

[J-61-99]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JAMES L. FISHER,	:	Nos. 170 and 171 M.D. Appeal Dkts. 1998
	:	
Appellee	:	Appeal from the Orders of the Superior
	:	Court, entered May 12, 1998, at Nos.
v.	:	585HBG97 & 597HBG97, affirming the
	:	Order of the Court of Common Pleas of
	:	York County, Civil Division, entered May
	:	29, 1997, at No. 93-SU-3964-02S
PATRICIA A. FISHER,	:	
	:	
Appellant	:	ARGUED: April 26, 1999

CONCURRING AND DISSENTING OPINION

MR. JUSTICE NIGRO

DECIDED: April 25, 2001

I agree with Mr. Justice Saylor's Concurring and Dissenting Opinion that the question of whether particular stock options represent marital property should depend on the characteristics of the stock option plan at issue, and, thus, must be decided by the trial court in light of the particular stock option plan. I write separately, however, to address the issue of how those stock option plans that are found to be marital property by the trial court, but mature after separation and equitable distribution, should be valued and distributed.¹ Contrary to the Majority, I do not believe that the non-holding spouse, in this case Ms.

¹ For the purpose of this opinion, a stock option "matures" when the option holder has the absolute right to purchase the stock at the option price. A stock option is "exercised" when the option holder actually purchases the stock at the option price. Prior to maturing, a stock option cannot be exercised.

Fisher, should only be able to receive her marital share of the options' value when the holding spouse exercises the options.

While the nature of stock options necessarily means that the holder of the options has the "option" of exercising them at her discretion, the fact that the options are marital property also means that both spouses, not merely the holding spouse, possess a property interest in the options' value. Given this property interest, the non-holding spouse should, in my view, clearly have some say as to when the options are exercised. I would therefore find that the non-holding spouse should have the choice of whether or not she wishes to receive her marital share of the options' value when those options mature. If the non-holding spouse chooses not to receive her marital share of the options' value on the date of maturity, the non-holding spouse must then wait until the holding spouse exercises the options in order to receive her marital share of the value.

This "either or" method provides for a fair and balanced treatment of each party's property interest in the options and furthers the legislative policy of "effectuat[ing] economic justice" between the parties. See 23 Pa.C.S. § 3102(a)(6). For example, a non-holding spouse may believe that the value of the options will not increase subsequent to the date of maturity. Thus, that spouse would likely choose to receive her marital share of the options' value at that time. At the same time, if the non-holding spouse believes that the options' value will increase after maturity, she would likely want to hold on to the property interest in the options until the holding spouse exercises the options. If, however, the non-holding spouse chooses to wait until the options are exercised, the holding spouse can then exercise the options at his discretion.²

² If the option-holding spouse allows the options to expire without exercising them, I believe that fairness requires that the option-holding spouse pay the non-holding spouse her marital share of the options' value, if any, on the date of expiration.

Allowing the non-holding spouse to choose to value the options on either the date of maturity or the date of exercising serves the dual purpose of acknowledging the holding spouse's property interest in the options and avoiding protracted litigation and court involvement. If the non-holding spouse chooses not to receive the options' value at maturity, the "either or" method recognizes the holding spouse's interests by allowing the holding spouse to exercise the options at his discretion. In addition to providing for the holding spouse's interests, the "either or" method avoids a burdensome, on-going court entanglement. By limiting the non-holding spouse's choice of valuation to either the date of maturity or the date of exercising, the non-holding spouse is, for example, precluded from seeking her share of the options in increments, e.g., choosing to receive ten percent of her marital share of the options at maturity, and then returning to court the next week and requesting another ten percent, and so on. Such protracted and on-going litigation would unduly burden both the holding spouse and the court system.

In sum, I join the Majority in reversing the Superior Court's order since I believe that stock options can be marital property, but I dissent from the Majority's formula for distributing those options that are found to be marital property.