

27 Misc.3d 1204(A)

Unreported Disposition

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Supreme Court, Nassau County, New York.

Gina HENIG, Plaintiff

v.

Marc HENIG, Defendant.

No. 202061–09.

|  
Feb. 25, 2010.

#### Attorneys and Law Firms

Jeffrey S. Schecter & Assoc., [Vincent F. Stempel, Jr.](#),  
Garden City, attorney(s) for defendant.

#### Opinion

[EDWARD A. MARON, J.](#)

\*1 Plaintiff (Wife) moves by Order to Show Cause seeking an Order a) deeming the lifetime medical insurance benefits received by Defendant (Husband) from the New York Police Department be marital property; b) directing the valuation of the Husband's lifetime medical insurance benefits received from the New York Police Department; c) directing the already Court appointed neutral forensic accountant, Joel Rackower, to conduct the valuation of the Husband's lifetime medical insurance benefits; d) directing the already Court appointed neutral forensic accountant, Joel Rackower to value the Husband's lifetime medical insurance benefits as an asset, and/or to value the benefit in determining the Husband's income the purpose of deciding his support obligations incident to this proceeding. Husband opposes Wife's motion.

This Court concludes that Wife has failed to provide sufficient information to justify the determination that Husband's lifetime benefits are “property” acquired during the marriage, and thus a marital asset subject to Equitable Distribution.

#### Background

The parties were married on January 3, 1988 and there are three children of the marriage, to wit: D., born x/xx/1990, D., born xx/xx/1991, and A., born x/x/2000. On October 1, 2009 a Preliminary Conference was held and the issues of grounds, custody, and visitation were resolved. The Court also appointed experts to evaluate certain marital assets.

Husband is a retired New York City Police Officer, and since his retirement on December 31, 2007, he has been entitled to and does receive lifetime medical, dental and vision benefits for himself, Wife, and the parties' children. Wife argues that the medical insurance is a marital asset and subject to Equitable Distribution and/or equals a benefit to be included in determining Defendant's income. Husband disagrees.

Wife argues that the Domestic Relations Law contemplates an expansive view of marital property and analogizes the lifetime health benefits to a pension insofar as such benefits are an asset received only upon retirement. Husband's counsel, however, argues that these lifetime benefits are not like a pension, because they have been utilized and enjoyed throughout the marriage, unlike a pension which matures and is paid out only after retirement.

Wife's counsel argues that an employee's vested interest in a pension plan, to the extent it was acquired between date of marriage and commencement of the divorce action, even if unmatured at time of the divorce action, is marital property. Counsel claims that Husband's rights to the coverage are not defeasible, but rather are matured as of his retirement, and Wife has rights independent of the Defendants, i.e., if there were no divorce and Husband were to die, Wife and children would still receive benefits, however, counsel has not submitted any documentary evidence, specific to the plan, to substantiate these claims.

Wife's counsel also argues that lifetime benefits, like a pension, are contractual rights, which has some value because they are received in lieu of higher compensation, which Husband would have earned otherwise, however, counsel again provides no proof to substantiate this claim.

\*2 In sum, counsel asserts that Husband's insurance benefits equals a thing of value which was earned during

the marriage, and argues, in the alternative, that if the free lifetime benefits are not deemed marital property and thus subject to Equitable Distribution, such benefits should be considered additional income to him for purposes of determining his support obligations.

Husband argues that since enactment of [DRL § 236 B](#), neither the Court of Appeals nor the four appellate divisions have held that employee-subsidized health insurance benefits are marital property subject to Equitable Distribution. In fact, in contemplation of the loss of such health benefits, [DRL § 255\(a\)](#) directly addresses the issue stating that “once a judgment is signed a party there to may or may not be eligible to be covered under the other party's health insurance plan.” Counsel also argues that amendments to [DRL § 236\(B\)](#) provide that loss of health insurance benefits upon dissolution of marriage are factors that a court must consider for the purposes of determining maintenance and Equitable Distribution, but that such benefits are not itself an asset, and if the Legislature intended that such benefits be included in the definition of marital asset, it would have done so as it has amended and modified other provisions concerning health insurance.

Husband further argues that Wife is not without remedy as to the cessation of her continued coverage since she may elect continuation of coverage under a COBRA option, or she could obtain her own health insurance benefits through full-time employment, the cost of which is a consideration in her support award, if any. Wife's available remedy through the election of COBRA coverage would ensure the avoidance of any possible double-dipping by ordering the titled spouse, Husband, to pay for her health insurance. Husband's counsel, however, has not submitted any proof of the availability of a COBRA option to Wife upon dissolution of the marriage, nor is there indication in any of the papers before this Court as to Wife's ability to obtain benefits through employment.

It is undisputed that Husband does not receive *free* lifetime health insurance benefits, but that he currently pays \$15.32 per month for such benefits and an annual deductible \$300.00. The continuation of the benefits is at a continued cost to Husband, and his failure to make such payments will result in the cessation of such benefits. He further states that Husband's dental insurance only reimburses him for a fraction of his expenses and Husband

is required to pay the majority of dental expenses out-of-pocket. In further support of the proposition that lifetime health benefits are not defined like a pension, counsel asserts that Wife has already received her marital portion of the insurance having enjoyed its benefits during the marriage, and even the period after Husband's retirement and until such time that the Judgment of Divorce is entered. Furthermore, he argues that upon divorce Husband will pay the monthly premium from his separate property, and continuation of the health insurance policy is conditioned upon payments made from separate property and therefore any marital right to the insurance terminates upon divorce.

**\*3** Wife's counsel argues that whether the health benefits are received with or without cost is not a persuasive argument under the circumstances of this action, because Husband's receipt of such benefits for himself and the entire family is at a de minimus sum, and that his savings is of value. He argues that the total premium for the year is a mere \$184.84 per year, with a \$300.00 annual deductible. He attempts to argue that comparable medical coverage for a family of five people would cost well in excess of \$1,500.00 per month, if obtained on the open market, with a deductible likely to be well in excess of \$300.00.

Wife's counsel cites [Walek V. Walek, 193 Misc.2d 241, 749 N.Y.S.2d 383 \(Sup.Ct.2002\)](#), an Erie County decision in his reply papers, wherein the Court held that health insurance benefits were a marital asset and subject to Equitable Distribution. This Court finds that case distinguishable where Husband in *Walek* used a portion of his sick time, which could have been paid to him directly, to fund the 10% required premium payment necessary to receive those post-retirement, lifetime benefits. The sick time had a value, which was arguably marital property, which marital property was then used to directly fund those lifetime benefits. Wife has not demonstrated that these circumstances exist in this action.

In support of the application to value the benefit and to use that value in determining the Husband's income for support purposes, Wife's counsel also cites [Susan K v. Myron, 13 Misc.3d 1220\(A\) \(Sup.Ct.2006\)](#), a New York County decision wherein the Court considered husband's unearned income from annual automobile and medical insurance benefits in making its determination on his application for a post-judgment downward modification of his support obligations. However, Wife's counsel in

this matter inaccurately reports the findings of the case, specifically, the value placed on the automobile and medical benefits. Notwithstanding the flawed reporting, this Court is not provided with sufficient information with respect to the circumstances surrounding the valuation of the benefits considered in the aforementioned case, i.e., in what form the benefits were received.

### *Decision and Order*

[Domestic Relations Law § 236\(b\)\(1\)\(c\)](#) defines marital property as “all property acquired by either or both spouse's during marriage and before ... the commencement of a matrimonial action, regardless of the form in which title is held.”

In the case of [DeLuca v. DeLuca](#), 97 N.Y.2d 139, 736 N.Y.S.2d 651, 762 N.E.2d 337 (2001), the Court of Appeals stated that [DRL 236\(b\)\(1\)\(c\)](#) “evinces an unmistakable intent to provide each spouse with a fair share of things of value that each helped to create and expects to enjoy at a future date.” citing [DeJesus v. DeJesus](#), 90 N.Y.2d 643, 665 N.Y.S.2d 36, 687 N.E.2d 1319 (1997). The Court in [DeLuca](#) went on to reason that there is a presumption of marital property based on the contemporary view of marriage as an economic partnership, where each party is credited with their share of contributions, monetary or otherwise, to the value of the marriage. [DeLuca](#) at 144, 736 N.Y.S.2d 651, 762 N.E.2d 337 (internal citations omitted).

\*4 [Section 255 of the Domestic Relations Law](#) states in pertinent part that:

A court, prior to signing a judgment of divorce or separation, or a judgment annulling a marriage or declaring the nullity of a void marriage, shall ensure that:

1. Both parties have been notified, at such time and by such means as the court shall determine, that once the judgment is signed, a party thereto may or may not be eligible to be covered under the other party's health insurance plan, depending on the terms of the plan.

\* \* \*

2. If the parties have entered into a stipulation of settlement/agreement on or after the effective date of this section resolving all of the issues between the parties, such settlement/agreement entered into between the parties shall contain a provision relating to the health care coverage of each party; and that such provision shall either: (a) provide for the future coverage of each party, or (b) state that each party is aware that he or she will no longer be covered by the other party's health insurance plan and that each party shall be responsible for his or her own health insurance coverage, and may be entitled to purchase health insurance on his or her own through a COBRA option, if available.

\* \* \*

[Section 236 B\(6\) of the Domestic Relations Law](#) states in pertinent part that:

In determining the amount and duration of maintenance the court shall consider:

\* \* \*

- (11) the loss of health insurance benefits upon dissolution of the marriage; and

\* \* \*

The threshold question is whether the lifetime health benefits constitutes property. Wife has failed to demonstrate that such benefits are “property”. Even if it were to be deemed property, Wife has failed to provide this Court with a sufficient showing to justify classifying such benefits are “marital property”. Wife failed to demonstrate that the post-retirement lifetime benefits involved a reduction in Husband's earned wages in order to obtain such benefits or that these lifetime benefits are provided through the employer utilizing funds set aside from a portion of the Husband's income earned through his employment. She does not allege that he had an opportunity to “opt out” of such benefits in exchange for higher wages. It is interesting that neither party thought it prudent to attach any documentary evidence outlining the terms and conditions of such benefits.

Additionally, the argument with respect to the de minimus amount Husband is required to pay for the continued health insurance and that Husband's cost for such

comparable **medical benefits pales** in comparison to that which it would cost Wife is not persuasive. Even if this argument were accepted, the loss of benefits for one spouse has been contemplated by the Legislature in its amendment to the Domestic Relations Law to include the loss of health insurance benefits in the determination of maintenance. Although Wife's counsel argues that such savings for Husband constitutes an asset to which Wife contributed, the Court is not persuaded.

**\*5** Based upon the foregoing, the Court finds that Wife has failed to demonstrate the continuation of the health benefits are marital property as contemplated by the Domestic Relations Law. Furthermore, the Court finds that it was the intent of the Legislature to exclude such benefits from the “pot” of “marital assets” as evidenced by the amendments to the Domestic Relations Law to

specifically ensure that such loss of benefits by a spouse post-judgment is a consideration in the determination of maintenance, as well the recent language adopted to ensure that all parties are aware of the possibility of loss of such health benefits. Wife is not without remedy, the future cost of health benefits is a consideration for any award of maintenance and Equitable Distribution.

Accordingly and based upon the foregoing, Wife's motion is DENIED.

This constitutes the decision and order of this court.

**All Citations**

27 Misc.3d 1204(A), 910 N.Y.S.2d 405 (Table), 2010 WL 1340829, 2010 N.Y. Slip Op. 50546(U)

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