No. 124676

In the Supreme Court of Illinois

LOUISE ZAMUDIA f/k/a LOUISE OCHOA,

Plaintiff-Appellee,

v.

FRANK OCHOA, JR.,

Defendant-Appellant.

Appeal from the Illinois Appellate Court of the
Third Judicial District, No. 3-16-0537.
There Heard on Appeal from the Circuit Court of the Fourteenth Judicial District,
Whiteside County, Illinois, No. 14 D 94 ST.
The Honorable **John L. Hauptman,** Judge Presiding.

BRIEF AND ARGUMENT OF APPELLANT FRANK OCHOA, JR.

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Appellant Respondent, Frank Ochoa, Jr., acquired 48 months of "permissive" service credit on his Illinois State Employee Pension out of 320 aggregate months of service credits by making a contribution during the marriage and serving in active duty military before the marriage. Incident to a dissolution of marriage, the trial court, by an Order dated August 10, 2016, characterized that 48 months of permissive service credit as non-marital because ". . . what was purchased to enhance the pension sought to be collected was military time earned prior to the marriage."

By an Opinion filed February 20, 2019, the Third District Appellate Court, in a 2-1 decision, reversed the trial court, holding ". . . to the extent that a pension benefit is a marital asset, any enhancement in value obtained during the marriage is also a marital asset."

STATEMENT OF JURISDICTION

Pursuant to Supreme Court Rule 316, the Defendant-Petitioner brings his appeal as a question of such importance that it should be decided by the Supreme Court, having timely filed his Petition for Leave to Appeal to the Supreme Court.

On August 10, 2016, the Trial Court entered an Order granting the Defendant-Petitioner's Motion for Reconsideration filed on May 27, 2016. On September 9, 2016, Plaintiff-Respondent filed a Notice of Appeal.

On February 20, 2019, the Third District of the Illinois Appellate Court issued its order, reversing the Trial Court's decision and remanding with directions.

On March 25, 2019, Defendant-Petitioner timely filed a Petition for Leave to Appeal. On May 22, 2019, this Court granted Defendant-Petitioner's Petition for Leave to Appeal.

ISSUE PRESENTED

Whether the trial court properly found that forty-eight months of permissive service credit added to an Illinois State Retirement Pension is non-marital and the marital estate is only entitled to a reimbursement of its monetary contribution for the enhancement when the military service occurred prior to the marriage and the enhancement was purchased during the marriage?

ISSUE FOR REVIEW

Are all enhancements in value to an Illinois State employee's pension marital to the extent the pension is marital, and more specifically, is Frank Ochoa, Jr.'s 48-month enhancement to his permissive service credits pursuant to the opportunity granted to military service veterans to upgrade their annuities by "purchasing" the service credits marital because the purchase was paid for using marital funds and because the pension was in payment status during the marriage?

STATUTES INVOLVED

> 40 ILCS 5/14-104(j) - By paying the contributions otherwise required under this Section, plus an amount determined by the Board to be equal to the employer's normal cost of the benefit plus interest, but with all of the interest calculated from the date the employee last became a member of the System or November 19, 1991, whichever is later, to the date of

payment, an employee may establish service credit for a period of up to 4 years spent in active military service for which he does not qualify for credit under Section 14-105, provided that (1) he was not dishonorably discharged from such military service, and (2) the amount of service credit established by a member under this subsection (j), when added to the amount of military service credit granted to the member under subsection (b) of Section 14-105, shall not exceed 5 years. The change in the manner of calculating interest under this subsection (j) made by this amendatory Act of the 92nd General Assembly applies to credit purchased by an employee on or after its effective date and does not entitle any person to a refund of contributions or interest already paid. In compliance with Section 14-152.1 of this Act concerning new benefit increases, any new benefit increase as a result of the changes to this subsection (j) made by Public Act 95-483 is funded through the employee contributions provided for in this subsection (j). Any new benefit increase as a result of the changes made to this subsection (j) by Public Act 95-483 is exempt from the provisions of subsection (d) of Section 14-152.1.

750 ILCS 5/503(a) - (a) For purposes of this Act, "marital property" means all property, including debts and other obligations, acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property": (1) property acquired by gift, legacy or descent or property acquired in exchange for such property; (2) property acquired in exchange for property acquired before the marriage; (3)

property acquired by a spouse after a judgment of legal separation; (4) property excluded by valid agreement of the parties, including a premarital agreement or a postnuptial agreement; (5) any judgment or property obtained by judgment awarded to a spouse from the other spouse except, however, when a spouse is required to sue the other spouse in order to obtain insurance coverage or otherwise recover from a third party and the recovery is directly related to amounts advanced by the marital estate, the judgment shall be considered marital property; (6) property acquired before the marriage, except as it relates to retirement plans that may have both marital and non-marital characteristics; (6.5) all property acquired by a spouse by the sole use of non-marital property as collateral for a loan that then is used to acquire property during the marriage; to the extent that the marital estate repays any portion of the loan, it shall be considered a contribution from the marital estate to the non-marital estate subject to reimbursement; (7) the increase in value of non-marital property, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section; and (8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.

Property acquired prior to a marriage that would otherwise be non-marital property shall not be deemed to be marital property solely because the property was acquired in contemplation of marriage.

The court shall make specific factual findings as to its classification of assets as marital or non-marital property, values, and other factual findings supporting its property award.

750 ILCS 5/503(c)(2)(A) - When one estate of property makes a contribution to another estate of property, the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation. No such reimbursement shall be made with respect to a contribution that is not traceable by clear and convincing evidence or that was a gift. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property that received the contribution.

40 ILCS 5/17-116(a) - Each teacher having 20 years of service upon attainment of age 55, or who thereafter attains age 55 shall be entitled to a service retirement pension upon or after attainment of age 55; and each teacher in service on or after July 1, 1971, with 5 or more but less than 20 years of service shall be entitled to receive a service retirement pension upon or after attainment of age 62.

STATEMENT OF FACTS

Frank Ochoa, Jr. honorably served in active duty military service from 1974 to 1980. In August of 1989, Frank commenced employment with the Illinois State Police. 125.5 months later, in late January 2000, Frank married Louise Zamudia. In September of 2006, Frank paid $4,813.20 to the State Retirement System to purchase 24 months of permissive service credit associated with his active duty military service under 40 ILCS 5/14-104(j). In August of 2011, he paid another $4,813.20 to complete the payment for the full 48 months of military service. Frank retired on August 1, 2011 with 320 months of aggregate service credits, 263.5 of actual service, 48 months of permissive service, 6 months unused sick time and 2.5 of unused vacation time, with the sick and vacation time also purchased during the term of the marriage for an additional $4,010.82.

The parties stipulated that the "regular" service credits earned during the term of the marriage was 138 months.

In the Order dated August 10, 2016, the trial court quoted from *In re Marriage of Ramsey,* 339 Ill.App.3d 752 (5th Dist. 2003), as follows:

> ". . . when an early retirement incentive enhances pension benefits, to the extent that such enhancements are derivative of the right to receive the pension as deferred compensation, the proportion of the enhancement that is marital property is exactly the proportion of the pension as a whole that is marital. In the unusual case where the entitlement is not purely derivative, however, that portion of the enhancement not derived from the right to receive the pension itself is the pensioner's sole property."

The trial court then concluded that Frank's 48 months of permissive service credits were not "purely derivative" of the right to receive the pension because the specific enhancement was attributed to military time earned prior to the marriage. Because there were marital funds necessarily contributed to qualify for the enhancement,

Frank was required to reimburse the marital estate one-half the payment contributed pursuant to 750 ILCS 5/503(c)(2)(A).

The Third District reversed. The majority wrote that the fact that Frank began receiving his annuity payments during the marriage was "not an insignificant factor" for two reasons: First, the Ochoa pension, unlike the *Ramsey* pension, did not involve an unknown future value, and second, the Ochoa pension enhancement "came into existence" during the marriage. This led to the Court's broad conclusion ". . . to the extent that a pension benefit is a marital asset, any enhancement in value obtained during the marriage is also a marital asset . . ."

The dissent concluded "The trial court got it exactly right," submitting that the timing of the receipt of annuity payments (whether before or after the dissolution) was irrelevant to the issue of whether those specific 48 months of service credit were marital, pointing out that the effect of the majority's decision is to judicially add 4 years to the marriage. It also states that under any analysis, the entire pension is simply not marital since Frank worked as a state police officer for over a decade before marrying Louise and, thus, the pension falls within the statutory realm of a commingled asset containing both marital and non-marital components and that neither the contribution payments (which are reimbursable) nor the distribution (the timing of which is not relevant) preclude an equitable apportionment of each element of the pension – the two different portions of regular service credits (before and after) and the third component of the permissive service credits, by designating each element as being either marital or non-marital.

STANDARD OF REVIEW

At the Appellate Court, both Appellant and Appellee acknowledged that the Trial Court's factual findings accurately reflected the evidence that there was no disputed facts, only law. The applicable standard of review of the Trial Court's ruling on whether the permissive service credits purchased during the marriage is marital property, is *de novo*. *In re Marriage of Peters*, 326 Ill.App.3d 364, 366 (2001).

ARGUMENT

THE TRIAL COURT CORRECTLY RULED AND THE THIRD DISTRICT DISSENT CORRECTLY OBSERVED THAT THE FORTY-EIGHT (48) MONTHS OF PERMISSIVE MILITARY SERVICE INCREASING AN ILLINOIS STATE RETIREMENT SYSTEM PENSION IS NON-MARITAL AND NOT INCLUDED IN THE NUMERATOR OF THE FRACTION USED TO CALCULATE THE MARITAL PORTION OF THE PENSION WHEN THE ELIGIBILITY FOR THE PURCHASE IS FROM PENSIONER'S YEARS OF PRE-MARRIAGE MILITARY SERVICE DESPITE THE LUMP SUM CONTRIBUTION BEING MADE WITH MARITAL FUNDS DURING THE MARRIAGE AND DESPITE THE PENSIONER RETIRING DURING THE MARRIAGE.

The issue presented in this case is the marital/non-marital character of forty-eight (48) months of permissive service credit to an Illinois State Retirement Pension (SRS Pension) based on years of active duty military service when the military service occurred prior to the marriage although the payment contribution was made with marital funds during the marriage. Pursuant to Section 5/14-104(j) of the Illinois Pension Code, in order to enhance an SRS Pension with permissive military service credit for a period of up to four years, two components are required, the first of which is an eligibility requirement of up to 4 years spent in active duty military service. 40 ILCS 5/14-104(j). In the instant case, all of Frank Ochoa's active duty military years occurred more than 20

years *before* the marriage – from 1974 to 1980. (C. 259). The second component of the eligibility is the monetary contribution as provided by 40 ILCS 5/14-104(j). Here, the sum of $9,626.40 was contributed during the marriage to establish eligibility for permissive service credit for Frank's years of active duty military service. (C. 299). The monetary contribution was made in two-lump sum payments with $4,813.20 paid in September 2006 and the other half paid in August 2011 also in the amount of $4,813.20. (C. 299, C. 248-49).

Frank contended at trial and on appeal that the 48 months of permissive service credit are non-martial because the entitlement to the permissive military service "primarily derives" from the years Frank spent in active duty military service *before* the marriage. 750 ILCS 5/503(a). And, because the lump sum contribution for the enhancement was made during the marriage with marital funds, the marital estate was entitled to a reimbursement for its monetary contribution to the enhancement. 750 ILCS 5/503(c)(2)(A). These arguments were consistent with the analysis of the Fifth District in *In re Marriage of Ramsey, Id.*

Louise argued that the trial court erred by suggesting that the only relevant elements of eligibility are Frank's years of regular service as an employee of the Illinois State Police and the marital monetary contribution. (See Louise's Appellant's Brief, p. 21, 36). Louise's position ignored that the primary and necessary element to claim the entitlement for the permissive service is Frank's pre-marriage military service. Without Frank's years of military service, there is no option for Frank to enhance his SRS pension. The Third District reviewed the path suggested by the *Ramsey* Court, and as a threshold matter, distinguished it because in Frank Ochoa's case, the annuity payments

generated by the SRS pension commenced during the marriage. In the Third District's view, *Ramsey* involved a question of dividing a pension of unknown future value, "not whether a particular enhancement provision constituted marital or non-marital property." The *Ramsey* case involved TRS pension which was enhanced by the purchase of two early retirement incentives using non-marital funds. As characterized by the Third District, the *Ramsey* Court acknowledged that the enhanced pension "flowed from both his right to receive pension benefits in the first place and from the lump sum contributions he made following the dissolution of the parties' marriage." Since the Husband taught for 31 years, 60% of which eh worked during the marriage, that the enhanced benefit "resulted from both marital and non-marital elements." The Third District then weighs the *Ramsey* Court's concept of whether an enhancement is derivative or non-derivative of the right to receive the pension in the first place. In its analysis, the Third District ignores that the specific enhancements to the *Ramsey* TRS pension were a legislatively created incentive for teachers to retire before age 60. De-incentive was triggered if the teacher has at least 20 years of service and makes a one-time contribution. The statutory basis for that entitlement was found in 40 ILCS 5/17-116.19(d). A second incentive, known as the 2.2 upgrade, also required a one-time payment, pursuant to 40 ILCS 5/17-116(b)(3).

These two TRS enhancements, triggered by the eligibility of a minimum of 20 years actual regular service and a supplemental contribution are fundamentally different from the SRS pension enhancement triggered by Frank's military service, not by years of regular service credits. Frank's statutory enhancement is pursuant to 40 ILCS 5/14-104(j).

Perhaps the language of *Ramsey* focusing on the concept of "derivative or non-derivative" is more confusing than helpful. A more direct approach to the characterization of the marital/non-marital interests in pensions would be to simply use the language of the statute – 750 ILCS 5/503(b)(2) which repeatedly defines marital property in the context of "property acquired" and 503(b)(2) which is specific to pension benefits acquired by a method listed in subsection (a) and concludes by pronouncing that the division of pension benefits is an allocation of property in which each spouse has a species of common ownership.

The First District, First Division first addressed the issue of characterizing and halving a defined benefit pension plan in 1979 in the often cited case of *In re Marriage of Hunt*, 78 Ill.App.3d 653. In *Hunt*, the trial court found the husband's pension from his employer, Chicago Tribune, Inc., was not marital. The First District first looked at the language of Section 503, both to determine whether the pension interest was "property" and when it was "acquired."

Hunt held first that a contractual right to a pension is "property" regardless of whether it is "matured, vested or nonvested, or contributory or non-contributory." It then wrote that "Any part of such pension earned by the employee spouse while married is property 'acquired' during the marriage." The *Hunt* Court then looked to holdings in other states including California, where in a divorce proceeding, the Court concluded that a pension was community property "because it is acquired by the labor and industry of members of a form of partnership, that is a marital partnership and whatever is earned or gained by one partner during the existence of the marital partnership must accrue to the benefit of both partners." *Hunt Id.* at 660 citing *In re Marriage of Martin* (1975),

So.Cal.App.3d 581, 123 Cal. Rptr. 634. It continued its review of California law that community property treatment was justified because "pension benefits have become an increasingly significant part of the consideration earned by the employee for his services." Not stopping with California, the *Hunt* Court also compared the results from Arizona, Texas and Wisconsin all of which focused on "pension interests earned during the marriage."

Whether using the statute's language of "acquired" during the marriage or the *Hunt* variation of "earned" during the marriage, it is critical to recognize that the Ochoa pension interest is made up of multiple components, each earned or acquired at different times in different manners – the "regular service" by working both before and after the marriage and the "permissive service" due to military service, unused sick time and unused vacation. The permissive service attributable to the military service could not possibly be deemed acquired or earned during the marriage since the military service was years before the marriage.

CONCLUSION

The eligibility for the forty-eight (48) months of permissive service credit to Frank's SRS pension was "acquired" from the years Frank spent in active duty military service prior to the marriage. As a result, the additional forty-eight (48) months of permissive military service are non-marital. The lump sum monetary contributions made during the marriage to purchase the additional forty-eight (48) months do not transmute the military service credit into marital property, but rather create a right of reimbursement to the marital estate for its contribution. Therefore, Frank respectfully requests the Court to uphold the trial court's ruling and reverse the Third District: (1) that the forty-eight

(48) months of permissive military service credit are non-marital and not included in the marital portion of Frank's pension, and (2) that the monetary contribution made to purchase the permissive military credit creates a right reimbursement to the marital estate.

Respectfully submitted,

FRANK OCHOA, JR., Defendant-Petitioner
By WARD, MURRAY, PACE & JOHNSON, P.C.
His Attorneys

/s/ Paul A. Osborn
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 13 pages.

/s/ Paul A. Osborn
Paul A. Osborn

APPENDIX

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2019 IL App (3d) 160537

Opinion filed February 20, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

In re MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
LOUISE ZAMUDIO, f/k/a LOUISE OCHOA,	)	Whiteside County, Illinois.
	)	
Petitioner-Appellant,	)	
	)	Appeal No. 3-16-0537
and	)	Circuit No. 14-D-94
	)	
FRANK OCHOA, JR.,	)	
	)	Honorable John L. Hauptman,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion.
Justice O'Brien concurred in the judgment and opinion.
Presiding Justice Schmidt dissented, with opinion.

OPINION

¶ 1 Plaintiff, Louise Zamudio, formerly known as Louise Ochoa, and defendant, Frank Ochoa, Jr., were married in January 2000. The parties divorced in May 2016. At issue during the dissolution proceedings was whether Frank's 48 months of permissive military service credit, which he earned prior to the marriage but purchased during the marriage with marital funds in order to enhance his State Retirement System Pension (pension), was marital property that should be considered when determining the marital portion of his pension. Ultimately, the trial court determined the enhancement itself was not marital property, but it found that Frank must

reimburse Louise for her marital share of the funds used to purchase the enhancement. Frank does not dispute that portion of the trial court's ruling.

¶ 2 Louise appeals, asserting the trial court's judgment is reversible error. Specifically, she argues the permissive military service credit is marital property since the enhancement was purchased with marital assets.

¶ 3 FACTS

¶ 4 The parties were married in January of 2000. In May 2014, Louise filed a petition for dissolution of marriage. In anticipation of the dissolution of their marriage, the parties mutually resolved all but two issues. The unresolved issues concerned the disposition of Frank's pension, which began to accumulate prior to the marriage, and the amount and duration of maintenance.

¶ 5 Frank engaged in active duty military service from 1974 to 1980, after which he entered the military reserves where he served until 2003. He began working for the Illinois State Police in August 1989.

¶ 6 During the course of the parties' marriage, Frank used marital assets to purchase 48 months of permissive military service credit to enhance his pension. Specifically, in both 2004 and 2008, he purchased 24 months of permissive credit for a total cost of $9,626.40. His eligibility for the permissive service credit derived from his active duty military service completed approximately 20 years prior to the marriage. Frank retired from the Illinois State Police on August 1, 2011, with 320 months of service, which included 263.50 months of regular service credit, 48 months of permissive service credit purchased during the parties' marriage, 6 months of unused/unpaid sick time, and 2.5 months of sick/vacation time he had also purchased. Frank began receiving monthly annuity checks on or about August 1, 2011. He received 58 checks during the marriage. The initial monthly annuity payment was $9,088.86, of which

$1,363.33 represented the increase attributable to the purchased credits. Without the additional credits, Frank's monthly annuity would have been $7,725.53.

¶ 7 The parties agreed that Louise was entitled to 50% of the marital portion of Frank's pension; however, they disagreed on how much of Frank's pension was classified as marital. In that regard, both Frank and Louise submitted written arguments to the court. Frank asserted that Louise was entitled to reimbursement for contribution to the purchase of the permissive military service credit, but she was not entitled to any interest in that portion of his pension. In contrast, Louise argued that the pension account was marital property as was the enhancement created by purchasing the 48 months of permissive service credit with marital assets.

¶ 8 In April 2016, the trial court entered a written order, finding in pertinent part, "[t]hat because Frank acquired th[e] military permissive service to increase the number of months of service in order to enhance the benefit he would receive from his state pension *during the term of the marriage*, those months were earned during the marriage and should be included in the numerator of the fraction to determine the marital share of his pension."

¶ 9 Frank timely filed a motion to reconsider, arguing the trial court erred, as a matter of law, in finding the 48 months of permissive service credit to be marital property. He asserted the court's judgment ignored the fact that the permissive service credit could not have been purchased without his active duty military service, which was completed long before the parties married. He further maintained that "the eligibility and the 48 months of military service were not transformed into marital property when [he] exercised his right to purchase the military time with marital funds during the marriage." Rather, citing *In re Marriage of Ramsey*, 339 Ill. App. 3d 752 (2003), he argued that the timing of the purchase and the use of marital funds merely created a right of reimbursement in the marital estate for its monetary contributions.

¶ 10 Ultimately, the trial court agreed with Frank. In its August 2016 order, the court found it had erred in its prior judgment by failing to apply *Ramsey*. The court acknowledged the enhancement was purchased during the term of the marriage, but it noted that the enhancement "was not 'purely derivative' of [Frank's] right to receive his state pension because what was purchased to enhance the pension *** was military time earned prior to the marriage." The court held "[t]hat in keeping with the holding in *Ramsey*, [Frank] should reimburse [Louise] for her marital share of these funds which [it] f[ound] to be in the amount of $4,813.20."

¶ 11 Louise appeals.

¶ 12 ANALYSIS

¶ 13 On appeal, Louise maintains that the trial court erred in finding the 48 months of permissive service credit was not marital property.

¶ 14 Generally, we review a trial court's factual determination regarding whether an asset is marital property or not under the manifest weight of the evidence standard. *In re Marriage of Peters*, 326 Ill. App. 3d 364, 366 (2001). Here, however, the facts are not in dispute nor is the credibility of the witnesses at issue. *Id.* Instead, our only concern is to determine the legal effect of undisputed facts. Specifically, we must determine whether the permissive service credits purchased with marital assets during the term of the parties' marriage in order to enhance Frank's pension are marital property, even though the entitlement to the enhancement is not entirely derivative of Frank's right to receive his pension. Accordingly, our review is *de* novo. *Id.*

¶ 15 Both parties seem to rely on *Ramsey*, 339 Ill. App. 3d 752. In that case, the parties were married from 1969 to 1989, throughout which time the husband was employed as a school teacher who participated in the Teachers' Retirement System (TRS) of the State of Illinois

pension plan. Following the dissolution of their marriage, the trial court reserved jurisdiction to divide the husband's pension. *Id.* at 754. In 2000, 11 years after the parties divorced, the husband took advantage of two early retirement incentives that were available to teachers with at least 20 years of service by making two one-time payments to the TRS of $7397.46 and $6390.60. *Id.* at 754-55. Following the husband's retirement later that year, the wife filed a motion seeking a qualified Illinois domestic relations order (QULDRO) to divide the husband's pension. *Id.* at 755. The Massac County circuit court found that the husband's nonmarital monetary contributions could not be severed from the rest of his pension, and thus, it included the portion of the pension attributable to the early retirement incentives purchased by the husband as part of the marital pension. *Id.* The husband appealed, asserting that the wife should not be entitled to any portion of his pension attributable to the early retirement incentives he purchased with nonmarital funds. *Id.* at 756.

¶ 16 On appeal, the Fifth District acknowledged that the husband's entitlement to the enhanced pension benefits flowed from both his right to receive pension benefits in the first place and from the lump-sum contributions he made following the dissolution of the parties' marriage. *Id.* at 763. The court noted that the husband would not have been eligible for the enhancements no matter how much money he paid into TRS but for his contributions to the plan through teaching for 31 years—60% of which he worked during the marriage. *Id.* at 764. In other words, the court found that the husband's entitlement to the enhanced benefit was not "purely derivative" of his right to receive his pension but, instead, resulted from both marital and nonmarital elements. *Id.* The court concluded that "the most rational and equitable way to do justice to both parties is to require [the wife] to pay her proportionate share of the contributions necessary for [the husband] to qualify for the enhancements." *Id.* at 765. In conclusion, the court

found "that when an early retirement incentive enhances pension benefits, to the extent that such enhancements are derivative of the right to receive the pension as deferred compensation, the proportion of the enhancement that is marital property is exactly the same as the proportion of the pension as a whole that is marital." *Id.* at 766. The court continued, "[i]n the unusual case where the entitlement to such enhancements is not purely derivative, however, that portion of the enhancement not derived from the right to receive the pension itself is the pensioner's sole property." *Id.*

¶ 17 We find *Ramsey* instructive, although not dispositive of the issue at hand. A key difference between *Ramsey* and the instant case is that, unlike the annuitant in *Ramsey*, Frank began receiving his annuity payments during the marriage. It is undisputed that Frank received 56 annuity payments during the marriage. This is not an insignificant factor. The *Ramsey* court was addressing the common problem of how to divide a pension benefit with an unknown future value. In other words, the question in *Ramsey* was one of valuation, not entitlement. The issue was how much of the pension check was subject to formulaic division, not whether a particular enhancement provision constituted marital or non-marital property. To the extent that *Ramsey* addressed the concept of entitlement to enhancement pension benefits, it did so as *dicta*. However, *Ramsey* remains instructive regarding the proper resolution of this matter.

¶ 18 The fact that Frank had already been receiving an enhanced annuity benefit for 56 months during the marriage is significant for another reason. As the *Ramsey* court observed, "[i]f the pension enhancements are a separate and distinct benefit that came into existence after the dissolution, they are not a part of the pension check to be divided." *Id.* at 757 (citing *Hannan v. Hannan*, 761 So.2d 700, 707 (La. App. 2000) (finding enhancements to a pension to be an asset acquired after the marriage ended and therefore not subject to division along with the rest of the

pension)). However, if the enhancement *came into existence* during the marriage, as in the instant matter, there is no simple solution. Instead, *Ramsey* suggests the court must look to whether the enhancement is *derivative* of the right to receive a pension in the first place or if the enhancement is *non-derivative* in the sense that the enhanced portion is directly and solely attributable to non-marital contributions and not subject to division. *Ramsey*, 339 Ill. App. 3d at 763. Regarding the *derivative* nature of a pension enhancement provision, the *Ramsey* court cogently observed that "the right to receive an early retirement incentive package necessarily depends upon the right to receive the pension." *Id.* Also, [t]he right to pension enhancements can have no existence independent of the right to receive a pension." *Id.* In other words, to the extent that a pension benefit is a marital asset, any enhancement in value obtained during the marriage is also a marital asset subject to apportionment on an equitable basis.

¶ 19 In this case, Frank maintains that his eligibility for the 48-month permissive service credit stemmed *entirely* from his years of active duty military service, which was completed 20 years prior to the parties' marriage. However, Frank ignores the fact that his entitlement to the enhanced benefit is *derivative* of his entitlement to the pension in the first place. While it is undoubtedly true that, absent his military service, Frank would not have been entitled to purchase the permissive military service credit, it is equally true that that right to enhance the overall pension benefit accrued to his benefit as a result of his participation in the pension program, which provided the enhancement to member meeting the enhancement criteria.

¶ 20 In other words, Frank's entitlement to the enhanced value of each pension payment flows *both* from his participation in the plan itself *and* the fact that the pension statute allows him to enhance the present value of his annuity by an amount calculated based upon his prior military service. Viewed another way, Frank's entitlement to an enhanced annuity accrued while he

participated in the pension plan, and thus, a portion of that credit accrued during his marriage to Louise. The fact that the enhancement was calculated based on a number equal to the number of months Frank served in the armed forces did not mean that Frank acquired the asset at the time of his military service. Frank's military service had no relationship to his pension benefit *until* he exercised the option of purchasing the 48-month of additional credits, which was done during the marriage and with the use of marital funds.

¶ 21 The major problem with the dissent is that it views Frank's four years of military service as non-marital property that cannot be equitably divided by the trial court. The fundamental error in this analysis is in viewing the military service as "property." As we have previously noted, Frank's years of military service were not property, but simply conditions precedent, which the Pension Code allowed Frank to use to enhance the current value of his pension. It was the current value of the annuity payments, acquired during the marriage, that constituted marital property subject to equitable division by the trial court.

¶ 22 In sum, we find that the trial court erred in determining that the 48-month permissive service credit was nonmarital property. Thus, we reverse the trial court on that question and remand for an equitable distribution of the marital value of the defendant's pension annuity.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, the judgment of the circuit court of Whiteside County is reversed and the matter is remanded for an equitable apportionment of the defendant's pension.

¶ 25 Reversed; cause remanded.

¶ 26 PRESIDING JUSTICE SCHMIDT, dissenting:

¶ 27 As far as I can tell, this is the first decision in the free world ordering a trial court to consider a 4-year period that occurred 20 years prior to the marriage, as though the parties were married during those 4 years, in order to calculate the marital portion of a pension.

¶ 28 The issue before us is whether the trial court properly ruled that four years of military service completed by Frank years before his marriage to Louise should not be included in the numerator to determine Louise's marital percentage of Frank's pension. I am sure by now, having read the majority's opinion, you understand that Frank purchased this with the use of marital funds. The trial court found that it was not marital property and ordered Frank to reimburse Louise for one-half of the purchase price of the four-year military pension credit. This is a simple case. Frank enhanced a nonmarital asset with marital assets and, therefore, he must repay, and I believe has repaid, Louise for her share of those funds. The trial court got it exactly right. Frank's 48 months of military credit are no more marital property than are the 11 years of credit he earned for his Illinois State Police service prior to the marriage.

¶ 29 The majority finds the fact that Frank began receiving his annuity payments during the marriage as "[a] key difference between *Ramsey* and the instant case *** [and] is not an insignificant factor." *Supra* ¶ 17. I submit the fact that Frank began receiving his annuity payments during the marriage is totally irrelevant to the issue of whether his premarital military service credits, albeit purchased during the marriage, are marital property. Let us not lose sight of the fact that Louise does gain a benefit from the four years of military credit as Frank's pension is larger than it would have been without that credit. That is, as in *Ramsey*, pursuant to the trial court's ruling, Louise is getting her marital portion of the *enhanced* pension.

¶ 30 The majority notes, while trying to both distinguish and incorporate *Ramsey*, "if the enhancement *came into existence* during the marriage, as in the instant matter, there is no simple

solution." (Emphasis in original.) *Supra* ¶ 18. Yes, there is! The trial court got it right. So, the majority then goes on to proclaim that "*Ramsey* suggests the court must look to whether the enhancement is *derivative* of the right to receive a pension in the first place or if the enhancement is *non-derivative* ***." (Emphasis in original.) *Id.* First of all, under the majority's analysis, every enhancement to a pension is derivative of the existence of the pension. One cannot enhance an asset that does not exist. The majority correctly observes, "to the extent that a pension is a marital asset, any enhancement in value obtained during the marriage is also a marital asset subject to apportionment on an equitable basis." *Supra* ¶ 18. Louise received her share of the enhancement in value. Yet the majority simply ignores this. The majority wants to include the four years of military service as marital property in addition to giving her the marital portion of the enhanced value of the pension. That is, the majority gives Louise the same benefit she would have received had she and Frank been married while he served in the military. This also gives Louise a larger slice of the entire unenhanced pension by, in essence, judicially adding four years to the marriage.

¶ 31 The majority states, "However, Frank ignores the fact that his entitlement to the enhanced benefit is *derivative* of his entitlement to the pension in the first place." (Emphasis in original.) *Supra* ¶ 19. "While it is undoubtedly true that, absent his military service, Frank would not have been entitled to purchase the permissive military service credit, it is equally true that that right to enhance the overall pension benefit accrued to his benefit as a result of his participation in the pension program, which provided the enhancement to member[s] meeting the enhancement criteria." *Id.* Yes, if Frank did not have a pension, it could not be enhanced. Got that. Louise received her marital portion of the enhanced pension. That is a far cry from the majority's novel and unsupported proposition that Frank's four years of military credit is marital property. It

seems clear from the record that Frank could not have retired when he did absent his 11 years of Illinois State Police service prior to the marriage. Those years likewise enhanced his pension. Every year he served with the Illinois State Police enhanced his pension. Why not go for the gold and make those marital property, too?

¶ 32 Again, to conclude, Frank enhanced a nonmarital asset with marital funds. That does not make those 48 months of service marital property. See 750 ILCS 5/503(a)(2) (West 2016) ("[P]roperty acquired in exchange for property acquired before the marriage" is considered nonmarital property.); *id.* at § 503(c)(1)(A) (Where nonmarital property is commingled with marital property, it retains its nonmarital status so long as it retains its identity.); *In re Marriage of Henke*, 313 Ill. App. 3d 159 (2000) (noting that the legislature amended section 503(c) of the Illinois Marriage and Dissolution of Marriage Act in 1983 in order to reject the presumption at the time that commingled property was always transmuted to marital property). Nonetheless, Louise did receive a benefit from the enhancement because she is receiving her marital portion of the total, enhanced pension. That is an equitable apportionment of Frank's pension. Calling those 48 months that Frank served in the armed forces 20 years before the marriage marital property and increasing the marital portion of the entire pension is without precedent. That is, the 48 months of military service should not be included in the numerator of the equation determining the marital portion of the pension. Neither the law, equity, nor common sense supports the majority's decision.

¶ 33 I would affirm the trial court.

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

LOUISE ZAMUDIA, f/k/a Louise Ochoa,	)	
	)	
Plaintiff-Appellee,	)	
v.	)	No. 124676
	)	
FRANK OCHOA, JR.,	)	
	)	
Defendant-Appellant.	)	

The undersigned, being first duly sworn, deposes and states that on June 26, 2019, there was electronically filed and served upon the Clerk of the above court the Brief of Appellant. Service of the Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Paul A. Osborn
Paul A. Osborn

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Paul A. Osborn
Paul A. Osborn

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6/26/2019 5:39 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK