



# TAX TRENDS AND DEVELOPMENTS

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## Court of Appeals (1) Approves Trial Court's Award to W of Part of H's Pension Accrued Before Marriage and (2) Rules It Is Not an Invasion of His Separate Property – *Koch*, Mich App No. 333020 (7/18/17)

### Facts

- H and W were separated in 2014, in part due to alleged multiple incidents of spousal abuse, and were subsequently divorced after 27 years of marriage.
- At the time of divorce, H, 55, was receiving a pension of \$51,880 annually while W, 54, was earning \$15,058 at a parochial school district where she had worked for 22 years.
- Part of H's pension was accrued before the 1987 marriage.
- H had health insurance as part of his retirement package while W did not have employer paid health insurance.
- In view of (1) H's fault for the breakdown of the marriage and (2) the disparate financial circumstances of the parties, the trial court awarded W 55% of H's pension as spousal support.
- H appealed, claiming that by awarding W 55% of his pension, the trial court inappropriately invaded his separate property

### Court of Appeals (COA/Court) Decision

- The COA upheld the trial court decision and ruled that it did not invade H's separate estate.
- The COA stated the following regarding whether a trial court's jurisdiction was limited to retirement plan contributions made during marriage:

[MCL 552.18(1)] does not expressly restrict the circuit court's jurisdiction to pension contributions made within the confines of the marriage. Although that statutory provision provides that pension contributions made during the marriage must be considered, it does not

expressly provide that contributions made before the marriage may not be considered. That is, the language is inclusive and mandates what *must* be taken into account, but does not expressly exclude consideration of other contributions. [*Boonstra*, 209 Mich App at 562]

- Further, the Court stated that the following rationale has been adopted regarding whether pension benefits accrued pre-marriage may be divided in divorce:

The major consideration is the security of the family and the court may utilize any property in the real and personal estate of either party to achieve suitable support for the family as the court considers just and reasonable after considering the ability of either party to pay and the character and the situation of the parties, and all the other circumstances of the case. [*Booth*, 194 Mich App 284, 290 (1992); *Pickering*, 268 Mich App 1, 9 (2005).

- Thus, the COA decided that in light of the circumstances of the case, "it was 'just and reasonable' for the trial court to include in its considerations the portion of Defendant's pension that had accrued before the marriage. *Booth*, 194 Mich App 291."
- Finally, the Court stated that because the trial court did not consider H's pension accrued before marriage as his separate property, it did not have to consider the statutory exceptions (i.e., need or contribution) for invading a separate estate under MCL 552.23.

### Comments on the Case

- Essentially, the COA ruled that when pre-marital retirement benefits are involved, a "just and reasonable" stan-

dard for providing “suitable support of the family” is the paramount consideration.

- And, if awarded as spousal support, neither exception for invading separate property need be established to justify the award.
- Rather, ensuring the “suitable support of the family” takes precedence.
- This seems to run counter to typical compliance with the *Reeves* mandate to first identify the (1) marital and (2) separate components of the parties’ various property interests.
- What then is done in lock-step fashion is to treat the respective marital and separate property components of the total estate accordingly.
- But, as we know, if one party establishes “need” under MCL 552.23, the other’s separate property may be invaded to suitably provide for the need.
- What the unpublished *Koch* decision indicates is that when a pre-marital retirement benefit is involved and need is established, paying it as spousal support vs. an invasion of separate property is an option.
- This seems somewhat at odds with the 1997 *Reeves* decision mandate. However, if “need” is established, the substantive result is similar either way – that is, use of pre-marital retirement benefits to satisfy the need.

## Food for Thought

- “Need” sometimes consists of inadequate retirement security coupled with the lack of ability and/or time post-divorce to establish sufficient funds for support in retirement years.
- In such a case, if the other party has a 401(k) or qualified plan savings account which includes a pre-marital component, the, “suitable support of the family” standard might justify use of one party’s pre-marital retirement account to provide for the other’s suitable support in retirement years.

## 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.