

Family Law. *Allard v. Allard*, 708 A.2d 554 (R.I. 1998). A disability pension is subject to equitable distribution in a divorce proceeding to the extent that it represents the spouse's vested retirement pay earned during the marriage.

In *Allard v. Allard*,¹ the Rhode Island Supreme Court determined that a firefighter's disability pension is subject to equitable distribution in a divorce proceeding, despite this court's previous holding in *Thompson v. Thompson*² and the apparent protection afforded to such pensions under Rhode Island General Laws section 9-26-5.

FACTS AND TRAVEL

Albert R. Allard (Albert) and Camille E. Allard (Camille) were married on November 11, 1972.³ Approximately two years later, Albert was hired by the Woonsocket Fire Department as a firefighter/rescue worker.⁴ The marriage produced three children, all of whom were still minors when the parties were granted a final divorce in June of 1991.⁵

According to the provisions of the final judgment, "Albert was to pay Camille one-half the present value of his retirement pension evaluated as of March 15, 1991," the date the Family Court granted the parties an absolute divorce on the ground of irreconcilable differences.⁶ Albert's pension plan was valued at \$167,098, half that sum, or \$83,549, was the amount Camille was entitled to under the final judgment.⁷

Albert assigned to Camille his interest in the marital domicile in a consent decree dated May 18, 1994, as partial payment of the amount owed from the retirement pension under the decree.⁸ According to the decree, Albert's interest in the marital home amounted to \$35,500.⁹ The consent decree also provided that the

1. 708 A.2d 554 (R.I. 1998).

2. 642 A.2d 1160 (R.I. 1994).

3. *See Allard*, 708 A.2d at 555.

4. *See id.*

5. *See id.*

6. *Id.* According to the final agreement, this sum was to come from his share of the proceeds from the sale of the marital home. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

City of Woonsocket would pay Camille twenty-nine percent of Albert's monthly pension payments until the balance was paid off.¹⁰

On July 29, 1994, just months before Albert was to become eligible to apply for a twenty-year-retirement pension, he suffered a job-related injury.¹¹ Six months later, Woonsocket's mayor granted Albert's request for a disability-retirement pension.¹²

Albert moved to modify the final judgment of divorce on April 11, 1995, arguing that a disability pension plan, unlike a retirement pension plan, is not subject to equitable distribution.¹³ Additionally, Albert sought a reimbursement of \$35,500, his interest in the marital domicile which was conveyed to Camille pursuant to the consent decree, since that interest was conveyed in place of her receiving funds under the retirement plan.¹⁴

The family court entered a decision on September 7, 1995, finding that Camille was entitled to fifty percent of the value of Albert's pension, reduced by the \$35,500 she received pursuant to the consent decree.¹⁵ Albert objected to the entry of the decision, which the family court later rejected. Thereafter, on February 12, 1996, the order was entered by the family court.¹⁶ Albert filed a timely appeal with the Rhode Island Supreme Court.¹⁷

ANALYSIS AND HOLDING

The issue on appeal, according to the court, "[was] whether a disability pension is subject to equitable distribution to the extent that it represents an employed spouse's vested retirement pay

10. *See id.* The payments by the city to Camille were to begin when Albert began receiving the proceeds of his pension plan upon retirement. *See id.*

11. *See id.*

12. *See id.* According to the court,

[h]ad Albert retired without a disability in January 1995, he would have received a pension equal to sixty percent of his weekly pay, and Camille would have been entitled to receive one-half of that weekly sum until the balance owed to her pursuant to the consent decree was paid. By qualifying for a disability-retirement pension, Albert took payments equal to 66 2/3 percent of his weekly salary, or \$52.15 per week more than what he would have received in straight retirement pay. The disability payments received by Albert may enjoy certain tax advantages.

Id. at 556.

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

earned during the marriage."¹⁸ Albert argues that his disability pension is not subject to equitable distribution based upon the court's prior holding in *Thompson v. Thompson*. Thus, according to Albert, the trial justice erred in awarding Camille any portion of his disability pension.¹⁹

The court differentiated the facts of the present case from those in *Thompson*.²⁰ In *Thompson* the court addressed the distinction between a contributory retirement pension and a "true" disability pension.²¹ The primary difference between the two types of pensions concerns their status pursuant to Rhode Island General Laws section 15-5-16.1.²² Under section 15-5-16.1, a contributory retirement pension plan is subject to equitable distribution, whereas a "true" disability pension is not.²³

In *Thompson*, like here, the issue was whether the husband's municipal disability pension was a marital asset subject to equitable distribution.²⁴ In that case, the husband suffered a back injury and was forced to retire after ten years of service.²⁵ Subsequently, while the couple remained married, the money from the pension

18. *Id.* at 555.

19. *See Allard*, 708 A.2d at 556.

20. *See id.*

21. *Id.* (citing *Thompson*, 642 A.2d at 1164).

22. *See id.*

23. *See id.* Rhode Island General Laws section 15-5-16.1 provides in pertinent part:

Assignment of property.—(a) In addition to or in lieu of an order to pay spousal support made pursuant to a complaint for divorce, the court may assign to either the husband or wife a portion of the estate of the other.

(b) The court may not assign property or an interest therein held in the name of one of the parties if the property was held by the party prior to the marriage, but may assign income which has been derived therefrom during the term of the marriage, and the court may assign the appreciation of value from the date of the marriage of property or an interest therein which was held in the name of one party prior to the marriage which increased in value as a result of the efforts of either spouse during the marriage. The court also shall not assign property or an interest therein which has been transferred to one of the parties by inheritance before, during, or after the term of the marriage. The court shall not assign property or an interest therein which has been transferred to one of the parties by gift from a third party before, during, or after the term of the marriage.

Id. (quoting R.I. Gen. Laws § 15-5-16.1 (1956) (1996 Reenactment)).

24. *See Thompson*, 642 A.2d at 1163.

25. *See id.*

was used to pay household expenses and to increase the marital assets.²⁶ The *Thompson* court, noting a jurisdictional split on whether such pensions are marital assets, decided that "a disability pension is not a marital asset and is therefore not subject to equitable distribution."²⁷

The court refused to extend the holding in *Thompson* to cover the pension acquired by Albert after his divorce from Camille, even though, technically, both were disability pensions. In doing so, the court based its reasoning on two factors; the function of the disability pension, and various policy considerations.²⁸

First, the court noted that Albert had the option of selecting payment under two different pensions.²⁹ Even after his injury, both pensions served substantially the same function: to provide for Albert and his family throughout retirement.³⁰ The disability pension would, additionally, compensate Albert for his personal suffering and lost earning capacity as a result of his injury.³¹

The court also relied on reasons of policy when determining that Albert's pension was not exempt from equitable distribution, stating that "one spouse should not be allowed to defeat the other spouse's interest in an asset earned and accumulated during the marriage by invoking a condition wholly within his or her control."³² Thus, if Albert's position was adopted, it would be against the very nature of Rhode Island's equitable distribution statute due to the fact that family court justices would be precluded from making fair and just assignments of marital assets based upon the joint contribution of spouses during the marriage.³³

26. *See id.*

27. *Id.* at 1163. The court noted that "[a] number of courts have held that disability benefits are a marital asset." *Id.* (citations omitted). And "[o]ther jurisdictions have declared disability pensions separate property to be considered by the court only in awarding alimony and child support." *Id.* (citations omitted). The court further noted that courts of other jurisdictions "examine the nature of the disability benefits and may consider some portion of the payments marital property." *Id.* (citations omitted).

28. *See id.* at 557-59.

29. *See id.* at 557.

30. *See id.*

31. *See id.*

32. *Id.* at 558.

33. *See id.*

The decision in *Allard* in no way affects the existing doctrine that compensation for injuries is non-marital property.³⁴ The supreme court specifically held that "only that portion of [Albert's] disability pension attributable to his retirement pay is marital property subject to equitable distribution."³⁵ Therefore, compensation for pain and suffering, future lost wages, future medical expenses, and loss of earning capacity, are the injured spouse's separate property.³⁶

Albert's final argument on appeal concerns Rhode Island General Law section 9-26-5.³⁷ Albert contends that this section precludes Camille from being awarded any portion of his pension because it is statutorily exempt from attachment.³⁸ The court dismissed this argument, stating that the statute in question "is designed to protect funds from creditors and not from the families of employees."³⁹

CONCLUSION

In *Allard v. Allard*, the Rhode Island Supreme Court limited its previous holding in *Thompson v. Thompson* to "pure" disability pensions. The pension at issue in *Allard*, according to the court, was more than a mere disability pension, since it also constituted a spouse's retirement pension. Therefore, to the extent that the disability pension represented the spouse's vested retirement pay accumulated during the marriage, that pension is subject to equitable distribution in a divorce proceeding.

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34. *Id.*

35. *Id.*

36. *See id.* (citing *Kirk v. Kirk*, 557 A.2d 976, 978-79 (R.I. 1990)).

37. *See id.* at 559 n.4. The relevant portion of section 9-26-5 states:

No interest of any person in any pension fund or in any pension derivable therefrom, for the benefit of police officers or firefighters . . . by any city or town . . . to which fund the city or town contributes . . . shall be subject to trustee process or liable to attachment on any writ, original, mesne, or judicial, or be taken on execution or any process, legal or equitable; and no assignment of any such interest shall be valid.

R.I. Gen. Laws § 9-26-5 (1956) (1994 Reenactment).

38. *See id.*