

## **NON-VESTED PENSIONS ARE MARITAL PROPERTY:**

### **THE WHITFIELD DECISION**

**By Elliot H. Gourvitz**

The recent Appellate Division decision in *Whitfield v. Whitfield* heralds a major change in the equitable distribution law of New Jersey. *Whitfield* holds that a pension that was earned during the marriage, but that was neither vested nor matured at the time of the divorce, is marital property and thus subject to equitable distribution of property upon dissolution.

The majority in *Whitfield* specifically rejected the contrary 1095 Appellate Division holding in *Barba v. Barba*. It consigned *Barba* to oblivion with the observation act that, "We view *Barba* as an anomaly in developing law of equitable distribution and we disagree with it."

The court added that the practical difficulties inherent in valuation of non-vested pensions in no way affects their includability in the marital estate. The court criticized *Barba* for having "Inexplicably concluded" that non-vested pensions were not subject to equitable distribution. It found that *Barba's* most crucial error was in failing to Heed the Supreme Court's direction in *Kikkert v. Kikkert*, a case involving a vested but unmatured pension, which it said clearly rejected vesting as a relevant consideration in an equitable distribution analysis and refocused the inquiry on the statutory criteria of acquisition: whether or not the pension was acquired during the marriage. It re-affirmed the principle enunciated in *McGrew v. McGrew* that the mere existence of a contingency to the receipt of equitable distribution benefits is not a bar to includability.

### **The Facts**

In the *Whitfield* case, the parties were married in 1968, had three children, and separated some 16 years later, after which divorce proceedings were begun. The defendant-husband, an Air Force major and a pilot, began active duty with the United States Air Force five months after the parties were married. Because of his military status, the family moved every three years and lived all over the world. Major Whitfield was absent from home frequently, and according to Mrs. Whitfield, who spent her married life as a homemaker, she was "mother, father, housekeeper, everything. My husband was gone most of the time and I took care of everything."

Major Whitfield's military pension had not vested at the time the divorce complaint was filed and would not vest for another four years. He would not be eligible to receive the pension benefits until after 20 years of active service. As he testified at trial, "If I don't

work through the 26th of November, 1998, there is nothing whatsoever." What Major Whitfield failed to mention at trial was that if he did continue in the Air Force through that date (as, in fact, he is doing and has only a few months to go), he would be entitled to receive a pension of \$17,244 per year until his death. Major Whitfield will be 42 years of age in November 1998 and will have a life expectancy at that time of approximately 36 years. If he lives that long, his pension payments will amount to approximately \$620,000.

The far reaching nature and importance of the issues involved in this case explain the decision made by the National Organization of Women Legal Defense and Education Fund and seven other New Jersey and national organizations concerned with women's rights to intervene as amicus curate.

The military pension involved had what is known as a "cliff vesting" schedule, which means that it provides zero vesting for a given period, in this case 20 years, and requires the participant to complete that period of credited service in order to qualify for a length-of-service pension. The pension becomes absolute and matures only at the end of that period of time. Any number of years short of the required amount entitles the participant to no benefits at all.

Judge George Farrell, III, who presided over the trial in the Family Part in Salem County, found that Major Whitfield's non-vested military pension was not an asset subject to equitable distribution, stating that his determination was controlled by the then recently-decided Appellate Division decision in *Barba*. He noted that although *Barba* involved civilian pension, and *Whitfield* involved a military pension, which is under an entirely different statute, there was little distinction, if any, between the two with regard to the issue of vesting as a prerequisite for includability for purposes of equitable distribution. The Appellate Division in *Whitfield* agreed with Judge Farrell on that issue. Its determination is intended to apply to all non-vested pensions, civilian and military, regardless of their different statutory bases and vesting schedules.

Judge Virginia Long delivered the court's opinion on behalf of herself and Judge Warren Brody. She first notes that the Divorce Reform Act of 1971 acknowledged the significant contribution of both the husband and the wife to the marital relationship and directed the courts to effectuate and equitable distribution of the property, both real and personal, which was legally and beneficially acquired during the course of the marriage upon its dissolution. Citing the Legislature's social policy considerations, Judge Long noted that the statute gave recognition to the essential supportive role played by the wife in the home, as a homemaker, wife and mother, which would entitle her to a share of the family assets during the marriage, and that the division of property upon divorce is because the marriage is a shared enterprise, a joint undertaking and, in many ways, akin to a partnership.

Judge Long noted that the New Jersey law of equitable distribution had evolved smoothly over a period of time, with the exception of the subject of pensions, which has proved "a thorny problem," which unlike other marital assets were personal to one spouse and not easily subject to being shared with the other upon divorce. As a result, the courts have

given a different treatment to pensions, because they were intangible, difficult to value and because of the myriad of variations in pension structures, which, in themselves, evaded the formulation of a simple rule of includability.

In 1975 the New Jersey courts first declared a pension includable for distribution purposes in *Pellegrino v. Pellegrino*, which held that only the pensioner's contributions to the plan were marital property and completely excluded the employer's contributions.

The New Jersey courts had uniformly held that any contingency to the receipt of benefits precluded them from being vested and thus subject to equitable distribution. But, as early as 1977, in *Stern v. Stern*, the New Jersey Supreme Court had already signalled the inapplicability of "vesting" as an equitable distribution standard. *Stern* addressed these comments not to pensions, but to accounts receivable. The court noted:

Finally, it is urged that the accounts receivable should be excluded from consideration because they are not a property interest that has "vested" in the defendant. What we have already said would seem an adequate answer to this argument. We take the opportunity, however, to suggest that the concept of vesting should probably find no significant place in the developing law of equitable...These now customary usages of the concept of vesting are clearly in no way relevant to the question of effecting an equitable distribution upon the occasion of a divorce. Our statute requires, in order that property be available for distribution upon the occasion of a divorce. Our statute requires, in order that property be available for distribution incidental to a divorce, that it shall have been acquired during marriage. There is no reference to vesting. With only this brief word upon the subject, which is not really before us, we leave for another day any further discussion of the important and possibly difficult question as to what future interests may qualify as "property" within the meaning of N.J.S.A. 2A:34-23.

## **The Decision**

The court in *Whitfield* stated that unlike any other mere expectancy, the employee has some control over the receipt of a non-vested pension, albeit that control is not complete. If the employee continues to work for a number of years, that pension will be legally his, and this is what distinguishes a non-vested pension from a mere expectancy. Such a pension is property in the form of a contract right and is deferred compensation, subject only to fulfillment of the condition of a requisite number of years of employment by the employee.

The court further rejected the husband's argument that the pension would not be "earned" until the twentieth anniversary of his entry into the Air Force and that it would be acquired only for includability purposes at that time. The court further stated that both of these parties contributed to the earnings of defendant's pensions rights by their participation in the marriage, and that both justifiably expected to share the future enjoyment of these pension benefits, which represented a significant part of the marital

estate. The court concluded this analysis by saying that the includability of property in the marital estate does not depend on when during the marriage the acquisition took place, but depends solely on the nature of the interest and how it was earned.

### **Formula for Division**

In determining how the pension should be distributed, the court said that it must consider the conditional nature of the non-vested pension on issues of valuation and distribution. Because of the uncertainty of the valuation of the pension, the court concluded that in the absence of unusual circumstances, the pension should not be used to offset other assets. For example, in many cases where the pension is vested, the non-participant's interest in the pension plan is traded against equity in a marital home. If, in fact, the offset method were used, it might prove inequitable because it would mandate a pensioner to pay a spouse a time of divorce a share of a pension that he might never receive. This may be done voluntarily, but not under the duress of a court order.

The court specifically disapproved one variation on the offset method which was to calculate the spouse's share based on the present value, thus discounting the value and then deferring distribution until the pension is received. The court stated that the only reason for discounting to present value is to justify the payment in present dollars of a sum of money that is not due, if at all, until sometime in the future and, obviously, if the distribution is deferred until the future date, no discounting is necessary.

The court found that the spouse's percentage share is ascertained through a two-step process. The first step is to factor out that portion of the pension attributable to the marriage. This factoring involves the application of a fraction. The numerator of the fraction is the period of pension plan participation during the marriage and the denominator is the total period of plan participation necessary to the receipt of the benefits. Thus, in the *Whitfield* case, the includable fraction is 16/20, the number of the years the parties were married during which defendant accrued pension credits over the total number of years necessary for the pension to be received.

The second step for trial court is to determine the percentage to which each spouse is entitled, applying the equitable distribution criteria set forth in the landmark decision of *Painter v. Painter*. The advantage of this method is that if and when the pension is received, its distribution will be a ministerial act, which ordinarily will not require a return to court.

### **Conclusion**

The *Whitfield* opinion has taken its place as the leading Family Law pension decision in New Jersey. It is a comprehensive, top quality decision dealing with complex and top

priority issues. The decision expands the *Rothman* concept of marriage as skin to an economic partnership and applies it to the complex pension area.

*Whitfield* is important for a number of reasons. First of all, it protects the pension rights of military wives on divorce. *Whitfield* resolved affirmatively in our state the question of whether or not military wives are to be awarded a share of their spouses' pension upon divorce. For Mrs. Whitfield, in particular, it means that come November 1988, she will be entitled to her fair share of a pension asset worth over one-half million dollars, rather than exiting the 16 year marriage with only a share of the marital real estate and personalty.

Alan M. Grosman, the successful attorney for Mrs. Whitfield on this appeal, noted in his appellate brief that Congress meant something when it enacted the Uniformed Services Former Spouses Protection Act (USFSPA). In 1982, thereby negating the contrary 1981 U.S. Supreme Court decision in *McCarty v. McCarty*, and that Congress' intent would be frustrated in most cases by holding that non-vested military pensions, especially those involved in lengthy marriages, and not assets subject to division upon divorce. He noted that enactment of the USFSPA responded to a sense of national outrage and recognition of the important contribution that military wives play as homemakers to our military personnel. For the thousands of military wives domiciled in New Jersey who get divorced, this decision is very important.

But *Whitfield* goes far beyond that. It applies to all non-vested and vested pensions acquired by divorcing spouses. *Whitfield* stands for the proposition that all non-vested pensions, civil as well as military, are subject to equitable distribution and provides guidelines for their division and distribution. Since pensions are one of the most valuable assets acquired during most marriages and since they are a factor in most cases, the ruling in *Whitfield* applies to nearly every divorce action.

From now on every pension of divorcing spouses must be valued. Any attorney who learns of the existence of a vested or non-vested pension in a divorce case and fails to have it evaluated, henceforth, will be running the serious risk of a future malpractice action. Every matrimonial attorney must familiarize herself or himself with the rules laid down in this landmark equitable distribution case.