

Pugh v. Bankers Mutual Insurance Company, 206 Pa. Super. 136, 143, 211 A.2d 135 (1965) (citations omitted), it is also true that:

while the right to amend pleadings is ordinarily a matter resting in the sound discretion of the trial court, amendments should be allowed with great liberality at any stage of the case, unless, of course, they violate the law or prejudice the rights of the opposing party.

Puleo, supra. at 585 (citations omitted).

In the case at bar, the court finds that Bonded Applicators, Inc. will not be prejudiced by the court allowing the Nitterhouses to amend their complaint to specifically aver the existence of a latent defect. The amendment will not result in a new cause of action, but merely the correction of a defect in the pleadings.

Based on the above, the court finds that a four (4) year statute of limitations applies to his cause of action pursuant to 42 Pa.C.S.A. § 5525(i). The court further finds that the Nitterhouses shall be granted leave to amend their complaint to specifically allege the existence of a latent defect. The additional defendant's motion for judgment on the pleadings is hereby denied.

ORDER OF COURT

January 18, 1990, the court finds that a four (4) year statute of limitations applies to this cause of action pursuant to 42 Pa.C.S.A. §5525(i); the Nitterhouses are hereby granted leave to amend their complaint to specifically allege the existence of a latent defect; and the additional defendant's motion for judgment on the pleadings is denied.

ELHAJJ V. ELHAJJ, C.P. Franklin County Branch, No. F.R. 1986-716

Divorce - Marital Property - Pension Valuation

1. Even a non-vested or an unmaturred pension plan can be marital property and subject to division.
2. In calculating a pension plan's value, life expectancy must be calculated from the age at separation and not from when the beneficiary can retire without penalty.
3. When a pension plan allows for retirement at age 55 without penalty, an employee's normal retirement age may differ from the population at large.
4. Life insurance mortality tables are generally not appropriate in valuing pensions.
5. Tax ramifications must be considered when valuing a pension plan.

Carol Van Horn, Esq., Attorney for Plaintiff
William C. Cramer, Esq., Attorney for Defendant

OPINION AND ORDER

KAYE, J., January 17, 1990:

OPINION

This action in divorce and equitable distribution is before the Court on exceptions and objections filed by both parties to the findings and division of the marital property by the master. We remand to the master for revaluation of the husband's pension.

PROCEDURAL BACKGROUND

On June 7, 1988, Lorraine A. Elhadj ("Wife"), plaintiff, filed an action in divorce against William J. Elhadj, Jr. ("Husband"), defendant. In the complaint, the wife requested equitable distribution of the couple's marital property.

Despite negotiations, the couple was unable to agree upon the equitable disposal of their marital property, so the Court appointed a master to hear the dispute. The husband and wife presented evidence at master's hearings which were held on February 14 and 15, and March 22, 1989. The master filed his report on August 14, 1989, to which both parties filed exceptions and/or objections. The master filed a supplemental report on September 19, 1989 in response to the husband's first exception which corrected an accounting error in the original report. Both parties submitted comprehensive briefs on the remaining objections and/or exceptions, and we heard oral argument. The divorce and the equitable distribution actions were bifurcated, and a final divorce decree was entered on December 6, 1989. The equitable distribution action is pending.

FACTS

The parties were married on March 1, 1969 with each party having one prior marriage which ended in divorce. Husband had no children from his previous marriage. Wife had three daughters from her previous marriage, whose ages were four, seven and nine at the time of the marriage. There was only one child, Joseph, born to this marriage on July 25, 1970.

Wife was born on May 8, 1943, and she is currently forty-six years old. She has a high school education and holds a real estate license although she does not actively sell real estate at this time. Wife was employed at the Mechanicsburg Navy Depot at the time of her marriage in 1969, but she left that position to become a full-time homemaker and to raise the children. Wife testified that she became a homemaker at the request of her husband, but husband's testimony was essentially that wife's leaving her job was the result of a mutual decision between the parties. Wife returned to full-time employment in 1979 at the New Cumberland Army Depot eventually transferring her employment to Letterkenny Army Depot. Wife had reached a grade GS-7 with an annual salary of \$22,000 by the time of the hearing. Wife testified that without further education, her chances of future advancement were limited. She is in relatively good health.

Husband was born September 15, 1940, and is forty-nine years of age. He has a high school education and a realtor's license, although

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he is not actively selling real estate. Husband has worked for the federal government since 1962 and began working at Letterkenny Army Depot in 1969. At the time of the hearing, he had advanced to a grade GS-13 and was earning an annual salary of \$48,000. However, his prospects for future advancement are limited as he has been passed over three times for promotion. Husband is a smoker and has a family history of cancer. He has diverticular disease, high cholesterol, and takes medication daily.

During the first ten years of their marriage, Wife remained at home in the role of homemaker. Husband's earnings supported the family financially and were used to acquire marital assets during that time. Wife received no financial assistance from her former husband for the support of her three daughters. It appears that the former husband abandoned his children and could not be found, therefore, a claim for support could not be pursued. After Wife began to work in 1979, she also contributed to household expenses.

The master found that the couple had attained a higher than average standard of living which was supported "by borrowing and refinancing to a considerable degree" (Master's Report, Finding Number 19). The master also found that financial decisions were primarily controlled by the husband with little communication between the parties relating to the management of finances. The master further found that both Husband and Wife contributed to the running of their six person household. After her daughters graduated from high school, the wife used money she was earning, along with financial help from her parents, to pay for expenses related to her daughter's further education. Her last daughter left home sometime in or about 1983.

The marital relationship began to fall apart in the early 1980s after the wife returned to work. The wife began to question husband's management of the family finances. She refused to incur further debt believing that their combined salaries should have been adequate to cover their expenses.

The situation continued to deteriorate until the parties stopped living together as husband and wife. The parties agree that this separation occurred on February 19, 1986, although they continued to reside in the same house. Wife moved into one bedroom of the house which became her primary living space, and her ability to use

the residence was limited because of the actions taken by husband. Wife maintained her own space heater, and her private telephone line installed, and paid her own expenses, including utilities. She was unable to have cable TV because her husband had somehow disconnected service to her room. Wife paid one-half of the mortgage in one of the years she was living in one bedroom. In October of 1988, Wife moved out of the home after an altercation between the couple. Husband continued to pay for the expenses associated with the former marital home.

The parties' son, Joseph, continues to reside in the former marital home with his father. Joseph is a second year college student at Mont Alto Campus of Pennsylvania State University, and Husband has paid the expenses associated with his support and maintenance. Joseph's college costs have been paid for partially by Husband and partially by student loans. Wife has not made any support contribution for Joseph since the separation, although she has expressed a willingness to provide a home for him.

DISCUSSION

As with many married couples, the most valuable assets in this marital estate are the marital residence and the employee pension plans. Under Pennsylvania law, pensions are considered to be marital property and therefore are subject to equitable distribution upon divorce. *Braderman v. Braderman*, 339 Pa. Super. 185, 488 A.2d 613 (1985), *King v. King*, 332 Pa. Super. 526, 481 A.2d 913 (1984). Even a non-vested or an unmaturing pension plan can be marital property and subject to division. *Flynn v. Flynn*, 341 Pa. Super. 76, 491 A.2d 156 (1985).

A primary source of dispute in this case is the valuation of the husband's pension plan. Husband and Wife each presented expert testimony as to the value of their respective pension plans. Wife's expert valued Husband's pension at \$66,528 and Wife's at \$5,478. Husband's expert valued Husband's pension at \$27,402. Husband has stipulated to the wife's pension plan valuation of \$5,478. The master selected the \$66,528 (rounded off to \$66,500) as the proper value of Husband's pension plan to which the husband has filed exceptions and/or objections.

Generally, there are two types of pension plans, the *defined contribution* plan and the *defined benefit* plan. In the "defined contribution" plan, the employee is not promised a specific monthly amount on retirement. Instead, the employer makes contributions to the plan, and its eventual value will depend on the market value of the plan's investments. In the "defined benefit" plan, the employee is assured a fixed benefit amount which can be reasonably calculated as long as certain variables are known or assumed. These variables include length of service, age at retirement, life expectancy, etc. *Kalinoski v. Kalinoski*, 9 F.L.R. 3033 (Butler County, 1982).

The wife's expert testified that the husband has a defined benefit type of pension plan.

Two methods are generally used for dividing pension plan benefits when the Court decides an equitable distribution action, the "deferred distribution method" and the "immediate offset method." *Braderman v. Braderman, supra*. Determining the value of the plan depends on the method of distribution selected. When the "deferred distribution" method is chosen, the value of the plan is determined either when the plan has matured, or when it is paid to the employee spouse, and the division is made at that time. This method is preferred when the parties' other assets are inadequate to offset the pension's value or when the variables in the plan are so uncertain as to make the value of the plan too difficult to calculate with any degree of reasonable accuracy. A disadvantage of using this method is that the Court must retain jurisdiction over the case in order to supervise and enforce the court order deferring the distribution. This method also tends to prolong hostility between the parties because of continuing contact until the matter is finally disposed of *Braderman v. Braderman, supra*. It is also possible for the employee spouse to destroy some of the value of the pension by unilateral action such as resigning the job or by remarrying.

In the "immediate offset" method, an actuarial process is used to calculate the present value of the pension. This value is either offset against other assets in the estate or paid to the non-employee spouse in a lump amount. *Demasi v. Demasi*, 366 Pa.Super. 19, 530 A.2d 871 (1987), appeal denied 517 Pa. 631, 539 A.2d 811 (1988). The actuarial process which is used to determine the pension's

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present value can cause problems.

"Actuarial science is based on probability. No single calculation will be correct because nobody knows the future."

Kalinoski v. Kalinoski, supra at 3036. Although the process is based on some speculation, the actuary can calculate a reasonably fair and accurate value for the plan. *See generally, Demasi*. However, the process can cause confusion, and if the method is not followed exactly, an unreasonably inaccurate prediction of pension value may result. The greatest benefit of choosing the "immediate offset" method is that it results in a final and immediate settlement of the pension so that the parties can avoid any future entanglement. *Braderman v. Braderman, supra*.

The "immediate offset" method is the preferred method of distribution when the variables of the employee pension plan are reasonably predictable and there are sufficient assets to offset the pension's value or pay the non-employee spouse. The trial court must balance the facts of each case and consider the advantages and disadvantages of each method to find the one that results in a fair and equitable distribution. *Braderman v. Braderman, supra*. In order to perform this kind of analysis, the court must know the present value of the employee spouse's pension if that value can be reasonably and accurately determined.

In *Demasi, id.*, 336 Pa.Super. at 50, 530 A.2d at 886, the Superior Court set out the formula to be used to calculate the present value of the pension.

1. Calculate the amount of [the employee's] monthly pension benefit, assuming [employee] was at age sixty five on ... the date of separation.
2. Find [employee's] life expectancy at the time of separation and subtract his normal retirement age to determine the expected number of months of pension benefits.
3. Select an appropriate discount rate.
4. Find the value of the annuity at age 65.

5. Discount the value at age 65 to present value accounting for mortality, disability and termination.

6. Reduce present value of the plan if it has not yet vested.

7. Apply the coverture fraction if a portion of the pension was earned before the marriage.

In the instant case, a reasonably accurate calculation of the present value of the pension is needed in order to determine which type of distribution method, the "deferred" or "immediate offset" is most appropriate. If the present value of the pension has a disproportionate value in relation to the other marital assets, or if the variables are so uncertain that a present value cannot be calculated, the "deferred distribution" will be more appropriate. On the other hand, if there are adequate assets in the marital estate to offset the calculated present value of the pension, the "immediate offset method" may be more appropriate. But, we must have a reasonably accurate valuation of the pension prior to making any distribution decision.

Neither party has asserted that the present value of the husband's pension cannot be reasonably determined. However, each party contends that the other's expert made errors when calculating the present value of Husband's pension.

First, Husband maintains that Wife's expert erred in calculating the husband's life expectancy from age 55 instead of from the date of the parties' separation as required in Step 2 of the *Demasi* formula. We agree. The formula clearly requires that life expectancy be calculated from the husband's age at the date of separation, and not from the date Husband can retire without penalty.

Second, the husband contends that the wife's expert failed to discount for mortality, disability and termination as required in Step 5 of the *Demasi* formula. It is not clear from the record whether the wife's expert did indeed ignore these considerations. The expert testified on cross examination that the present value would terminate his employment or die. But, we could find no testimony to indicate whether the expert did or did not consider the probability that Husband would die or terminate his employment

before reaching retirement age.¹ This factor clearly must be considered when making a pension valuation.

Third, Husband asserts that the wife's expert erred in discounting the pension value as required in Step 2 of the *Demasi* formula at age 55 instead of at age 65, the normal retirement age. Step 2 requires finding

"life expectancy at the time of separation and subtracting the normal retirement age to determine the expected number of months of pension benefits."

We believe that Husband is correct when he states that 65 is the normal retirement age. But when a plan provides that an employee may retire without penalty at 55, the employee's normal retirement age may be different from the normal retirement age of the population at large.

The goal in calculating a pension plan value is to obtain a reasonably accurate and fair pension amount. Therefore, the variable data entered into the formula should be as accurate as possible. Many employees have some idea at what age they plan to retire realizing, of course, that events may occur which will alter that plan. We are unable to find any evidence in the record which indicates at what age Husband is planning to retire. It is not unreasonable to conclude that an employee who can retire without penalty at age 55 will do so, nor is it unreasonable to conclude that the employee would continue to work until age 65.

A sister Court of Common Pleas addressed a similar problem in *Bucci v. Bucci*, 134 P.L.S. 116. (Allegheny, C.P. 1985). The court used the normal retirement age of 65 to value the pension plan since the employee spouse testified that he planned to retire at age 65. However, the court in *Bucci* retained jurisdiction to modify the value of the pension if the spouse retired earlier. This approach discourages the employee spouse from indicating the later retirement age in order to decrease the present value of the plan when it

¹ For a discussion on calculating the present value of pension benefits, see Troyan, Pension Evaluation and Equitable Distribution, 10 F.L.R. 3001; and *Kalinowski v. Kalinowski*, 9 F.L.R. 3033 (Butler County, 1982).

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LEGAL NOTICES, cont.

Waynesboro Area School District
ULLMAN, PAINTER AND MISNER,
Solicitors

4/27, 5/4, 5/11/90

NOTICE

NOTICE IS HEREBY GIVEN that articles of incorporation have been filed with the Commonwealth of Pennsylvania, Department of State at Harrisburg, Pennsylvania, on May 1, 1990, for the purpose of obtaining a certificate of incorporation. The name of the proposed corporation organized under the Commonwealth of Pennsylvania Business Corporation Law, Act of December 21, 1988, (P.L. 1444, No. 177), is REASNER SAWMILL, INC.

Joel R. Zullinger
310 Chbg. Trust Co. Bldg.
Chambersburg, PA 17201
Attorney

5/11/90

NOTICE

Notice is hereby given that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania on the 4th day of April 1990, for the purpose of obtaining a certificate of incorporation. The name of the corporation organized under the Commonwealth of Pennsylvania Business Corporation Law of 1988, Act of December 21, 1988, (P.L. 1444, No. 177), 15 Pa. C.S. Sec. 1101, et seq., is CLINE'S CUSTOM BUILDING, INC., 1086 Arendtsville Road, Biglerville, PA. 17307. The purpose for which the corporation has been organized is to engage in and to do any lawful acts concerning any or all lawful business for which corporations may be incorporated under the Business Corporation Law of the Commonwealth of Pennsylvania.

STEPHEN E. PATTERSON
Patterson, Kaminski,
Keller & Kiersz
239 E. Main St.
Waynesboro, PA 17268

5/11/90

LEGAL NOTICES, cont.

IN THE COURT OF COMMON PLEAS
OF THE 39th JUDICIAL DISTRICT OF
FRANKLIN COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: June 7, 1990

BROWN: First and final account, statement of proposed distribution and notice to the creditors of Edmund C. Wingerd, Jr., Executor of the Estate of Beatrice S. Brown, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

KARPER: First and final account, statement of proposed distribution and notice to the creditors of Farmers and Merchants Trust Company, Executor of the Estate of Ambrose B. Karper, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

MCCURDY: First and final account, statement of proposed distribution and notice to the creditors of Mary M. Hill and James A. McCurdy, a/k/a William A. McCurdy, Jr., late of Hamilton Township, Franklin County, PA, deceased.

MILLER: First and final account, statement of proposed distribution and notice to the creditors of Laurel Miller, Executrix of the Last Will and Testament of Daisy V. Miller, late of Antrim Township, Franklin County, Pennsylvania, deceased.

Robert J. Woods, Clerk
Rhonda R. King, Deputy
Clerk of Orphan's Court
Franklin County, Pennsylvania

5/11, 5/18, 5/25, 6/1/90

is unlikely that he will continue to work that long. It thereby encourages the employee spouse to be as accurate as possible when testifying to his intended retirement age. We agree that the expert's assumption that the husband will retire at age 55 may have resulted in an unreasonably inaccurate pension valuation if the husband's intention is to work until age 65. We suggest that Husband's intended retirement age be obtained and used in Step 2 of the *Demasi* formula.

The wife contends that the husband's expert erred in using life insurance mortality tables where a distinction is made between smokers and non-smokers. Because Husband is a smoker, Husband's expert used a life expectancy figure that was several years shorter than the figure used by Wife's expert. The wife's expert used "the commissioner's 1980 mortality table", a unisex table which does not differentiate between smokers and non-smokers. (March 22, 1989 hearing at pp 43-45). The wife's expert testified that insurance mortality tables were heavily biased. Even the husband's expert testified on cross examination that life insurance mortality tables, with their distinction between smokers and non-smokers, are not usually used to value pensions. We agree, therefore, that the husband's expert erred in using life insurance mortality tables and his figure for the present value of the husband's pension is unfairly inaccurate.

The wife further contends that her expert made a conservative estimate of the high three salary assuming that the husband would receive no salary increases between the date of the valuation and retirement. As a result, the present value of the pension was decreased dramatically, which weighed heavily in favor of Husband. We believe that the wife's expert should have made a reasonable estimate of the husband's salary increases when making the pension valuation. Although this may have offset any other errors or assumptions made by the wife's expert, we cannot conclusively find that it does.

A final issue raised by Husband is that Wife's expert failed to consider the tax implications involved with the pension value. In *Diamond v. Diamond*, 360 Pa. Super. 101, 519 A.2d 1012 (1987), the Court stated that the decision must take into account tax law consequences when distributing marital assets. Also, in *White v.*

White, 382 Pa.Super. 478, 555 A.2d 1299 (1989), the Court that 23 PC 401 (d) (10), as amended, compels the court to consider tax consequences. We believe, as a matter of law, tax ramifications must be considered when valuing a pension plan.

Because the value of the pension plan has a considerable impact on the ultimate distribution decision, and because we believe both Husband's and Wife's experts erred in valuing the pension plan, we remand to the master for a revaluation of the pension plan consistent with this opinion.

ORDER OF COURT

NOW, January 17, 1990, the record in the above-captioned report is remanded to the Master for the purpose of receiving additional expert testimony consistent with the opinion appended hereto.

LARACUENTE, ADMRX. V. QUEEN, ET AL., C.P. Franklin County Branch, No. A.D. 1987-91

Negligence - Duty of Care - Inspection of Premises

1. Where an insurance company inspects property prior to issuing a fire insurance policy, its failure to require fire detection devices is not negligence as to the death by fire of a party.
2. The purpose of the insurance company's inspection was not to protect life but for the protection of the insured property.

Richard H. Wix, Esq., Counsel for Plaintiff.

William J. Peters, Esq., Counsel for Defendant/Aetna Casualty & Surety Company

OPINION AND ORDER

KELLER, P.J., January 10, 1990:

On April 27, 1985, a fire occurred at the property owned by

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