



## Court of Appeals Rules on Use of Pension as Income for Spousal Support Despite the Pension's Treatment as Property in the Divorce Settlement. *Osim v Scott*, Mich App No. 342237 (10/31/2019)

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### Facts

- After a 35-year marriage, H and W agreed to a settlement which provided, *inter alia*, that (1) H was awarded his pension – “free and clear of any claim” of W - and (2) W received the marital residence which had an equity of around \$100,000.
  - However, they asked the trial court to determine spousal support. The judge awarded W, who had some health issues, permanent spousal support of \$2,000 a month.
  - The judge notified the parties that H could ask for spousal support to be modified when he retired.
  - When H did retire, he took an approximately \$440,000 lump sum pay-out for his pension which is what he had to live on for the rest of his life.
  - H petitioned the court to terminate spousal support since his only source of income was his pension which he received as his property in the settlement.
  - The trial court, after reviewing the circumstances of each party - including the disparity between \$440,000 pension and the \$100,000 home equity - reduced spousal support to \$961.50, calculated by taking the approximate \$300,000 difference and dividing it by W's life expectancy.
  - H appealed.

### Court of Appeals Ruling

- The Court upheld the lower court's decision to reduce, but not terminate, spousal support.
- But, the Court ruled that the trial court failed to consider several relevant factors including:
  - The taxes H had to pay on receipt of the lump-sum;
  - That contributions were likely made to H's retirement after the divorce and, hence, were not marital; and,
  - That the lump-sum was all H had to live on for the rest of his life.

- The Court noted that the parties agreed that H would have the pension as his property and, further, that once an asset is awarded, it “is not subject to invasion by the former spouse, even indirectly, which is precisely what occurred when the trial court ... considered the pension” as H's income for determining spousal support.
- However, the Court also noted that a previously awarded pension is a consideration in balancing the “incomes and needs of the parties in a way that will not impoverish either party.”
- Thus, the Court remanded the case so that the trial court takes these factors into account.

### Comments on the Case

- The Court's ruling is essentially as follows:
  - Income from a retirement benefit awarded as property in a divorce settlement may not be included as income in a subsequent modification of spousal support.
  - But, such income is properly a consideration when doing so because the principles governing modification of spousal support are that “support must be just and reasonable under the circumstances and should balance the incomes and needs of the parties” so as not to impoverish either.
  - The tension between these two principles presents a tightrope to tread in attempting to achieve an equitable result in the “case specific” nature of divorce.

### 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.*

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