

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

JAMES L. FISHER, : No. 170 M.D. Appeal Dkt. 1998  
: :  
Appellee : :  
: Appeal from the Order of the Superior  
: Court entered on 5/12/98 at No. 585 HBG  
v. : 1997, affirming order entered on 5/29/97  
: at No. 93-SU-3964-02S, Court of  
: Common Pleas of York County, Civil  
PATRICIA A. FISHER, : Division  
: :  
Appellant : :

JAMES L. FISHER, : No. 171 M.D. Appeal Dkt. 1998  
: :  
Appellee : :  
: Appeal from the Order of the Superior  
: Court entered on 5/12/98 at No. 597 HBG  
v. : 1997, affirming order entered 5/29/97 at  
: No. 93-SU-3964-02S, in the Court of  
: Common Pleas of York County, Civil  
: Division  
PATRICIA A. FISHER, : :  
: :  
Appellant : Argued: April 26, 1999

**CONCURRING AND DISSENTING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: April 25, 2001**

I join the majority's decision to reverse the Superior Court's order, as I agree that employer-provided stock options can be marital property. Since stock option plans diverge widely among employers, however, I am not prepared to follow the categorical approach urged by the parties, namely, that all stock options must either be marital property or not. Rather, in my view, the determination of whether, and to what extent,

particular stock options represent marital property should depend upon the characteristics of the plan in question, and, thus, must necessarily be made by the trial courts in the first instance in light of the particular circumstances presented.<sup>1</sup> This is the thrust of the Superior Court's discourse in MacAleer v. MacAleer, 725 A.2d 829, 831 (Pa. Super. 1999), appeal granted 559 Pa. 692, 739 A.2d 1058 (1999),<sup>2</sup> and the approach followed by many other jurisdictions. See, e.g., DeJesus v. DeJesus, 665 N.Y.S.2d 36, 40 (N.Y. 1997)(citations omitted); In re Miller, 915 P.2d 1314, 1319 (Colo. 1996); In re Hug, 201 Cal Rptr. 676, 678 (1984). As noted in MacAleer, this form of fact-specific assessment is necessary to effectuate economic justice between the parties and assure a fair and just determination and settlement of their property rights. See MacAleer, 725 A.2d at 835 (citing 23 Pa.C.S. §3102(a)(6)).

I read the majority's legal holding -- that stock options earned during the marriage prior to separation must be considered marital assets -- as being consistent with the above and with MacAleer. The majority's decision, however, to characterize the stock options under consideration as marital property would appear to entail application of a per se rule (or at least a presumption that stock options that are "granted" are "earned"), since there is no discussion of factual circumstances making it more or less likely that such options are wholly attributable to compensation for services rendered. Indeed,

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<sup>1</sup> For example, it would be difficult to characterize as deferred compensation for services rendered a plan that is expressly structured so that the options are in exchange for future services; is conditioned upon some qualitative assessment of future performance; and/or is unilaterally revocable at the sole discretion of the employer prior to maturity. More commonly, stock options may be awarded by an employer in part as compensation for services rendered and in part as an incentive to future performance. In such a case, it may be appropriate to apportion the option or options between marital and non-marital property. See generally MacAleer, 725 A.2d at 831; DeJesus, 665 N.Y.S.2d at 40; Miller, 915 P.2d at 1319; Hug, 201 Cal Rptr. at 678.

<sup>2</sup> Although this Court allowed appeal in MacAleer, the appeal was subsequently discontinued on praecipe of the appellant.

because the parties took a categorical approach to the issue before the master, in the trial court and on appeal, the record contains scant evidence from which the precise nature of the options could be determined.

MacAleer expressly notes that it does not purport to address those instances where a stock option represents both compensation for past services and consideration for future services, see id. at 835, and I believe that a similar reservation would be appropriate in the present case. Development of principles to guide the trial courts in the apportionment of stock options between marital and non-marital property will require a close examination of “competing considerations of law and equity, predictability and flexibility, past versus future services, and accrual outside of and within the marriage.” DeJesus, 665 N.Y.S.2d at 40. Given such considerations, and the many and varied models presented by other jurisdictions, see generally Annotation, Divorce and Separation: Treatment of Stock Options for Purposes of Dividing Marital Property, 46 A.L.R.4<sup>th</sup> 640 (2000), the inquiry presents complexities of the sort that are best addressed where the Court has the benefit of fully-developed, informed advocacy. Therefore, where, as here, the parties overlook the possibility of a case-specific inquiry and thus do not provide the requisite advocacy, I would merely remand with directions to the trial court to determine whether and to what extent the stock options at issue were earned during the marriage and prior to separation.<sup>3</sup>

Finally, with regard to the valuation, I agree with the majority’s general approach in evaluating the particular circumstances of the case to select the method most suitable

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<sup>3</sup> I do note that I would not foreclose the possibility of implementing a rebuttable presumption that stock options that are “granted” or “awarded” have been earned, based on the proposition that the party who has been granted or awarded an option is in the best position to develop its precise characteristics on the record. Before acceding to this or any other position, however, I would want to consider the range of available options as developed in an appropriate case.

to achieve a just and fair result between the parties. Nevertheless, I would also relegate this function, in the first instance, to the trial court, subject to appellate review; thus I would include resolution of the valuation question within the mandate for remand.