

GEORGIE A. WENGER, Plaintiff, v. KENNETH H. WENGER,  
Defendant, C.P. Franklin County Branch, Civil Action No. 1997-509

*Exceptions to Master's Report — Classification of Pension — Support —  
Equitable Distribution*

1. Money included in an individual's income for purposes of calculating support payments may not also be simultaneously labeled a marital asset subject to distribution.
2. Using the same revenue as a source for support and equitable distribution results in an impermissible "double dipping."
3. Where Master classified Defendant's pension as "income" for purposes of calculating support prior to the filing of the Master's Report and a "marital asset" for equitable distribution after the filing of the Report, there was no impermissible double dipping as Master's actions created two distinct revenue pools.
4. Master did not err in reducing portion of Defendant's pension available for distribution to reflect the 18-month period, prior to the filing of the Master's Report, during which the pension was classified as income.
5. A pension earned throughout the course of a marriage is properly considered an asset of the marriage.
6. The Court will not disturb a distribution scheme where it effects "economic justice" among the parties.
7. Defendant is not entitled to a greater credit for future support payments in equitable distribution than given by the Master because Defendant's support obligation will change after equitable distribution as less income will be received from the pension, thus, Defendant's remedy is to seek modification of his support obligation.
8. Where the Master appropriately considered each of the Section 3502 factors in formulating the recommended distribution and where Plaintiff's superior financial position after the parties separation was due to her continued employment, while Defendant chose early retirement with his pension as his only income and made no attempt to acquire separate assets since the separation despite his earning capacity, the Master's distribution, resulting in a nearly 50/50 split between the parties, did not result in "unfair treatment" of the Defendant, nor did it "create a huge disparity" between the parties.

Appearances:

*Lynn Y. MacBride, Esq.*, Counsel for Plaintiff  
*James K. Reed, Esq.*, Counsel for Defendant

OPINION

Walsh, J., November 20, 2000

Background

This matter comes before the Court on Defendant's *Exceptions to Master's Report Dated June 1, 2000*, and filed June 9, 2000. Plaintiff, Georgie A. Wenger, is 47 years old and is currently employed by the Federal

Government, earning approximately \$44,000.00 per year. Kenneth H. Wenger, Defendant, is 50 years old and is presently retired from Federal Civil Service. Only one of the children to the marriage remains a minor, born October of 1990.

Plaintiff initiated the instant divorce action by filing a Complaint pursuant to Section 3301(c) of the Divorce Code, containing counts for equitable distribution and counsel fees and expenses. On November 9, 1999, the Plaintiff moved to appoint a Master, and Timothy D. Wilmot, Esquire, was appointed to serve as Master on November 12, 1999. Following a hearing before the Master on May 23, 2000, the Master gave Notice of the filing of the Master's Report and Recommendation and filed the Report on June 1, 2000.

Defendant timely filed exceptions to the Master's report raising six issues of alleged error by the Master. Argument on the exceptions was heard September 7, 2000. For purposes of argument the parties have narrowed those six issues into two substantive issues, which will be addressed accordingly. Specifically, these issues are:

1. Whether the master erred in characterizing Defendant's pension as marital property, or in the alternative by not crediting the Defendant for child support payments he will make in the future; and
2. Whether the factors of equitable distribution were properly considered by the Master in the instant matter.

Discussion

The Court will first address Defendant's contention that the Master erred in characterizing his pension as marital property, or alternatively by not crediting Defendant for child support payments to be made in the future. Defendant retired from civil service employment in September of 1996 under an early retirement option. By applying the coverture fraction of 78.89 percent to Defendant's monthly pension benefit of \$1,500, the Master determined that \$1,183.35 of his monthly payment is marital. *Master's Report*, Page 9. The present value of the marital portion of Defendant's pension was determined to be \$207,817.00. *Id.* at 12.

At the heart of the controversy is Defendant's claim that the Master erroneously classified a portion of his pension as a marital asset. Specifically, Defendant's pension was classified as income for purposes of calculating support prior to the filing of the Master's Report on June 1, 2000. Thereafter, the Defendant's pension was labeled a marital asset subject to equitable distribution.

At page 13 of the Report, the Master states that Plaintiff filed for child support on November 20, 1998. The Master additionally found Defendant's only source of income was his pension. Therefore, support payments effective from November 20, 1998, had to be calculated according to the monthly payments Defendant received from his pension. Citing *Cerny v. Cerny*, 440 Pa.Super. 550, 656 A.2d 507 (1995) and *Rohrer v. Rohrer*, 715 A.2d 463, 465 (Pa.Cmwlth. 1998), for the proposition that money included in an individual's income for purposes of calculating support payments may not also be labeled a marital asset subject to distribution, the Master opined that the portion of the pension classified as income was no longer available for distribution. As a result, the Master found it necessary to exclude from equitable distribution the marital portion of the monthly payment received by Defendant (\$1,183.35) for the 18-month period prior to the filing of the Report, from November 23, 1998, to June 1, 2000, during which time the payments were classified as income. Accordingly, the marital portion of Defendant's pension available for equitable distribution was reduced by \$21,300.30 from \$207,817.00 to \$186,516.70 to reflect the 18-month period during which time the pension was classified as income.

Initially, this Court notes that it has been unable to discover any clear authority governing the propriety of the current situation, in which the Master excluded that portion of Defendant's pension which had been classified as income prior to the filing of the Master's Report on June 1, 2000, and after which time the Defendant's pension would be classified as a marital asset for purposes of equitable distribution. Moreover, as neither party has provided any such authority, the Court believes it has been presented with a case of first impression.

Defendant looks to *Cerny* and *Rohrer* in support of his argument that the Master erred in failing to exclude all of Defendant's pension from the marital estate. Defendant argues that because the entire pension was used to calculate support, the entire pension must be excluded from equitable distribution. In *Cerny*, the court determined it was error for the Master to classify a lump sum termination payment from the husband's employer as income for support purposes, while **at the same time** classifying the same payment as a marital asset subject to equitable distribution. *Cerny*, supra., at 508-509. However, the only factual similarity between *Cerny* and the instant matter is that there is a single sum of money being used for both purposes of calculating support and equitable distribution. In *Cerny*, the court was presented with a scenario in which that single sum was classified as income and a marital asset **simultaneously**. However, in contrast to *Cerny*, the portion of Defendant's pension used to calculate support was

excluded from the rest of the pension classified as a marital asset, thereby dividing the single sum into two distinct parts. Therefore, the instant matter is distinguishable from *Cerny*.

In *Rohrer*, the defendant's retained earnings beyond 1992 were used to determine support payments. *Rohrer*, supra., at 465. Accordingly, the Master, in determining the marital assets subject to distribution, excluded those retained earnings after 1992 because they had been used to calculate support payments. *Id.* However, as the period prior to 1992 had not been used to calculate support, the Master classified husband's retained earnings prior to 1992 as a marital asset. *Id.* The Superior Court in *Rohrer* determined that the Master's characterization of the retained earnings as a marital asset prior to 1992 and as income for support purposes after 1992 did not constitute an impermissible "double dipping" because there were separate annual amounts of revenue which were divisible and distinguishable before and after 1992. *Id.*, at 465-466.

By analogy, *Rohrer* is applicable to the instant matter. As previously noted, excluding the portion of Defendant's pension used to calculate support divided the Defendant's pension into two distinct parts: before June 1, 2000, and after June 1, 2000. Significantly, the *Rohrer* court, looking to *Cerny*, stated, "[w]e do not condone 'double dipping', i.e., using the same revenue as a source for 'support' and 'equitable distribution.'" *Rohrer*, supra., at 466. Instantly, the methodology employed by the Master assures that Defendant's pension will not be characterized simultaneously as income and a marital asset. Instead, the Master's actions created a situation similar to *Rohrer* in which there were separate distinguishable revenue pools from which both support and equitable distribution could be determined. Because the pension was not classified simultaneously as a source of revenue for both support and equitable distribution, the Master's recommendation does not result in a "double dipping" of Defendant's pension. Therefore, we find no error on the part of the Master in not excluding all of Defendant's pension from the marital estate in order to effect economic justice.

Defendant argues in the alternative that the Master erred in failing to credit the Defendant for support payments he will make in the future. The crux of Defendant's argument is that even if it were proper for the Master to exclude a portion of his pension, Defendant should be entitled to a greater credit than was given as the Master failed to exclude the amount of his monthly payments that will be considered for support in the future. Following Defendant's line of reasoning, there are an additional 100 future payments until his daughter reaches age 18. Consequently, Defendant argues, the amount of his pension used to calculate those future support

payments should also be excluded from equitable distribution. Because Defendant's child support obligation was calculated based on the \$1,183.35 monthly payment, granting credit for the 100 future payments upon which support would be based would result in an additional \$118,335.00 being excluded from equitable distribution. Therefore, if the Court were to adopt Defendant's line of reasoning, the amount of Defendant's pension would be reduced by \$139,635.00 (\$21,300.00 + \$118,335.00), thereby decreasing the amount of his pension subject to equitable distribution to \$68,182.00 (\$207,817.00 - \$139,635.00). See *Defendant's Brief*, at 3.

We believe Defendant's argument is flawed. Defendant contends that the Master failed to recognize the fact that he must continue to make support payments from his pension, presently his only income, until his daughter is 18. *Defendant's Brief*, at 13. It appears Defendant's concern centers on his obligation to continue making child support payments in the future after the distribution proposed by the Master will significantly decrease the size of his monthly pension payments. However, Defendant's concern is unfounded. As of June 1, 2000, Defendant's pension is no longer classified as income for calculating support. After that time the Defendant's pension is classified as a marital asset and is subject to equitable distribution. Accordingly, Defendant's support obligation will change as of June 1, 2000, as Defendant will be receiving less income from his pension upon which to calculate the remaining 100 support payments. Therefore, the Court agrees with the Plaintiff's contention that the Defendant's remedy is not to disturb the Master's findings and exclude all or a greater portion of his pension from equitable distribution, but to seek a modification of his child support obligation based on a substantial change in circumstances. *Plaintiff's Brief*, at 4.

As the Court has found no clear authority, nor has any been presented to the Court, we find the Master's characterization of Defendant's pension is not inconsistent with either *Rohrer* or *Cerny*. If we were to allow Defendant's entire pension to be classified as income for purposes of support, it would remove a significant marital asset from the distribution. A pension which has been earned throughout the course of the marriage is properly considered an asset of the marriage. *Braderman v. Braderman*, 339 Pa.Super. 185, 488 A.2d 613 (1985). Therefore, allowing Defendant to shield his pension behind the cloak of support would preclude Plaintiff from receiving her equitable share of the marital property. Such a result would clearly amount to a windfall for the Defendant. Because the distribution scheme recommended by the Master embodies economic justice to the parties, this Court will not disturb the Master's characterization of

Defendant's pension as marital property or his determination not to credit the pension for future child support payments.

Defendant's second argument, couched in terms of a claim that the Master failed to properly consider the Section 3502 factors of equitable distribution, essentially asserts that the Master's proposed distribution results in the "unfair treatment of the Defendant" and "creates a huge disparity between the parties." *Defendant's Brief*, at 4. Initially, we note that Defendant has failed to offer evidence in support of his position that the Master erred in considering the factors and has failed to, at a minimum, indicate which factors were improperly considered. Moreover, it is apparent that the Master did consider the Section 3502 factors in formulating his Report and Recommendation. *Master's Report*, at 14-18. However, insofar as Defendant has raised the issue of the "fairness," the Court will examine the distribution scheme to determine if economic justice has been achieved.

Defendant claims the distribution is unfair because a significant portion of his pension was used to calculate child support and because his pension is subject to an additional 100 months of support obligations. *Defendant's Brief*, at 4. In light of the above analysis regarding Defendant's support obligation in relation to his pension, we find this argument must fail. Briefly, the Court has determined that because Defendant's pension is characterized as a marital asset after June 1, 2000, those funds will no longer be used to calculate support. Instead, the 100 payments, making up Defendant's future support obligation, must be calculated according to the amount of monthly income Defendant receives from his pension after distribution. Were we to hold otherwise, such "double dipping" would result in an inequitable distribution in favor of Plaintiff.

In support of his contention that the distribution scheme is unfair, Defendant places heavy emphasis on the fact that Plaintiff continues to earn \$44,000.00 a year and retains her pension, while Defendant's pension is subject to equitable distribution and must be used as the source of future child support payments. *Defendant's Brief*, at 4. Significantly, the Master found the primary reason for Plaintiff's superior financial position was her decision to continue working after the separation, while Defendant voluntarily retired early. *Master's Report*, at 16. Notably, Plaintiff had accumulated a substantial value in her pension since the date of separation. *Id.*, at 14. Meanwhile, Defendant's early retirement resulted in the forfeiture of his ability to be employed by the Federal Government for five years. *Id.*, at 15 and 16. We note that this 5-year period should expire in September of 2001 as Defendant entered early retirement in September of 1996. The Report also indicates that Defendant has an earning capacity outside civil

service, from which he could acquire future income, albeit less than he previously enjoyed in his former employment. *Id.*, at 16. Moreover, the Defendant's own testimony before the Master established that he is capable of securing employment for \$8.00 an hour, but that he has chosen not to explore those opportunities as he has not found the "right job." *Id.*, at 15. Significantly, the Master commented:

The Master did consider the fact that Georgie has accumulated a considerable non-marital asset in the nature of her post-separation pension benefits. This asset, however, was acquired due to her diligent employment since the date of separation. Kenneth, however, simply failed to make any effort to accrue any separate assets since the date of separation, and has fulfilled his support obligation through payments from the pension which he accumulated primarily during the marriage.

*Id.*, at 18-19.

Defendant claims the Master's distribution has created a "huge disparity between the parties." *Defendant's Brief*, at 4. However, in light of Defendant's self-induced financial status, we do not think the Master's distribution of marital assets is inequitable. The fact that Plaintiff chose to continue working since the date of separation in order to ensure financial security does not establish that Defendant should somehow be entitled to a greater share of the marital assets, where he has voluntarily retired and opted to forgo any new employment after the separation. This Court notes that the Master's recommendation results in a distribution in which Plaintiff receives \$204,312.18 and Defendant receives \$198,940.97, a difference of only \$5,371.21. *Master's Report*, at 19-20. This disparity can hardly be categorized as unfair. Based on a review of the Report, the Court also finds that the Master has appropriately considered each of the Section 3502 factors in formulating the recommended distribution. Further, the proposed distribution in the instant matter serves the goals of equitable distribution by effecting economic justice. Therefore, the findings of the Master will not be disturbed.

#### ORDER OF COURT

November 20, 2000, after consideration of Defendant's *Exceptions to Master's Report Dated June 1, 2000*, the Briefs and arguments of the parties, the *Master's Report and Recommendation* and the law, it is hereby ordered that the *Master's Report and Recommendation* is affirmed.

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