[J-148-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

F. ANDREW SMITH,	:	No. 62 MAP 2006
	:	
Appellee	:	Order of the Superior Court entered
	:	August 4, 2005 at No. 1321 MDA 2004
	:	which Reversed and Remanded the Order
v.	:	of the Court of Common Pleas of Adams
	:	County, Civil Division, entered July 21,
	:	2004 at No. 95-S-038.
THERESE A. SMITH, NOW THERESE A.	:	
BOULDING,	:	881 A.2d 855 (Pa. Super. 2005)
	:	
Appellant	:	ARGUED: December 4, 2006

DISSENTING OPINION

MR. JUSTICE SAYLOR

As the majority observes, neither party has briefed the proper application of Section 3501(c) of the Divorce Code, promulgated in 2004, see 23 Pa.C.S. §3501(c), which is deemed controlling in this case. While I do not disagree that the statute is on its face controlling, it became applicable to the present proceedings only after the presentation of argument in the Superior Court,[1] and is not addressed in briefs presented by the parties to this case. Therefore, at a minimum, supplemental briefing

[1] See 23 Pa.C.S. §3501, Historical and Statutory Notes (making Section 3501(c) applicable to equitable distributions pending on or after a June, 2005 effective date).

should be required to obtain the benefit of advocacy before rendering a final decision attempting to settle the law this area.

This case has both singular aspects, involving the post-hoc application of a unique retirement benefit, as well as more ordinary ones, such as delineating the range of post-separation retirement benefits that is exposed to the application of a coverture fraction. With regard to the latter, the majority encounters a number of conceptual difficulties occasioned by the unique facts of the case. For example, it is undisputed that the employee-spouse withdrew and retained all of his monetary contributions to his retirement plan, see R.R. at 30a, and no claim is presently before this Court pertaining to a specific accounting for such sum. Presumably for these reasons, the majority elects not to consider whether the portion of those contributions that were contributed post-separation fit within the critical passage of Section 3501(c) exempting "enhancements arising from postseparation monetary contributions made by the employee spouse, including the gain or loss on such contributions." 23 Pa.C.S. §3501(c)(2). See Majority Opinion, slip op. at 21 & n.17. Yet, despite some awkwardness in working its way around this obstacle, the majority finds itself able to announce that the corresponding portion contributed by the employer (or the fund) does not arise from any post-separation contribution. See id.

While it is not impossible to do otherwise, an orderly resolution of the question of whether a benefit "aris[es] from postseparation monetary contributions" would ordinarily begin with consideration of whether such contributions are in issue in the first instance, followed by an evaluation of the connection between the contributions and the benefit. The majority's inability to follow such an orderly path due to the unique circumstances of this case strongly suggests against its use as a vehicle to construe the material passage of Section 3501(c).

Indeed, despite its efforts, the majority, by its rationale, facially appears to categorize an employee-spouse's actual postseparation monetary contributions (for lack of a better term) as something other than "postseparation monetary contributions" under Section 3501(c). For example, the majority indicates that "we view regular payroll deductions as part and parcel of 'the continued employment of the worker' as discussed in Holland." Majority Opinion, slip op. at 21. This is the precise category of benefits that Holland, in the same sentence, specifically designates as benefits "the [non-employee] spouse is permitted to enjoy." Holland v. Holland, 588 A.2d 58, 60 (Pa. Super. 1991).[2]

The majority's sole justification for its decision that the bulk of Husband's post-separation monetary contributions are not "postseparation monetary contributions" for purposes of its opinion is contained in a single sentence: "To decide otherwise would create the untenable result that the same postseparation enhancement would be included in marital property if the enhancement occurred in a pension without payroll deductions, but excluded in pensions with payroll deductions." Majority Opinion, slip op. at 21. This rationale, however, appears to assume that the Legislature intended application of a coverture fraction either to both of post-separation employee and employer contributions or to neither. This, however, appears to be belied by the Official Comment to Section 3501(c): "New subsection (c) seeks to . . . . include all postseparation enhancements except for postseparation monetary contributions by the employee spouse in the value of the pension." 23 Pa.C.S. §3501(c) (emphasis added); accord 17 WEST'S PA. PRACTICE, FAMILY LAW §23:2 (6th ed. 2007) (explaining that post-separation increases in value based upon years of service are subject to the coverture fraction, but that the employee's post-separation monetary contributions themselves are

[2] The majority's differential treatment of percentage-based increases is reflected in a separate passage of its opinion dealing with the more unique legal aspects of this case.

not). This comment develops specific facts from the decision in Gordon v. Gordon, 545 Pa. 391, 681 A.2d 732 (Pa. 1996), crediting the plurality decision to divide a portion of an early retirement benefit between marital and non-marital portions according to the proportion of the employee and employer contributions, respectively.[3]

The majority's perspective places the central focus on whether contributions were in the same amount before and after separation and minimizes what appears to be the Legislature's simpler focus on the pre- or post-separation timing of the employee contributions. This leads to the rather incongruous holding that, while about seventy-seven percent of Husband's post-separation contributions is not a "postseparation monetary contribution" for purposes of the majority opinion, the other twenty-three percent is, in fact, a post-separation monetary contribution. See Majority Opinion, slip op. at 22. The majority also finds the employer-added benefit attributable to this twenty-three percent of Husband's post-separation monetary contributions to be exempt from the application of the coverture fraction, see id., despite the rather clear parallel to Gordon as developed in the Official Comment to Section 3501(c).

It is my considered opinion that there are reasonable perspectives concerning the application of Section 3501(c) that are not being considered because of the unique

[3] While Gordon is certainly distinguishable on its facts because it involved an early retirement incentive entailing a one-time post-separation contribution, the Legislature made general reference to the case in direct connection with the devising of a scheme for the equitable division of defined benefit retirement plans. See 23 Pa.C.S. §3501(c) (captioned "Defined benefit retirement plans"). Therefore, the Assembly's focus on the character of the division in Gordon, as opposed to the particular type of benefit at issue in the case, seems apparent. See 23 Pa.C.S. §3501(c), Official Comment (crediting the position from Gordon that "would have included the portion of the [early retirement benefit] paid for by the employer in the marital estate" (emphasis added)); Gordon, 545 Pa. at 399, 681 A.2d at 736 (holding that, "[t]he portion of the [retirement-plan] annuity paid for by the employer, but not the portion paid for by [the employee], . . . is includable in the marital estate . . .").

circumstances of this case and the absence of critical advocacy. Thus, I cannot support the majority opinion, and instead, would either require additional briefs or dismiss this case as improvidently granted.