IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD B. GORMAN,[1]	§	
	§	No. 568, 2010
Petitioner Below,	§	
Appellant,	§	Court Below: Family Court of the
	§	State of Delaware, in and for Sussex
v.	§	County
	§	
NANCY A. GORMAN,	§	Petition No. 08-21844
	§	File No. CS08-02440
Respondent Below,	§	
Appellee.	§	

Submitted: January 26, 2011
Decided: February 11, 2011

Before **HOLLAND, BERGER,** and **JACOBS**, Justices.

O R D E R

This 11th day of February 2011, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Richard B. Gorman ("Husband"), the petitioner below, appeals from the Family Court's division of marital assets after final entry of divorce. On appeal, Husband claims that the trial court erred by granting Nancy A. Gorman ("Wife"), the respondent below, 50% of his disability pension payments. We find merit to his claim, and accordingly, reverse.

[1] All parties have been assigned pseudonyms pursuant to Supreme Court Rule 7(d).

2. Husband began working as a mechanic with the Maryland State Police ("MSP") in April 1990. In September 1991, Husband suffered a permanently disabling shoulder injury while on the job. That injury required five surgeries, and Husband was not permitted to return to work. As a result of that injury, Husband began receiving disability payments.

3. When the couple married in 1993, Husband was already receiving his disability payments. Although he did not return to work at the MSP, Husband remained with the MSP until he retired in June 1995. He currently receives "Perm. Disability Pension Payment" checks from the Maryland State Retirement Agency ("MSRA"). Those payments provide a monthly gross allowance of $1,206.72, of which $227.97 is automatically deducted for health insurance, union dues, and term life insurance, leaving a net allowance of $978.75. Husband will continue to receive his disability pension payments for the remainder of his lifetime.

4. The couple divorced in April 2009. On June 28, 2010, the Family Court held a hearing to divide the martial estate. At that hearing, Wife asserted a marital claim to the portion of Husband's disability pension that had accrued during the two years and three months between the date the couple married and the date Husband retired, on the basis that Husband's pension constituted retirement income and was part of the martial estate. Husband argued that his pension was not part of the marital estate because it was a non-taxable disability payment. The

trial judge stated that the court "need[ed] something in black and white that this is a disability pension that . . . can't be divided," and requested that Husband follow up with the court after contacting the MSRA.

5. Husband contacted the MSRA, which responded by letter dated July 6, 2010. In that letter, the MSRA stated that Husband was "receiving an accidental disability retirement benefit" and that his retirement date was June 1, 1995. The letter also stated that the accidental disability retirement benefit was non-taxable, and "was granted because [Husband is] totally and permanently disabled from performing [his] job duties and the disability is the direct result of an accident that occurred on the job." Husband forwarded the MSRA's letter to the Family Court on July 16, 2010.

6. On August 16, 2010, the Family Court issued an order dividing the marital estate.[2] Relying on this Court's decision in *Courtney v. Plitt*,[3] the Family Court judge concluded that Husband's pension payment was a divisible martial asset and awarded Wife 50% of the marital portion of Husband's pension.[4] Husband appeals from that order.

[2] *Gorman v. Gorman*, Petition No. 08-21884, slip op. at 1 (Del. Fam. Ct. Aug. 16, 2010).

[3] 582 A.2d 934 (Table), 1990 WL 168293 (Del. 1990).

[4] *Gorman*, slip op. at 7-8.

7. The sole issue on appeal is whether the Family Court erred in concluding that Husband's disability pension payments were part of the marital estate, and therefore, subject to division. We conclude that it did.

8. This Court reviews a Family Court's decision dividing martial property for an abuse of discretion.[5] We review the court's conclusions of law *de novo*.[6] We will not disturb findings of fact, however, unless they are clearly wrong and justice requires them to be overturned.[7]

9. The Family Court made no explicit factual finding about the nature of Husband's pension payment–*i.e.*, whether the payment was a disability payment that was not subject to marital division.[8] Rather, the court concluded that the rationale of *Courtney* applied and that, therefore, Husband's pension was divisible.[9] We infer from that conclusion that the Family Court found Husband's pension to be retirement income, rather than disability income that was a substitute for his earnings and (as such) not subject to marital division.

---

[5] *Forrester v. Forrester*, 953 A.2d 175, 179 (Del. 2008).

[6] *Id.*

[7] *Id.*

[8] *See Gorman*, slip op. at 7-8.

[9] *Id.* at 8 ("After considering the record presented, I am satisfied that the holding in *Courtney v. Plitt* is applicable to this case.").

10. In *Courtney*, this Court held that even though the wife had retired from her teaching job due to a physical disability, the wife's disability retirement income was part of the marital estate, because the wife received her retirement income "based on her number of years of service within several Pennsylvania school districts."[10] Our *Courtney* decision rested, in part, on the premise that disability pension payments are deferred compensation that should be treated the same as ordinary pension payments.[11] We there emphasized that the husband and wife had a separation agreement that failed to "distinguish between pensions based on age and service and those based on disability," and found that wife's pension payments fell within the scope of that agreement.[12]

11. The Family Court's reliance on *Courtney* was misplaced. Here, unlike in *Courtney*, there is no "deferred compensation." Husband was injured and had already been receiving disability payments before the couple married. Husband's W-2 forms indicate that the disability pension payments represented "Perm. Disability Pension Payment." Moreover, as the MSRA letter demonstrates, Husband receives his current non-taxable disability pension payments because he was "totally and permanently disabled from performing [his] job duties and the

[10] *Courtney v. Plitt*, 582 A.2d 934 (Table), 1990 WL 168293, at *1 (Del. 1990).

[11] *Id.* at *2.

[12] *Id.*

disability [was] the direct result of an accident that occurred on the job." Where the benefits are intended to compensate for a loss of bodily function, those payments are not considered "retirement income" subject to marital division.[13] Nothing in the MSRA's letter indicates that any portion of Husband's disability pension payment represented "retirement income" based on Husband's years of service with the MSP.[14] Rather, the record evidence establishes that Husband's disability pension payment was for a permanent and total disability that would not be part of the marital estate, or subject to division.

12. The Family Court concluded, however, that Husband's disability pension payments represented true "retirement income" that had been earned or had accrued during the marriage, and was, therefore, subject to marital division.[15] But, the court's order identifies no evidence in the record that would support that conclusion. Given the inapplicability of *Courtney*, and the absence of record evidence supporting the result reached here, we must find that the Family Court abused its discretion in so concluding.

---

[13] *Forbes v. Forbes*, 520 A.2d 669 (Table), 1986 WL 18351 (Del. 1986) (affirming trial court's decision that total and permanent disability payments serve a different purpose than pension payments, and therefore, are not considered "retirement income.").

[14] *See Potter v. Potter*, 1997 WL 905933, at *4 (Del. Fam. Ct. Nov. 3, 1997) (concluding that where the amount of benefits "is directly related to the length of service . . . and to the salary level during the marriage," those benefits constitute divisible retirement income).

[15] *Robert C.S. v. Barbara J.S.*, 434 A.2d 383, 388 (Del. 1981) (holding that "a non-employee spouse is only entitled to a share of pension benefits earned during the marriage.").

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is **REVERSED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice