



ROBACH VS. ROBACH

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This Month's Column: Court of Appeals distinguishes *McNamara vs. Horner* in ruling that allocation of appreciation between a pre-marital employee benefit account balance and contributions during marriage is acceptable where information to do so is available. *Robach vs. Robach*, Mich App Docket No. 352077 (12/16/21) - Unpublished.

Facts

- H & W were married in 2011 and divorced in 2019.
- H had various stock options, stock grants, and additional shares of stock in the company at which he worked.
- Most of these stock interests were acquired before the marriage though some did not vest until after.
- H claimed that his stock options and grants were not received "on account of service credit **accrued during marriage**" (emphasis added) and, accordingly, were not part of the marital estate under MCL 552.181(1).
- Further, he hired an expert to allocate the appreciation on his retirement account between growth attributable to (1) their pre-marital balances and (2) contributions during marriage.
- The expert was able to do so because H had Fidelity account statements for the entire period of the marriage.
- The trial court agreed with H and his expert, and, correspondingly, awarded his company stock and appreciation allocated to his pre-marital retirement account balances to him as his separate property.
- W appealed.

Court of Appeals Decision

- W claimed that because the expert relied on statements provided by H the expert's analysis was unreliable.
- She further claimed that, pursuant to the published case of *McNamara vs Horner*, 249 Mich App 177 (2002), contributions during marriage were commingled with pre-

marital funds in the retirement account and, hence, could not be separately identified for the allocation.

- The Court ruled, essentially, that it had not been demonstrated that the account statements used by the expert were unreliable.
- It also upheld the expert's allocation of appreciation during marriage because the expert was able to specify pre- and post-marital funds in the Fidelity statements.

Comments on the Case

- As readers of this column may recall, the decision in *McNamara vs. Horner* has been criticized as arbitrarily narrow with its strict application often resulting in gross unfairness.
- Where sufficient documentation is available – as in the *Robach* case – it is quite possible to allocate appreciation during marriage between a pre-marital retirement account balance and (2) contributions during marriage.
- Having all the statements for the subject period is certainly ideal. But, if a few are missing, interpolating between statements is sometimes possible.
- While the published *McNamara vs. Horner* case remains the law in Michigan, the unpublished *Robach* decision indicates that a common-sense result may be attained where sufficient information is available.
- As a matter of full disclosure, the author hereof was the expert in *Robach*.

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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