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# In re Marriage of Olhausen: The Characterization of State Disability Retirement Benefits After Dissolution

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# In re Marriage of Olhausen: The Characterization of State Disability Retirement Benefits After Dissolution

On May 14, 1975, the California Court of Appeal, Second District, Division 4, rendered its decision in the case of *In re Marriage of Olhausen.*[1] This decision is the first in California to characterize State disability retirement benefts as the separate property of the disabled spouse, after dissolution of the marriage. The scope of this note is to evaluate the significance of this case in light of previous decisions and to prognosticate its future impact on California community property law.

On October 2, 1972, the trial court entered its judgment dissolving the eight-year marriage of Alan and Jan Olhausen. During the course of their marriage, Alan had been employed in police work for the Cities of La Habra and Vernon from 1967 to 1970, and 1970 to 1972 respectively. Alan sustained a fractured spine during his Vernon employment, which prevented him from performing further services as a police officer. As a result of this injury, he was retired with disability benefit payments of $444.58 per month beginning April 10, 1972.[2] The source of these retirement benefits was a fund comprised of amounts deducted from each of Alan's paychecks during the course of his employment as a police officer[3] and contributions from his employer.[4]

In its judgment dissolving their marriage, the trial court concluded that the disability benefits accruing after dissolution were not community property and therefore not subject to division

1. 48 Cal. App. 3d 190, 121 Cal. Rptr. 444 (1975).
2. Id. at 192, 121 Cal. Rptr. 444 n.1 (1975). The Los Angeles manager of the Public Employees Retirement System testified that Alan's benefits were payable solely because of his disability. Since Alan's total service was less than five years, he had not worked long enough to have any vested rights in other benefits.
3. This deduction was mandated by CAL. GOVT. CODE § 20600 et seq. (West 1970).
4. This contribution was mandated by CAL. GOVT. CODE § 20750 et seq. (West 1970).

between the parties. It was the trial court's characterization of disability retirement benefits as the separate property of the disabled spouse after dissolution from which Jan prosecuted her appeal.

There is a plethora of case law in California dealing with the division of "retirement" benefits upon dissolution of the marriage. The great majority of these cases involve retirement benefits based upon longevity or length of service. These cases have consistently held that such benefits are, to the extent they have vested[5] during the marriage, community property subject to equal division between the spouses in the event the marriage is dissolved.[6] The rationale underlying the community treatment of these benefits ". . . is the concept that they do not derive from the beneficience of the employer, but are properly part of the consideration earned by the employee."[7] Thus in cases dealing with longevity retirement pay, whether the employee is required to make contributions to the retirement fund has been held inapposite to the ultimate characterization of the benefits as community property.[8] Furthermore, the principle that longevity retirement benefits are community property has been held to apply whether the source of the retirement fund lies in a state, federal, military, or private employment relationship.[9]

Recently, in the cases of *In re Marriage of Jones*[10] and *In re Marriage of Loehr*,[11] the California Supreme Court refused to apply the rationale underlying the community characterization of "longevity" retirement benefits to "military disability" retirement benefits. Instead it stated that:

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5. The right to retirement benefits 'vests' when an employee acquires an irrevocable interest in a fund created by his own contribution and/or the contributions of his employer. The 'vesting' of retirement benefits must be distinguished from the 'maturing' of those benefits, which occurs only after the conditions precedent to the payment of the benefits have taken place or are within the control of the employee. In re Marriage of Fifthian, 10 Cal. 3d 592, 596, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371, n.2 (1974).

6. Waite v. Waite, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972); Phillipson v. Board of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970); Benson v. City of Los Angeles, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963); French v. French, 17 Cal. 2d 775, 112 P.2d 235, 134 A.L.R. 366 (1941); Crossan v. Crossan, 35 Cal. App. 2d 39, 94 P.2d 609 (1939).

7. In re Marriage of Fifthian, 10 Cal. 3d 592, 596, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371 (1974).

8. Phillipson v. Board of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970); Sweesy v. L.A. etc. Retirement Board, 17 Cal. 2d 356, 110 P.2d 37 (1941).

9. Waite v. Waite, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972);

> Since disability pay serves primarily to compensate the disabled servicemen for current suffering and loss of earning capacity, we conclude that only such payments as are received during the marriage constitute a community asset. The veteran's right to payment subsequent to dissolution is his separate and personal right.[12]

The Court in *Jones* and *Loehr* analogize "military disability" retirement pay with compensation for personal injury, rather than with "longevity" retirement pay. By making this analogy, the Court was able to apply the laws relating to the division of personal injury damages upon dissolution of the marriage.[13] These laws permitted the court to characterize "military disability" retirement pay as the separate property of the disabled spouse after dissolution.

Although compensation actually recovered for personal injury during the marriage is community property under California law,[14] the Supreme Court held in *Washington v. Washington*[15]

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Phillipson v. Board of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970); Estate of Perryman, 113 Cal. App. 2d 1, 283 P.2d 298 (1955); French v. French, 17 Cal. 2d 775, 112 P.2d 235, 134 A.L.R. 366 (1941); In re Marriage of Fifthian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); In re Marriage of Karlin, 24 Cal. App. 3d 25, 101 Cal. Rptr. 240 (1972); Bensing v. Bensing, 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1972); In re Marriage of Brown, 27 Cal. App. 3d 188, 103 Cal. Rptr. 510 (1972); but cf. Goldberg, Is Armed Services Retired Pay Really Community Property?, 48 Calif. St. B.J. 12 (1973).

10. 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).

11. 13 Cal. 3d 465, 531 P.2d 425, 119 Cal. Rptr. 113 (1975).

12. In re Marriage of Jones, 13 Cal. 3d 457, 464, 531 P.2d 420, 425, 119 Cal. Rptr. 108, 113 (1975).

13. CAL. CIV. CODE §§ 5119, 5126 (West Supp. 1975).

14. Zaragosa v. Craven, 33 Cal. 2d 315, 320-321, 202 P.2d 73, 76-77, 6 A.L.R. 2d 461, 466 (1949). In Zaragosa, the court held that a wife's cause of action for personal injuries arising during the marriage is community property, and consequently barred by the contributory negligence of her husband. To overcome the injustice arising from the imputation of contributory negligence between husband and wife, the Legislature in 1957 enacted Civil Code § 163.5, which provided that all personal injury damages were the separate property of the injured spouse. This rule, in turn, proved unsatisfactory (*see* 8 Cal. Law Revision Com. Rep. (1966) pp. 427-433), and in 1968 the Legislature amended § 163.5 to restore the community property status of personal injury damages recovered during the marriage and enacted § 169.3 to provide that damages received after dissolution are the separate property of the injured spouse. This time the Legislature met the problem of imputed negligence head on, enacting Civil Code § 164.6 to bar imputation of contributory negligence between husband and wife. §§ 163.5, 164.4 and 169.3 were reenacted as Civil Code §§ 5109, 5112,

that a cause of action for personal injuries which had not been reduced to a judgment at the date of divorce became the separate property of the injured spouse. In response to the decision in *Washington*, the California Legislature enacted California Civil Code Section 5126,[16] which extended the *Washington* holding to cover cases in which the claim for personal injury had been reduced to a judgment prior to dissolution, but payments were received after the interlocutory decree of dissolution. With regard to personal injury damages the law in California has evolved to the following rule:

> Personal injury damages received during the marriage are community property, but amounts received after dissolution are the separate property of the injured spouse.[17]

Following the *Jones* and *Loehr* decisions, the Court in *In re Marriage of Olhausen* analogized "state disability" retirement benefits with personal injury damages, thereby invoking the aforementioned rules pertaining to personal injury damages upon dissolution.

The analogy drawn in *Jones*, *Loehr* and *Olhausen* between disability retirement benefits and personal injury damages is well founded when one considers the equities involved in such cases. The equitable considerations were well framed by Justice Traynor in *Washington v. Washington*,[18] wherein he stated that although a rule classifying personal injury damages as community property

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and 5126 respectively, in the 1969 Family Law Act. [CAL. CIV. CODE §§4000 et seq. (West Supp. 1975)].

15. 47 Cal. 2d 249, 302 P.2d 569 (1956).

16. CAL. CIV. CODE § 5126 (West Supp. 1975):

(a) All money or other property received by a married person in satisfaction of a judgment for damages for personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages is the separate property of the injured person if such money or other property is received as follows:

(1) After the rendition of a decree of legal separation or a final judgment of dissolution of a marriage.

(2) While either spouse, if he or she is the injured person, is living separate from the other spouse.

(3) After the rendition of an interlocutory decree of dissolution of a marriage.

(b) Notwithstanding subdivision (a), if the spouse of the injured person has paid expenses by reason of his spouse's personal injuries from his separate property or from the community property subject to his management and control, he is entitled to reimbursement of his separate property or the community property subject to his management and control for such expenses from the separate property received by his spouse under subdivision (a).

17. In re Marriage of Pinto, 28 Cal. App. 3d 86, 89, 104 Cal. Rptr. 371, 373 (1972); Walzer, *Cal. Marital Termination Settlements*, (CONT. ED. B. 1971), p. 61; *Attorney's Guide to Family Law Practice*, (CONT. ED. B. 2d ed. 1972), pp. 247-248.

18. 47 Cal. 2d 249, 302 P.2d 569 (1956).

> may be justified when it appears that the marriage will continue, it loses its force when the marriage is dissolved after the cause of action accrues. In such a case not only may the personal elements of damages such as past pain and suffering be reasonably treated as belonging to the injured party, but the damages for future pain and suffering, future expenses, and future loss of earnings are clearly attributable to him as a single person following the divorce. Moreover, as in any other case involving future earnings or other after acquired property, the wife's right, if any, to future support may be protected by an award of alimony.[19]

The *Jones* and *Loehr* decisions limited themselves to the characterization of "military disability" retirement benefits as the separate property of the disabled spouse after dissolution of the marriage. *Olhausen* has extended that characterization to include "state disability" retirement benefits, basing the extension on the rationale propounded by the *Jones* and *Loehr* decisions.

There is, however, a distinction between "military disability" and "state disability" retirement benefits which merits discussion. The former is entirely a non-contributory fund, whereas the latter is not. The Court in *Olhausen* addresses this distinction by saying:

> We are of the opinion that the distinction is without substance, and that the reasoning of the military retirement cases is applicable to disability retirement under the state system as well.
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> . . . . The reasoning of the *Jones* and *Loehr* cases, holding that disability allowances are not community property, is not based upon the absence of a community interest in the retirement system. The distinction is in the purpose of the payment.[20]

The law in California is well settled that, where the "premiums" on the husband's insurance policy are paid with community property funds, the chose in action represented by the policy is community property.[21] The Supreme Court in *Jones* and *Loehr*

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19. Id. at 253-254, 302 P.2d at 571.

20. 48 Cal. App. 3d 190, 193, 121 Cal. Rptr. 444, 445 (1975).

21. New York Life Ins. Co. v. Bank of Italy, 60 Cal. App. 602, 605, 214 P. 61, 62 (1923); Bazzell v. Endriss, 41 Cal. App. 2d 463, 465, 107 P.2d 49, 50 (1940); Mundt v. Connecticut Gen. Life Ins. Co., 35 Cal. App. 2d 416, 421, 95 P.2d 966, 968 (1939); Blethen v. Pac. Mutual Life Ins. Co., 198 Cal. 91, 99, 243 P. 431, 434 (1926); Estate of Wedemeyer, 109 Cal. App. 2d 67, 71, 240 P.2d 8, 11 (1952); Estate of Mendenhall, 182 Cal. App. 2d 441, 444, 6 Cal. Rptr. 45, 47 (1960); Tyre v. Aetna Life Insurance Co., 54 Cal. 2d 399, 402, 353 P.2d 725, 727, 6 Cal. Rptr. 13, 15 (1960). Polk v. Polk, 228 Cal. App. 2d 763, 781, 39 Cal. Rptr. 824, 835 (1964).

decisions did not have to wrestle with the body of case law involving the payment of insurance premiums with community property funds, because in those cases the servicemen never made any "premium" payments. However, in *Olhausen*, Alan was required to make payments to the fund from which his disability benefits emanated. Surely, these payments can be likened to "premium" payments under a private insurance plan. Whereas in *Jones* and *Loehr* there was no need to discuss the case law dealing with the community characterization of insurance proceeds where the premiums have been paid with community funds, in *Olhausen* discussion was logically unavoidable. The failure of the Court to discuss or distinguish the case law dealing with insurance is the inherent weakness of the *Olhausen* decision. However, the weakness is not fatal, because the outcome of the *Olhausen* decision is just and equitable for all parties concerned. Had the Court merely discussed the insurance case law and concluded that the equities involved in the case outweighed the community interest created by the payment of premiums with community funds, the decision would have been beyond reproach.

There are several potential ramifications of *In re Marriage of Olhausen*. By classifying state disability retirement benefits as the separate property of the disabled spouse after dissolution of the marriage, the Court has opened the door to argument as to the classifications of other types of disability payments. For instance, in the area of Workmen's Compensation benefits, the cases of *Northwestern Redwood Co. v. Industrial Acc. Com.*[22] and *Estate of Simoni*[23] have firmly established that Workmen's Compensation payments received during the marriage are community property, but there has never been a case deciding the character of Workmen's Compensation benefits after dissolution. After *Olhausen*, it would appear that Workmen's Compensation benefits should be the separate property of the disabled spouse following dissolution of the marriage. The same is true of benefits stemming from private disability insurance programs.

Founded as it is on considerations of justice and equity, the *Olhausen* decision is unlikely to be reversed and should become the law of California. Therefore, it would behoove attorneys handling dissolution cases to take special note of the *Olhausen* decision. The attorney representing the disabled spouse who fails to argue, upon

22. 184 Cal. 484, 194 P. 31 (1920).
23. 220 Cal. App. 2d 339, 33 Cal. Rptr. 845 (1963).

dissolution of the marriage, that Workmen's Compensation payments or private insurance disability payments are the separate property of his client may, in light of *Olhausen*, face a malpractice suit such as that arising in the case of *Smith v. Lewis.*[24]

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24. 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975). Smith v. Lewis was an action against an attorney for malpractice in failing to assert his client's community interest in her husband's federal and state retirement benefits in marriage dissolution proceedings. The defendant attorney represented the wife in the proceedings and his failure to claim any interest on behalf of his client to husband's retirement benefits, in light of recent decisions in the field, resulted in a judgment and verdict for the wife against the attorney in the amount of $100,000.