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DOMESTIC RELATIONS - ARKANSAS SUPREME COURT DEFINES MARITAL PROPERTY TO INCLUDE FUTURE PENSION BENEFITS. *Day v. Day*, 281 Ark. 261, 663 S.W.2d 719 (1984).

In 1981 Mrs. Day filed suit for divorce from her husband of twenty-nine years, Dr. Day. The divorce was contested only as to marital property.¹ Dr. Day had been employed by the University of Arkansas since 1961² and during that time Dr. Day made monthly contributions to the University's pension plan.³ His interest in the pension plan could not be diminished by the University and was not made contingent upon his continued employment. However, Dr. Day was not allowed to withdraw the funds standing to his credit and also could not transfer his interest in the plan.

The Washington County Chancery Court found Dr. Day's interest in the University's pension plan to be marital property.⁴ Dr. Day appealed the chancery court's decision and argued that the pension plan was separate property and immune from Mrs. Day's claim. The Arkansas Supreme Court affirmed the chancellor's decision and held that Dr. Day's interest in the pension plan was marital property which was subject to allocation between the parties.⁵ *Day v. Day*, 281 Ark. 261, 663 S.W. 2d. 719 (1984).

1. ARK. STAT. ANN. § 34-1214 (Supp. 1983) defines marital property as all property acquired by either spouse subsequent to the marriage with exceptions which are not at issue in this case. The statute also provides that upon entry of a divorce decree, each spouse is entitled to the property he or she owned prior to marriage and one-half of all marital property. The court retains the discretion to make some other division of marital property if an equal division is found to be inequitable.

2. Dr. Day had been employed by the University of Arkansas since 1961, first as a physics professor and later as an associate dean.

3. Dr. Day made monthly contributions to the plan at the rate of ten percent of his salary. The University matched his contributions. At the time of the trial the total contributions by and for Dr. Day totaled \$62,498.10. The accumulated value of his interest in the plan was \$95,425.03. The plan is a combination of fixed and variable annuities which cannot be paid in a lump sum, have no loan value and cannot be transferred. Dr. Day could, however, stop making contributions at any time and begin receiving his annuities.

4. See ARK. STAT. ANN. § 34-1214 (Supp. 1983) and *supra* note 1 for definition of marital property. The chancellor awarded half of the \$95,425.03 in benefits to Mrs. Day. Under the decree, only when Dr. Day elects to begin receiving the annuities will Mrs. Day receive her benefits upon the half interest awarded to her. Any contributions made after the date of decree will accrue only to Dr. Day's benefit.

5. See ARK. STAT. ANN. § 34-1214 (Supp. 1983) and *supra* note 1 for the proper division of marital property.

The well-established American practice of granting alimony and dividing property upon divorce stems from the English ecclesiastical law as it existed before the reform of the English court system in 1857.⁶ In England the ecclesiastical courts did not grant absolute divorces as are granted in the United States, but instead granted only *divorces a mensa et thoro*.⁷ The alimony awarded under these circumstances merely constituted a recognition and enforcement of the husband's duty to support his wife, which continued after judicial separation.⁸ The ecclesiastical courts formulated several reasons in attempting to explain why a continuing duty to support was placed on the husband, while no reciprocal duty to support was placed on the wife.⁹ One reason was the fact that the ecclesiastical courts gave the husband exclusive control over his wife's property.¹⁰ Alimony was further made necessary by the lack of employment opportunities for women during the nineteenth century.¹¹ Additionally, the ecclesiastical courts considered the degree of the husband's fault when making the award of alimony or property¹² and held that where the wife was the guilty party in the marriage breakup she was not entitled to alimony.¹³ Thus, even in English law, awards made upon divorce were not measured solely by the wife's need for support.

During the late 1800's many American states enacted statutes, based on decisions by the English ecclesiastical courts, which made property and alimony awards only to the wife.¹⁴ Many authorities questioned the adoption of the English view by the states because the courts in America granted absolute divorces, which terminated the relationship of husband and wife, while English courts granted *divorces a mensa et thoro*, which did not free the husband and wife from the bonds of matrimony.¹⁵ The authorities reasoned that the theory which

6. H. CLARK, LAW OF DOMESTIC RELATIONS §14.1 (1968).

7. H. CLARK, *supra* note 6. This type of divorce authorized the husband and wife to live apart, but did not set them free from the bonds of marriage.

8. *Id.*

9. *Id.*

10. *Id.* The ecclesiastical courts commonly remedied this problem by taking into account the value of the property the wife took into the marriage when awarding alimony to the wife. See *Smith v. Smith*, 2 Phill. Ecc. 235, 161 Eng. Rep. 1130 (1814); *Cooke v. Cooke*, 2 Phill. Ecc. 40, 161 Eng. Rep. 1072 (1812).

11. H. CLARK, *supra* note 6.

12. *Id.* See, *Otway v. Otway*, 2 Phill. Ecc. 109, 116 Eng. Rep. 1092 (1813).

13. Vernier and Hurlbutt, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197, 198 (1939).

14. *Id.* at 201. See, e.g., CAL. CIV. CODE §139 (1937); MINN. STAT. ANN. §518.55 (West 1969); ILL. REV. STAT. ch. 40, §419 (1975).

15. See *supra*, notes 6 and 13.

supported the English view of alimony could not apply to the absolute divorces granted by American courts because the husband's duty to support his wife terminated with the marriage.¹⁶ Nevertheless, American courts have continued to award alimony. In the opinion of some judges, alimony merely continues the support which the wife was entitled to receive while the marriage existed.¹⁷ Other courts look on alimony as furnishing damages for the husband's wrongful breach of the marriage contract.¹⁸ Still others speak of it as a penalty imposed on the guilty husband.¹⁹

The Arkansas Legislature, in 1891, enacted section 34-1214 of the Arkansas Statutes Annotated.²⁰ This statute, deeply rooted in the law of the English courts, provided that a wife who is granted a divorce shall be entitled to one-third ($\frac{1}{3}$) of her husband's personal property absolutely and one-third ($\frac{1}{3}$) of her husband's real property for life.²¹ In addition, the wife was entitled to the property only as long as she was not the guilty party in the divorce.²²

Decisions by the Arkansas Supreme Court are illustrative of how the statutory provision which granted the wife a one-third ($\frac{1}{3}$) interest in her husband's personal property was interpreted. In *Beene v. Beene*,²³ a trial court had granted the wife one-third of the remainder of her husband's personal property after deductions for the husband's debts had been made.²⁴ The Arkansas Supreme Court reversed, stating that Mrs. Beene was entitled to one-third of the personal property *absolutely*, without taking the husband's indebtedness into consideration.²⁵

In another case, *Reed v. Reed*,²⁶ the court determined that a husband's interest in a partnership was personal property. As in *Beene*, the court stressed the fact that Mrs. Reed was entitled to one-third of her husband's personal property absolutely and that this would include one-

16. See *supra* note 13.

17. *Id.*

18. See *Driskill v. Driskill*, 181 S.W.2d 1001 (Mo. App. 1944).

19. See *Lewis v. Lewis*, 202 Ark. 740, 151 S.W.2d 998 (1941).

20. 1891 Ark. Acts 27, later codified as ARK. STAT. ANN. §34-1214, provided that a wife who was granted a divorce would be entitled to one-third ($\frac{1}{3}$) of her husband's personal property absolutely and one-third ($\frac{1}{3}$) life estate in all lands in which her husband was seized of an estate of inheritance at any time during their marriage.

21. *Id.*

22. *Id.*

23. 64 Ark. 518, 43 S.W. 968 (1898).

24. *Id.* at 521, 43 S.W. at 969.

25. *Id.* at 522, 43 S.W. at 969.

26. 223 Ark. 292, 265 S.W.2d 531 (1954).

third of any interest that Mr. Reed might have in a partnership.²⁷ Also, in *Mickle v. Mickle*,²⁸ the court held that "personal property," under section 34-1214,²⁹ included shares of stock purchased by Mr. Mickle during his marriage to Mrs. Mickle.³⁰ The court awarded Mrs. Mickle a one-third absolute interest in all shares of stock purchased by her husband during the marriage.³¹

The first case in Arkansas to indirectly touch on the question of whether pension benefits were personal property which could be divided upon divorce was *Stone v. Stone*.³² In that case the husband's guardian had been receiving payments from the husband's United States Government pension and had been putting the payments in a bank account. The Arkansas Supreme Court affirmed the trial court's decision to award Mrs. Stone one-third interest in the bank account as a share of her husband's personal property.³³ The court reasoned that this was a specific partition of property owned by the parties during coverture and that the wife took her share as a mandate of the law.³⁴

After *Stone*, it was over forty years before another decision concerning the issue of whether pension benefits were personal property was handed down. The first such decision was *Fenney v. Fenney*,³⁵ in which the court held that Mrs. Fenney was not entitled to one-third of her husband's Air Force pension. The court concluded that since the right to the pension, not yet due and payable, could not be assigned, sold, transferred, or conveyed, it could not be considered personal property within the meaning of section 34-1214.³⁶

In another decision involving pension benefits, *Knopf v. Knopf*,³⁷ the court held that Mr. Knopf's railroad pension was not subject to

27. *Id.* at 294, 265 S.W.2d at 532.

28. 253 Ark. 663, 488 S.W.2d 45 (1972).

29. ARK. STAT. ANN. §34-1214 (Supp. 1983).

30. 253 Ark. at 665, 488 S.W.2d at 47.

31. *Id.*

32. 188 Ark. 622, 67 S.W.2d 189 (1934).

33. *Id.* The court awarded Mrs. Stone \$400 of the \$1200 that was in the bank account. It should be noted that the court did not reach the issue of whether Mrs. Stone had an interest in future payments under the pension.

34. 188 Ark. at 624, 67 S.W.2d at 190.

35. 259 Ark. 858, 537 S.W.2d 367 (1976).

36. *Id.* See also *Lowery v. Lowery*, 260 Ark. 128, 538 S.W.2d 36 (1976). In *Lowery* the court cited *Fenney* and gave the same reasons for refusing to award Mrs. Lowery a one-third interest in her former husband's pending Jones Act claim. The Jones Act, codified at 46 U.S.C. §688 (1984), provides that a seaman injured in the course of his employment by the negligence of the owner, master, or fellow crew members can recover damages for his injuries from his employer.

37. 264 Ark. 946, 576 S.W.2d 193 (1979).

division upon divorce, since the pension benefits were not presently available to Mr. Knopf and would not be available to him until he reached age sixty-five or until an occupational disability occurred. Once again, the court reasoned that, under section 34-1214, benefits which could not be assigned or conveyed should not be treated as personal property.³⁸

At the time of the Arkansas Supreme Court decisions in *Fenney* and *Knopf*, courts in other jurisdictions were beginning to recognize pensions as property which was subject to division upon divorce. California, a community property state, overruled a thirty-five year precedent³⁹ in *In re Marriage of Brown*⁴⁰ and concluded that future pension benefits represent a property interest, and to the extent that such rights derive from employment during coverture, they comprise a community asset subject to division upon divorce. The earlier California decision had refused to recognize a pension payable in the future as community property because such pensions were contingent upon continued employment.⁴¹ The court in *Brown* refused to accept this view, stating that when community funds or efforts are expended to acquire a conditional right to future income, the future income should be treated as a community asset.⁴²

Several common-law jurisdictions also allowed future pension benefits to be included in property settlements between divorced couples.⁴³ In *In re Marriage of Pope*,⁴⁴ the Colorado Court of Appeals held that a public employee pension plan could be regarded as property of Mr. and Mrs. Pope's marriage. The court reached this decision by determining that Mr. Pope's pension plan was an asset of the marriage because it was created by deductions from Mr. Pope's salary which would have otherwise been available to the parties during their marriage.⁴⁵ The court then stated that the pension could be divided between husband and wife upon divorce because the pension was not subject to forfeiture

38. *Id.* at 948, 576 S.W.2d at 194.

39. *French v. French*, 17 Cal. 2d 775, 112 P.2d 235 (1941). This case held that non-vested pension benefits are not property, but are mere expectancies and thus not a community asset subject to division upon dissolution of marriage.

40. 15 Cal.3d 838, 544 P.2d 561 (1976). *See also* *Everson v. Everson*, 24 Ariz. App. 239, 537 P.2d 624 (1975) (since pension plans were a mode of employee compensation, that portion of the plan earned during coverture should be regarded as marital property).

41. *French*, 17 Cal.2d 775, 112 P.2d 235 (1941).

42. *In re Marriage of Brown*, 15 Cal. 3d at 842, 544 P.2d at 566.

43. *See, e.g.*, *In re Marriage of Pope*, 544 P.2d 639 (Colo. Ct. App. 1975); *In re Marriage of Powers*, 527 S.W.2d 949 (Mo. App. 1975).

44. *In re Marriage of Pope*, 544 P.2d 639 (Colo. Ct. App. 1975).

45. *Id.*

in any manner.⁴⁶

In 1979 the Arkansas General Assembly enacted Act 705, later codified in section 34-1214 of the Arkansas Statutes Annotated.⁴⁷ The major purpose of this statute was to forestall an equal protection challenge to the property division law which was enacted in 1891.⁴⁸ The statute amended portions of the 1891 statute which only allowed benefits to wives, and distributed property upon divorce without distinguishing between the husband and wife.⁴⁹ In addition to remedying the equal protection flaws, the new statute drastically changed the method of property division upon divorce. Section 34-1214 now provides that upon entry of a divorce decree, each spouse is entitled to the property which he or she owned prior to marriage and each spouse is entitled to one-half of all marital property.⁵⁰

Initially, the new concept of marital property had little effect on the outcome of divorce cases involving pension benefits. In *Paulsen v. Paulsen*,⁵¹ the Arkansas Supreme Court held that a military retirement pension does not come within the scope of section 34-1214 and should not be divided equally as marital property. The court relied heavily on *Fenney*⁵² and said that retirement pay is not a fixed asset which is subject to division upon divorce.⁵³ The court also reasoned that the legislative purpose in enacting section 34-1214 was to eliminate gender-based statutes and to remove the distinction between real and personal property, but was not to define marital property any more broadly than prior law, which had refused to include a spouse's pension within the definition of marital property.⁵⁴

In *Day v. Day*,⁵⁵ the Arkansas Supreme Court realized that it had been failing to recognize the new concept of "marital property" created by section 34-1214. The court stated that the statute defines marital

46. *Id.*

47. ARK. STAT. ANN. §34-1214 (Supp. 1983). This statute provides for an equal division of all "marital property" between husband and wife. Marital property is defined as all property acquired subsequent to marriage.

48. *Third Annual Survey of Arkansas Law*, 3 UALR L.J. 235, 236 (1980).

49. *Id.*

50. The term "marital property" is defined as all property acquired subsequent to marriage, with exceptions which are not important in this case.

51. 269 Ark. 523, 601 S.W.2d 873 (1980). *See also* Hackett v. Hackett, 278 Ark. 82, 643 S.W.2d 56 (1982) (wife not entitled to any portion of her husband's employee capital account upon divorce); Sweeney v. Sweeney, 267 Ark. 595, 593 S.W.2d 21 (1980) (pension benefits which are vested but not currently due and payable not personal property).

52. 259 Ark. 858, 537 S.W.2d 367 (1976).

53. *Paulsen*, 269 Ark. at 525, 601 S.W.2d at 874.

54. *Id.*

55. 281 Ark. 261, 663 S.W.2d 719 (1984).

property as *all* property acquired by either spouse after marriage and, additionally, that the statute directs all marital property to be distributed to each spouse *equally*.⁵⁶

The court in *Day* stated that the clear purpose of section 34-1214 is to insure that all spouses are treated equally when property is allocated in a divorce settlement.⁵⁷ The court reasoned that if a distinction is drawn between amounts of money which are currently payable and amounts of money contained in a pension which are vested but payable in the future, the purpose of the statute would be frustrated.⁵⁸ For instance, if Dr. Day had deposited ten percent of his salary in a savings account each pay period for the last twenty years the money would have undoubtedly been included as "marital property." The court stated that the result should be the same when Dr. Day used part of the family's money to purchase pension benefits which are payable in the future.⁵⁹ The court concluded that to hold otherwise would deprive Mrs. Day of the equal treatment mandated by section 34-1214 and the fourteenth amendment of the United States Constitution.⁶⁰

After examining section 34-1214, the court further supported its decision by turning to the leading case in this area, *In re Marriage of Brown*.⁶¹ In *Brown*, the California court reasoned that when pension benefits, vested or nonvested, derived from employment during coverture, they comprise a community asset subject to division in a property settlement proceeding.⁶² Although the Arkansas court relied heavily on *Brown*, it should be pointed out that *Brown* applied to both vested and nonvested pension benefits.⁶³ The Arkansas court clearly noted that Dr. Day's benefits were vested and the court's decision seems to be limited to this situation.⁶⁴

The court also said that the chancellor was correct in deferring Mrs. Day's realization of income from her one-half interest in the plan until Dr. Day elects to begin receiving the annuities. The court determined that it was better to defer Mrs. Day's realization than to try to

56. *Id.* at 265, 663 S.W.2d at 721.

57. *Id.*

58. *Id.* In addition, the court stated that the statute was mandated by recent United States Supreme Court decisions which state that spouses must be treated equally.

59. *Id.* at 265, 663 S.W.2d at 721.

60. *Id.*

61. 15 Cal.3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976).

62. *Id.*

63. *Id.*

64. 281 Ark. at 268, 663 S.W.2d at 722.

estimate the present value of her benefits under the pension plan.⁶⁵

In conclusion, the Arkansas Supreme Court reasoned that earnings or other property acquired by each spouse must be treated as marital property, as defined by section 34-1214. Also, neither spouse can deprive the other of any interest in marital property by putting it temporarily beyond his or her control, as by a purchase of annuities or by participation in a retirement pension plan.⁶⁶

The dissent, written by Justice Hickman, argued that the pension should not be regarded as marital property simply because Dr. Day contributed a small percentage of his pay check to the pension.⁶⁷ The fact still remained that Dr. Day's pension had no cash value, no loan value, and it could not be transferred or assigned.⁶⁸ The dissent stated that the majority decision would create an inequitable situation; for example, it might be extended to insurance benefits with no cash or loan value simply because the insurance was paid for with funds acquired during the marriage. The dissent asserted that such assets should not be treated as marital property, but instead any inequity in a settlement of marital property should be offset by an award of alimony.⁶⁹

The Arkansas Supreme Court recently reaffirmed the holding in *Day*. In *Gentry v. Gentry*,⁷⁰ the wife claimed an interest in her husband's civil service pension. The contributions to the plan were made while the couple was married and the husband was drawing pension benefits when the divorce action was filed. The court concluded that the civil service pension was marital property and in doing so the court relied heavily on *Day*.⁷¹ In both of these cases the court firmly stated that vested pension benefits should be included within the definition of marital property. The court defined vested to mean that the pension could not be diminished by the employer and was not contingent upon the employee's continued employment. Therefore, it appears that the courts will strive to achieve an equal division of property and in so doing they will regard a pension, which is vested, as marital property.

The decisions in *Day* and *Gentry* should have a significant impact on the practice of family law in Arkansas, one reason being that a pension may be the largest, and quite often the only substantial asset of a

65. *Id.*

66. *Id.*

67. *Id.* at 269, 663 S.W.2d at 723.

68. *Id.*

69. *Id.*

70. 282 Ark. 413, 668 S.W.2d 947 (1984). See also *Deaton v. Deaton*, 11 Ark. Ct. App. 165, 668 S.W.2d 49 (1984) (employee retirement fund was marital property).

71. *Gentry*, 282 Ark. 413, 668 S.W.2d 947.

marriage. This means that many couples who once would have been regarded as having very little property will now have an asset which must be given proper recognition in property settlement. These cases are also significant because they signify another advance by Arkansas courts toward equalizing the division of property upon divorce, as mandated by the United States Supreme Court.⁷²

In the past, courts have taken a narrow view as to what fits the definition of marital property. One reason for this may have been that some types of property are hard to value accurately. Thus, *Day*⁷³ is significant because it implies that courts in Arkansas will no longer be allowed to exclude future benefits from marital property on the grounds that the benefits are too uncertain to value.

The decision in *Day* gave little attention to the proper method of valuation when dividing pension benefits. Most authorities agree that there are two basic methods for valuing and dividing pension benefits: 1) present cash value method and 2) fractional share method.⁷⁴ Under the present cash value method, a lump sum value is placed on the pension and awarded to the employee spouse. Meanwhile, other marital property of equal value is given to the other spouse.⁷⁵ The obvious problem under this plan is obtaining a proper appraisal of the value of the pension. For instance, a young, recently divorced husband may die soon after he pays his ex-wife through the property settlement thousands of dollars for a marital interest in a pension that evaporates at his death and from which he never benefits. However, many courts have found that uncertainties in determining present value are outweighed by the fact that the division of property is promptly settled and is not unduly extended until pension benefits become payable to the employee.⁷⁶

The other commonly used method is the fractional share method. Under this method, pension rights are determined upon dissolution of the marriage, but no money or assets change hands until the pension benefits are paid. The major problem with this method is making an accurate apportionment of marital and separate interests under the

72. See *Orr v. Orr*, 440 U.S. 268 (1979) (Alabama's statutory scheme imposing alimony obligations on husbands but not wives violates equal protection clause of the fourteenth amendment.)

73. In *Day*, Mrs. Day was awarded one-half (½) interest in the plan, but realization of income from the plan was deferred until Dr. Day begins receiving benefits from the plan.

74. W. REPPY, JR. & C. SAMUEL, *COMMUNITY PROPERTY IN THE UNITED STATES* 299-301 (1983).

75. *Id.*

76. *Id.* at 300.

pension plan.⁷⁷ The courts have tried to avoid this problem by apportioning the benefits based on a ratio of the time of marriage during which these pension benefits were earned to the total years of service during which the pension was earned. This ratio is then applied against the amount of pension income to be received. The non-employee spouse then receives one-half of this amount unless the court deems it inequitable.⁷⁸ For example, if an employee works fifty months before marriage and one hundred months during marriage, quitting when the marriage ends, the marital property part of the pension will be two-thirds (100/150). The non-employee spouse would then probably receive one-half of this amount.

The court in *Day* has taken a giant step toward equalizing the division of property between the spouses in a divorce action. This decision touches a substantial marital asset, and should have a significant impact on the family law practice in Arkansas, even though the proper method of valuation is still in doubt.

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77. *Id.*

78. Rennick, *Apportionment of Community Property Interests in Prospective Military Retirement Benefits upon Divorce*, 9 ST. MARY'S L. J. 72 (1977).