates on the death of the holder.[25] Moreover, it may be acquired through many years of education and cannot be acquired by mere purchase.[26] Unlike

16. *Id.*; *see, e.g.*, *In re* Marriage of Olar, 747 P.2d 676 (Colo. 1987); *In re* Marriage of Weinstein, 470 N.E.2d 551 (Ill. 1984); Archer v. Archer, 493 A.2d 1074 (Md. 1985); Davey v. Davey, 415 N.W.2d 84 (Minn. Ct. App. 1987); Mahoney v. Mahoney, 453 A.2d 527 (N.J. 1982); Stevens v. Stevens, 492 N.E.2d 131 (Ohio 1986); Pacht v. Jadd, 469 N.E.2d 918 (Ohio 1983); Hodge v. Hodge, 529 A.2d 15 (Pa. 1986). While the prevailing view excludes professional degrees and licenses from the definition of marital property, courts have held that increased earning capacity engendered by a professional degree and a spouse's financial contributions to the other spouse's achievement of the professional degree may both be considered in awarding alimony. *See, e.g.*, Drapek v. Drapek, 503 N.E.2d 946, 949-50 (Mass. 1987).

17. 503 N.E.2d 946 (Mass. 1987).

18. *Id.* at 949-50.

19. *Id.* at 949 (citing Cabot v. Cabot, 462 N.E.2d 1128 (1984)).

20. *Id.*

21. 574 P.2d 75 (Colo. 1978).

22. *Id.* at 77.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

property, it cannot be assigned, sold, transferred, conveyed or pledged.[27]

There appears to be only one jurisdiction that has held that a professional degree is marital property. In *O'Brien v. O'Brien*,[28] the New York Court of Appeals determined that a professional license, viz., a license to practice medicine, acquired during the marriage is marital property subject to equitable distribution.[29] The court found that the inclusion of a professional license attained during the marriage was mandated by New York Domestic Relations Law section 236(B)(1)(6), which provided that contributions and expenditures made toward furthering a spouse's education should be considered in distributing marital property.[30] As such, the court asserted that the spouse, who presumably worked while the other spouse attended school, was entitled to an equitable portion of the value of the license.[31] As marital property, the value of the license was equivalent to the enhanced earning capacity of its holder.[32]

ANALYSIS AND HOLDING

Adhering to the majority of jurisdictions, the Rhode Island Supreme Court held in *Becker* that professional licenses and degrees, and the attendant enhanced earning capacity of the holder spouse, are not marital property to be equitably distributed under Rhode Island General Laws section 15-5-16.1.[33] Adopting the reasoning of *Drapek*, the court stated that to "embrace a rule that would subject such an item to distribution upon dissolution would result in the foreclosure of consideration of the effect on the individual's earning capacity of such future events as death, illness, or unpredictable market variables."[34] Therefore, the supreme court affirmed the trial court's decision to exclude the husband's professional degree from the marital property, as well as its decision to exclude the wife's testimony on that issue.[35]

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27. *Id.*
28. 489 N.E.2d 712 (N.Y. 1985).
29. *Id.* at 713.
30. *Id.* at 716-17.
31. *Id.* at 717.
32. *Id.*
33. *Becker*, 669 A.2d at 531-32.
34. *Id.*
35. *Id.* at 532.

CONCLUSION

In *Becker*, the Rhode Island Supreme Court explicitly adopted the majority view that professional degrees with their enhancement of earning potential are not marital property. However, the Rhode Island Legislature appears to have adopted the minority position of *O'Brien*. Under the 1992 amendment to section 15-5-16.1, contributions by one spouse to the education and increased earning power of the other can now be considered in determining the nature and value of the marital property.[36] Because the Beckers filed for divorce in 1989, the 1992 amendment was inapplicable to them. However, in view of the amended statute, Rhode Island courts now will consider the value of an advanced degree along with the other factors enumerated in the amended statute.

Michael J. Williams

36. 1992 R.I. Pub. Laws ch. 269, § 2(a)(9).

Family Law. *Duke v. Duke*, 675 A.2d 822 (R.I. 1996). Neither state nor municipal pensions are immune from court orders to use those funds for child support, even though they contain provisions prohibiting either attachment or assignment.

In *Duke v. Duke*,[1] the Rhode Island Supreme Court considered whether the use of public pension funds for child support constituted an exception to provisions exempting such funds from attachment or assignment.[2] In upholding a family court order attaching a firefighter's pension funds to pay child support, the court held that such provisions were "designed to deal with creditors and not the families of employees,"[3] and that the order would not "constitute an assignment within the meaning of the statute."[4]

FACTS AND TRAVEL

Charlotte Duke (plaintiff) and Gordon Duke (defendant) divorced in 1984.[5] Plaintiff filed an action in family court, charging that the defendant was delinquent in making child support payments.[6] In 1992, the family court found the defendant "in willful contempt" of his obligation to pay child support, and ordered that his pension fund be attached, with the balance deposited with the court to satisfy those payments.[7] In 1994, an order was entered directing the Employees' Retirement System of the City of Providence to close out defendant's pension, distribute to the plaintiff certain amounts due her, and deposit the remainder in the family court registry to be used for further payments owed.[8] The defendant filed a petition with the Rhode Island Supreme Court for a writ

1. 675 A.2d 822 (R.I. 1996).
2. *Id.* at 823. "No interest of any person in any pension fund or in any pension derivable therefrom, for the benefit of policemen or firemen . . . shall be subject to trustee process or liable to attachment . . . or any process, legal or equitable; and no assignment of any such interest shall be valid." R.I. Gen. Laws § 9-26-5 (1985). "[T]he right of a member or beneficiary to a pension . . . and the monies in the various funds created hereunder . . . shall not be assignable, subject to execution, garnishment, attachment . . . or any other similar process of law." Providence, R.I., Code § 17-193 (1991), *quoted in Duke*, 675 A.2d at 823.
3. *Duke*, 675 A.2d at 823 (citing Moran v. Moran, 612 A.2d 26, 33 (R.I. 1992); Young v. Young, 488 A.2d 264, 267 (Pa. 1985)).
4. *Id.*
5. *Id.* at 822.
6. *Id.*
7. *Id.* at 822-23.
8. *Id.* at 823.

of certiorari for review of the order.[9] Both the defendant and the City of Providence filed a motion to continue a stay of the order that had been previously granted by the lower court pending such review, which was granted.[10]

BACKGROUND

In *Stevenson v. Stevenson*,[11] the Rhode Island Supreme Court held that an anti-attachment statute did not preclude a police officer's pension from being valued as a marital asset upon divorce.[12] *Stevenson* was a case of first impression in Rhode Island on the issue of whether pension funds that are protected by anti-attachment statutes may be viewed as marital assets.[13] In its decision, the court noted that "a pension is . . . analogous in form to a forced savings account whose funds will become available to the parties upon retirement, [and are thus] correctly considered . . . to be marital property."[14] The court held there was no assignment within the meaning of the exemption statute, because the lower court only calculated the value of the husband's pension for the purposes of distributing the marital assets, and did not assign any interest in it to the wife.[15] Thus, *Stevenson* left open the question of whether an exemption statute would preclude division of a public employee's pension upon divorce,[16] noting that the majority of courts viewed pension funds as marital property.[17]

In 1992, the supreme court addressed the issue of whether a municipal employee's pension fund could be divided as part of a divorce settlement in *Moran v. Moran*,[18] holding that an "exemption statute was not intended to deprive a family of pension benefits or to allow a retiree to evade his familial support obligation."[19]

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9. *Id.*
10. *Id.*
11. 511 A.2d 961 (R.I. 1986).
12. *Id.* at 965.
13. *Id.* at 964.
14. *Id.* at 965.
15. *Id.*
16. *Id.* at 966.
17. *Id.* at 964-65 (citations omitted).
18. 612 A.2d 26 (R.I. 1992).
19. *Id.* at 33 (citing Young v. Young, 488 A.2d 264 (Pa. 1985)). In *Moran*, the employee was a teacher whose municipal employee's pension plan was exempted by statute from lien, attachment, garnishment, assignment or transfer. R.I. Gen Laws § 36-10-34 (1990), *quoted in Moran*, 612 A.2d at 31.

Moran expressly adopted the reasoning set forth by the Pennsylvania Supreme Court in *Young v. Young*,[20] noting that the *Young* court had considered the legislative intent "in creating the pension statute and the rationale behind strict enforcement of support orders."[21] The Pennsylvania Supreme Court addressed the apparent discrepancy between the clear statutory language and its holding, stating that the purpose of the exemption clause[22] was to protect the family, which outweighed any government interest in not having to comply with attachment orders.[23] The *Young* court also held that its reading of the statute was correct[24] because it reached a reasonable result,[25] it favored the public interest in not having to support families because of an individual's refusal to do so, and it promoted justice "between the parties."[26] The *Moran* court agreed with *Young* that to preclude pensions from equitable distribution would "lead to absurd and unfair results," and stated that "[w]e do not believe that the Legislature intended this exemption statute to create such inequities within the family."[27] In acknowledging that it had not previously addressed the issue of whether public pensions are subject to assignment notwithstanding exemption provisions, *Moran* made clear that there would be exceptions to such exemptions, at least in the area of family welfare.[28]

ANALYSIS AND HOLDING

In *Duke,* the Rhode Island Supreme Court first noted that the state anti-attachment statute, Rhode Island General Laws section 9-26-5, did not prevent the family court from ordering payment of

20. 488 A.2d 264 (Pa. 1985).

21. *Moran*, 612 A.2d at 33.

22. *Young*, 488 A.2d at 268. The municipal pension in *Young* contained a provision stating that "[t]he compensation or pension herein mentioned shall not be subject to attachment or execution, and shall be payable only to the beneficiary designated, and shall not be subject to assignment or transfer." *Id.* at 265-66.

23. *Id.* at 267-68.

24. *Id.* at 267 (Anti-attachment statutes should be "liberally construed to effect [sic] their objects and promote justice.").

25. *Id.* The court noted that a pension fund represents deferred income, and it would be unfair to deprive children or a former spouse of those benefits in the future. "We do not believe that the legislature intended to create such an unreasonable result." *Id.* at 269.

26. *Id.*

27. Moran v. Moran, 612 A.2d 26, 33 (R.I. 1992).

28. *Id.*

child support from a pension fund, because the statute was intended to protect such funds from creditors, not families.[29] Next, the court referred to its previous holding in *Stevenson*, stating that because pensions were a form of forced savings that deprived a family of the present use of income, they should be considered "marital property, subject to division along with the employee's other assets."[30] Whether the pension belonged to a policeman (*Stevenson*) or a firefighter (*Duke*), made no difference to the court.[31] While not expressly citing to either *Stevenson* or *Moran*, the court stated that the exemption statute was not meant to prevent the family court from ordering the fulfillment of a support obligation (*Moran*), nor was it an assignment within the meaning of the statute (*Stevenson*).[32]

Finally, the court held that the municipal anti-attachment ordinance, Providence Ordinance section 17-193, did not protect the pension funds from being used for child support, noting that "[c]hild support is a statewide concern that a municipal ordinance may not impede or frustrate in its implementation."[33] Thus, a court may order that both state and municipal pension funds can be reached for the purpose of child support, despite anti-attachment provisions.[34]

CONCLUSION

While anti-attachment provisions in pension funds purport to prevent any attachment or assignment, Rhode Island, like some other courts,[35] construes such provisions as being intended to protect the funds from creditors, thus remaining available for the benefit of the pensioner's family. While *Stevenson* and *Moran*

29. Duke v. Duke, 675 A.2d 822, 823 (R.I. 1996) (citing *Moran*, 612 A.2d at 33).

30. *Id.* (citing Stevenson v. Stevenson, 511 A.2d 961, 965 (R.I. 1986)).

31. *Id.*

32. *Id.* To avoid direct attachment, the court modified the family court's order to require the defendant to assign the funds to the plaintiff for her use. *Id.* at 824.

33. *Id.* at 823-24.

34. *Id.*

35. *In re* Marriage of Branstetter, 508 N.W.2d 638 (Iowa 1993) (pension is marital asset subject to division, despite anti-attachment statute); Hollman v. Hollman, 528 A.2d 146 (Pa. 1987) (following Young v. Young, 488 A.2d 264 (Pa. 1985)); Faus v. Faus, 319 N.W.2d 408 (Minn. 1982) (claims of a firefighter's dependents for child support are an exception to the pension exemption statute). *But see* Fowler v. Fowler, 362 A.2d 204 (N.H. 1976); Ogle v. Ogle, 442 P.2d 659 (Cal. 1968).

addressed the issue of pensions as marital assets, *Duke* filled a gap in this area of the law by holding that anti-attachment provisions do not bar pension funds from being reached by court order to fulfill child support obligations.

Renee G. Vogel, MD, MPH