

State of New Hampshire
Supreme Court

NO. 2008-0216

2009 TERM

JULY SESSION

In the Matter of
Michele Sukerman
and
William Sukerman

RULE 7 APPEAL OF FINAL DECISION OF
DERRY FAMILY DIVISION COURT

BRIEF OF RESPONDENT/APPELLANT WILLIAM SUKERMAN

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

TABLE OF CONTENTS

TABLE OF AUTHORITIES	<i>ii</i>
QUESTIONS PRESENTED	<i>1</i>
STATEMENT OF FACTS AND STATEMENT OF THE CASE	<i>2</i>
SUMMARY OF ARGUMENT	<i>4</i>
ARGUMENT	<i>5</i>
I. William Sukerman has Several Separate Pension Benefits	<i>5</i>
II. <i>Fabich</i> and <i>Preston</i> are Consistent	<i>7</i>
III. Court Erred by Awarding Michele a Share of William’s Disability Benefits	<i>8</i>
CONCLUSION	<i>9</i>
REQUEST FOR ORAL ARGUMENT AND CERTIFICATION	<i>9</i>
APPENDIX	<i>following p. 10</i>

TABLE OF AUTHORITIES

NEW HAMPSHIRE CASES

<i>In re Chamberlin</i> , 155 N.H. 13 (2007)	5
<i>In re Costa</i> , 156 N.H. 323 (2007)	2, 5
<i>Fabich v. Fabich</i> , 144 N.H. 577(1999)	7, 8
<i>Hodgins v. Hodgins</i> , 126 N.H. 711 (1985)	5, 8
<i>In re Preston</i> , 147 N.H. 48 (2001)	7, 8
<i>In the Matter of Valence and Valence</i> , 147 N.H. 663 (2002)	5

MASSACHUSETTS STATUTES

MASS.GEN.LAWS ch. 32 § 1	2
MASS.GEN.LAWS ch. 32 §§7(2)(a)(I)	2
MASS.GEN.LAWS ch. 32 §§7(2)(a)(iii)	2
MASS.GEN.LAWS ch. 32 § 8	3
MASS.GEN.LAWS ch. 32 § 91A	3

QUESTIONS PRESENTED

1. Did the court err in awarding to Michele Sukerman a portion of William Sukerman's disability pension benefit?

Preserved: RESPONDENT'S MOTION FOR CLARIFICATION AND RECONSIDERATION
(Nov. 2008); 2 *Trn. passim*.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Michele and William Sukerman were married in 1988. 1 *Trn.* at 6. They had three children, all now or soon to be emancipated. 1 *Trn.* at 8-9, 37; 2 *Trn.* at 27-45. Michele filed a petition for divorce based on irreconcilable differences in January 2008, 1 *Trn.* at 7, when the couple declared bankruptcy, 1 *Trn.* at 18-19, and the parties separated in February. 1 *Trn.* at 44. They stipulated to most issues, leaving the court to divvy up their assets.

Michele works as a licensed nursing assistant. 1 *Trn.* at 9. William was a firefighter with the Massachusetts Port Authority (MassPort) Fire Rescue in Boston. 1 *Trn.* at 26. He worked there for over 17 years, and was married to Michele during that entire period. 1 *Trn.* at 12-13; 2 *Trn.* at 9. In May 2007, at only age 47, and after the parties separated, William suffered a heart attack. Consequently, in August 2008 during the pendency of this divorce proceeding, he was forced to retire. 1 *Trn.* at 12, 26, 30. William now works part-time selling fire safety equipment. 1 *Trn.* at 16, 39.

MassPort is part of the Massachusetts retirement system, and the issue here is the disposition of William's MassPort pension. 1 *Trn.* at 11. By statute the pension consists of several separate components. 2 *Trn.* at 9; MASS.GEN.LAWS ch. 32 § 1 ("retirement allowance" is "the sum of the amount of the annuity and the amount of the pension"); MASS.GEN.LAWS ch. 32 §§7(2)(a)(I) and (iii); *In re Costa*, 156 N.H. 323, 328-29 (2007). First is an annuity, to which William contributed during his tenure, and which the parties agree is an asset of the marital estate. It pays about \$630 per month. The second is a disability benefit, which pays about \$3,900 per month, 1 *Trn.* at 27-29; 2 *Trn.* at 15, and which is funded by the retirement system and not from any withholdings from William's salary. The third component is William's

ordinary retirement benefit, to which he would have been eventually entitled had he not been disabled.¹

The annuity and ordinary retirement components cannot be rescinded. The disability component, however, is easily defeated by circumstances such as if William were to become rehabilitated or non-disabled. MASS.GEN.LAWS ch. 32 § 8. It is also subject to a pay-cap – that is, if William were to earn more than \$25,000 per year, the disability component is reduced commensurately, and any overage must be refunded to the Commonwealth. ORDER (Nov. 5, 2008), *appx.* at 11; 1 *Trn.* at 16, 39, 45; MASS.GEN.LAWS ch. 32 § 91A.

The Derry Family Division (*Paul S. Moore*, M.M.) took evidence at a hearing in November 2008, and issued an order of divorce.² ORDER (Nov. 5, 2008), *appx.* at 11. After motions for reconsideration, it heard argument by the parties’ attorneys in January 2009³ and issued a second order. ORDER (Jan. 26, 2009), *appx.* at 13. Without distinguishing among the components, the court “finds that [William’s] ‘benefit’ is a contributory defined benefit plan and, as such a divisible property right.” *Id.* William appealed.

¹There are other components as well, such as survivor benefits and health benefits, not relevant here.

²The transcript of the November 5, 2008 hearing is referred to herein as 1 *Trn.*

³The transcript of the January 23, 2009 hearing is referred to herein as 2 *Trn.*

SUMMARY OF ARGUMENT

William Sukerman first describes the components of the Massachusetts retirement system, and delineates their differences. He then argues that these differences make the disability portion not a part of the marital estate. William then shows how the two competing authorities on the matter are reconcilable, and suggests a resolution that provides Michele Sukerman a more fair share of William's total retirement package.

ARGUMENT

In a two-step analysis, this Court reviews *de novo* whether an asset is marital property, but accords deference to the equitable distribution of the asset. *In re Chamberlin*, 155 N.H. 13, 15-16 (2007); *In the Matter of Valence and Valence*, 147 N.H. 663, 666 (2002).

I. William Sukerman has Several Separate Pension Benefits

William Sukerman's Massachusetts pension benefits comprise several separate and interrelated benefits. *In re Costa*, 156 N.H. 323, 328-29 (2007). The first is an annuity – essentially a savings account. The amount of the annuity is based on the amount withheld from his paychecks over the years and the accumulated interest. There is no dispute that the benefit is part of the marital estate in which Michele shares.

The second benefit is William's regular retirement, which, had he continued to work without disability, would have been an entitlement payable at some time in the future. Exactly what the monthly benefit is worth would depend upon William's future career path, the rate of pay he would attain at the end of his firefighting career, the timing of his retirement, and other considerations.

That amount is also part of the marital estate, divisible subject to both the methodology and the formula set forth in *Hodgins v. Hodgins*, 126 N.H. 711 (1985). The *Hodgins* methodology recognizes that when pension benefits are “impossible to compute ... in any meaningful way,” *Hodgins*, 126 N.H. at 715, the decree should provide that the spouse take a portion of the benefit “upon maturity.” *Id.* at 716. Once the benefits commence, the spouse enjoys her portion calculated by the formula specified.

The third pension benefit here at issue is Williams's disability payment. It has

characteristics that make it uniquely different from both the annuity and the retirement.

First, it pays now upon disability, and not later upon retirement. Second, it pays less than retirement – 72 percent of William’s final year’s salary rather than 80 percent of a presumably higher future final year’s salary. Third, it is funded by the retirement system, and not by withholdings from William’s paychecks over the years. Fourth, it is defeasible. If William were to overcome his disability, the payment stops. Likewise, if William were to perform work unhampered by his continuing disability the payment stops *and* he would have to return excess earnings to the Massachusetts retirement system. To administer both these possible stoppages, William is required to undergo periodic medical screenings and must submit his annual federal tax filings to the system. Thus the benefit is highly conditional, and not an entitlement.

This last difference shows the extent to which disability retirement is intended to replace, at least in part, future earnings and is not wholly a benefit earned during employment. If it were wholly earned during employment, he would be entitled to it regardless of his future health or earning, and Michele would take her equitable share of it. By failing to take into account that it is defeasible, and may not exist in the future, the court has advanced to Michele payments to which she should not be entitled until the time William would have retired had he not been disabled.

II. *Fabich* and *Preston* are Consistent

In *Fabich v. Fabich*, 144 N.H. 577, 580 (1999), this Court adopted a “functional” approach to disability benefits, deeming them part of the marital estate as to the amount they replace lost wages during the marriage, and not part of marital estate as to the amount they replace lost future earnings after the marriage ends. In *In re Preston*, 147 N.H. 48 (2001), this Court took a “mechanistic approach,” and ruled that a personal injury settlement was marital property regardless of its theoretical function. In *Preston* this Court wrote, “to the extent that *Fabich* is inconsistent with our opinion today, it is overruled.” *Preston*, 147 N.H. at 51.

Juries in personal injury cases rarely apportion their awards into neat categories such that a divorce court can determine what portion accrued during the marriage and what portion is to replace lost future wages that necessarily accrue after the marriage has ended. Thus, *Preston* relied on the broad language of the property distribution statute to declare the entire award was within the marital estate and subject to equitable division.

The Massachusetts pension system, however, *does* make these neat distinctions. It is altogether clear that William’s disability payments replace lost future earnings that are outside of the marriage. If that were not the case, he would be entitled to the payment regardless of whether he recovers his health or is able to work despite his disability. But that is not the case – the disability pension is inherently defeasible, and thus replaces lost future wages that necessarily occur after the end of the marriage.

Fabich and *Preston* are thus reconcilable. *Preston* applies when, as in standard tort settlements or jury awards, it cannot be discerned what is the temporal function of the payment. *Fabich* applies when it can. This Court recognized in *Preston* that both possibilities exist by not

overruling *Fabich* altogether, but only “to the extent” they are “inconsistent.”

The outcome that fairly shares the parties’ assets would be to first keep the disability payments out of the marital estate, and then, following *Hodgins*, allow Michele’s share of regular retirement to spring into being at the future date at which William would have been entitled to them.

III. Court Erred by Awarding Michele a Share of William’s Disability Benefits

Even if the court did not err as a matter of law – that is, if *Preston* overruled *Fabich* even in these circumstances – the court nonetheless erred. Its error was awarding Michele a share of that portion of William’s disability benefits that are designed to replace future earnings, are defeasible, may not exist depending upon his health and ability to maintain employment, and did not arise until William’s heart attack which was after the couple separated.

CONCLUSION

Based on the foregoing, William Sukerman requests this Court find that his disability benefit is not part of the marital estate, and that if it is, it should nonetheless not have been shared with Michele.

Respectfully submitted,

William Sukerman
By his Attorney,

Law Office of Joshua L. Gordon

Dated: July 2, 2009

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for William Sukerman requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the controlling authorities bearing on this case are in need of resolution, and because the court below unfairly awarded William Sukerman's spouse a share of his disability benefits.

I hereby certify that on July 2, 2009, copies of the foregoing will be forwarded to Cynthia M. Weston, Esq.

Dated: July 2, 2009

Joshua L. Gordon, Esq.

APPENDIX

1. ORDER (on decree of divorce) (Nov. 5, 2008) *11*

2. ORDER (on reconsideration) (Jan. 26, 2009) *13*