TAX TRENDS AND DEVELOPMENTS

Skelly at Odds with Michigan Statute

By Joseph W. Cunningham, JD, CPA

In its 2009 published decision in *Skelly v Skelly* (No. 287127, 12/29/09) (Skelly), the Court of Appeals (COA) essentially ruled that employee benefits earned during marriage are not marital assets if subject to forfeiture on the occurrence – or non-occurrence - of an event after the divorce.

The Skelly decision has previously been characterized in this column as arbitrary, overbroad, and inconsistent with the equitable, case specific nature of divorce. What was not mentioned previously is that Skelly is out of step with Michigan statute – MCL 552.18. This was recently brought to my attention by Scott Bassett, who in fact drafted the language that became MCL 552.18 in 1985.

Skelly

Recap of the case:

- After 25 years of marriage, H filed for divorce.
- He had attained a high position with Ford and in 2007, in the latter part of his career, was awarded a $108,000 "Retention Bonus" payable in three installments of $36,000 on each of May 31, 2007, 2008, and 2009.
- Entitlement to the entire bonus was conditioned on his continued employment at Ford through May 31, 2009.
- The trial court ruled that the first two $36,000 installments were marital property since, evidently, both had been received before the 7/23/08 date of divorce.
- H appealed.
- As indicated above, the COA ruled that all three $36,000 payments – including the two received during marriage – were not marital property since all were conditioned on an event occurring after the divorce – H's continued employment at Ford through May 31, 2009.

MCL 552.18

The 1985 statute, in pertinent part, is as follows (emphasis added):

Headnote

"552.18 Rights or **contingent rights** in and to vested or **unvested** benefits or accumulated contributions as part of marital estate subject to award by court."

Statute

"Sec. 18.

Any rights in or to vested pension, annuity, or retirement benefits, or accumulated contributions in any pension, annuity, or retirement system, payable to or on behalf of a party on account of service credit accrued by the party during marriage shall be considered part of the marital estate subject to award by the court under this chapter.

Any rights or **contingent** rights in or to **unvested** pension, annuity, or retirement benefits payable to or on behalf of a party on account of service credit accrued by the party during marriage may be considered part of the marital estate subject to award by the court under this chapter where just and equitable."

Comments

Arbitrary "one size fits all" strictures applicable to divorce settlements can produce unfair, inequitable results.

Example:

- H and W were married 30 years during which (1) H put in heavy hours to climb the corporate ladder at Mega, Inc. (Mega) and (2) W worked at least as hard raising their 3 children, taking care of the home, and supporting H's career.
- Toward the end of H's highly successful career, he, along with other top Mega execs, was awarded stock rights, which vested 20% in each of the ensuing 5 years.
- The value of the stock rights was higher than the total of H's compensation from Mega during the past 10 years.
- After receiving the first stock award, H filed for divorce to end the 31 year marriage.
- H claims that, under *Skelly*, W has no interest in the remaining 80% of the stock rights.

Observations

1. So, despite the *Hanaway* like circumstances, under *Skelly*, W would be denied her share of the substantial pay-off to H close the culmination of his career in which, under Michigan divorce law, she was his equal partner.
2. But for H's 30-year career during which W satisfied her "partnership" responsibilities, he would not have attained the position entitling him to the stock rights award.
3. Why not allow the trier of fact to decide how to divide the unvested stock rights in these circumstances, applying the "just and equitable" criteria in 552.18?
4. In *Everett v Everett,* No. 127293 (7/71992), another published case, the COA addressed stock options owned by H – some of which were unvested. The Court ruled as follows re the unvested options:
   - The unvested options should not be valued the same as fully vested options; and
   - The trial court "must divide these options in a manner which protects defendant's (i.e., W's) equitable share in them."
5. When pensions first became divisible in divorce, the language frequently used in judgments of divorce began with – "If, as, and when" the participant begins to receive her pension, etc. The rationale was that benefits earned during marriage – whether vested or not - should be divided if ultimately received.
6. *Skelly* flatly prohibits doing so with employee benefits subject to any contingency.
7. 552.18 relates specifically to pensions, annuities, and retirement benefits. Thus, one might assert that it does not apply to stock options, stock rights, retention bonuses, etc. But, these are simply different forms of employee compensation - as are pensions, annuities, and retirement benefits.

Is there any plausible reason to treat them differently with regard to dividing the value attributable to years of marriage? Why not use the "just and equitable" standard across the board?

About the Author

Joe Cunningham *has over 25 years of experience specializing in financial and tax aspects of divorce, including business valuation, valuing and dividing retirement benefits, and developing settlement proposals. He has lectured extensively for ICLE, the Family Law Section, and the MACPA. Joe is also the author of numerous journal articles and chapters in family law treatises. His office is in Troy though his practice is statewide.*