Dividing Retirement Assets and Stock and Other Executive Compensation in Divorce

November 12, 2020

1:00 p.m. – 3:00 p.m.

CT Bar Association

Webinar

CT Bar Institute, Inc.

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LAWYERS' PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

Competency:

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

Responsibility:

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

Mentoring:

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer’s conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

Dividing Retirement Assets, Stock and other Executive Compensation in Divorce

November 12, 2020

1:00 p.m. – 3:00 p.m.

I. Importance of Identifying All Retirement Assets/Executive Comp

1. Some/Most valuable assets available for division.

2. Malpractice Exposure

3. Obligation to list value on Financial Affidavit (Reville v. Reville, 312 Conn. 428, (2014))

4. Risk of opening judgment. See Reville above.

5. Failure to include proper language in separation agreement/ proposed orders creates post judgment problems.

    a. COLA - Loiseau v. Loiseau, No. FA064005144, 2008 WL 2553026, (Conn. Super. Ct. June 11, 2008)
    b. Gains/ Losses (Kremenitzer v. Kremenitzer, 81 Conn. App. 135 (2004))
    c. Pre-retirement survivor annuity
    d. Early retirement subsidy
    e. Disability benefits (Mickey v. Mickey, 292 Conn. 597 (2009))
    f. Loans – include or exclude in account value?

6. Difficulty of post-judgment change in property settlement.

    a. Stipulation – Only if both parties agree!
        - COLA
        - Gain/loss
    b. C.G.S. §52-212a (Open the judgment)
        - Within four months
        - Both parties confer jurisdiction
        - (Common law; not in statute)
            - Fraud
            - mutual mistake
            - duress

II. Categories of Plans

1. Private Employer Retirement Plans (Non-governmental):

    a. ERISA Plans
        - Traditional Defined Benefit vs. Cash Balance Defined Benefit
        - 401k
        - Profit Sharing/ESOP

    b. Non-qualified Retirement Plans (Also called Top Hat Plans)
        - Defined Benefit – often a mirror of qualified plan (SERP)
        - 401k (supplemental)
        - Deferred compensation plans (e.g. Bonus payments deferred)

    c. Executive compensation
        - Stock options
        - Restricted stock
        - Restricted stock units
        - Phantom stock

2. Governmental Plans (are NOT nonqualified plans!)

    a. Federal (Shared Payment)
        - FERS Pension
        - Survivor benefit
        - Thrift Savings Plan (TSP) - Civilian

    b. State (Shared Payment)
        - Regular State Employees
            - CSERS Conn State Employee Retirement System (Pension)
            - J&S may be enforced
            - 457 Deferred Compensation
        - Teachers
            - Teacher's Pension – (CSTRS)
            - J&S will be enforced
            - 403b (TSA- Tax Sheltered Annuity)

    c. Municipal (Shared or Separate Payment)
        - Pension (CMERS or local plan)
        - 457 Deferred Compensation

    d. Military (Shared Payment)
        - Defined Benefit Pension
        - Survivor Benefit Plan (SBP) – one- year rule
        - Thrift Savings Plan (TSP) - Military

3. IRAs

    a. Traditional
    b. Roth

III. Identification of Assets and Discovery Issues

1. Obligation to disclose on Financial Affidavit

    a. Monthly amount
    b. Present value
        - Financial affidavit instructions vs Reville
    c. Non-Vested Assets
    d. Non-Qualified Assets
    e. Clues to failure to disclose

2. Discovery tools:

    a. Benefit statement
        - Non-qualified plans often don't have statements
    b. Summary Plan Descriptions (SPD)
    c. My Rewards Statements
        - Example Fidelity or TPA
        - SEC website
    d. Stock option plans; restricted stock plans, bonus plans, phantom stock plans, etc.
    e. Use of subpoenas
    f. Request for Production
    g. Request to Admit

3. Entitlement to "executive compensation" plans is not just for executives.

    a. Definition of highly compensated employee – more employees covered than you may think.
    b. 401(a)(17) = $285,000 gets to a non-qualified benefit
    c. Microsoft example- stock options

IV. Drafting Separation Agreements and Proposed Orders

1. List every asset by correct name. List qualified assets separately from nonqualified assets.

2. Valuation date: Date of divorce vs. Date of retirement.

3. Separate Interest vs. Shared Interest.

4. Ways to Divide:

    a. Coverture -Thomasi v. Thomasi, 181 Conn. App. 822, 188 A.3d 743 (2018)
    b. Marital Fraction
    c. Subtraction Method. NOTE: ADVERSE CONSEQUENCE TO PAYOR!

5. Premarital assets are not automatically excluded from consideration. (Martin v. Martin, 101 Conn. App. 106, 111, 920 A.2d 340, 345(2007); Tracey v. Tracey, 97 Conn. App. 122 (2006); Ricciuti v. Ricciuti, 74 Conn. App. 120, 810 A.2d 818 (2002), cert. denied 262 Conn. 946, 815 A.2d 676 (2003); Kaluzka v. Kaluzka 2015 WL 3518711; Hillinski v. Hillinski, 2006 WL 2808245)

6. Non-vested assets may be divided. Bornemann v. Bornemann, 245 Conn. 508, 752 A.2d 978 (1998)

7. Important Provisions that Must be Addressed

    a. Defined benefit plans:
        - COLAs
        - Early retirement subsidies
        - Pre-retirement survivor benefits
            - Mandated J&S; life insurance (Shared Payment)
    b. Individual Account Plans (401k, 403b, 457)
        - Gains and losses
        - Loans

8. IRAs

    a. Find out if DRO required.
    b. If no DRO required, may still require other documents.

9. Drafting issues with executive compensation.

    a. Power of Attorney
    b. Important tax issues
    c. Language about vested vs non-vested.

V. Distribution and Tax Issues.

1. Private Employer Plans

    a. Pre-retirement survivor benefits
    b. Post-retirement survivor benefits

2. Governmental Plans

    a. Pre-retirement survivor benefits
    b. Post-retirement survivor benefits
    c. Employee contributions
    d. Life insurance

3. Timely filing of QDROs and DROs

    a. Participant dies – loss of benefits
    b. Participant commences benefit payments – must open judgment (Cifaldi v. Cifaldi, 118 Conn. App. 325 (2009)
    c. Participant takes money (e.g. 401(k))– loss of benefits

4. IRAs

    a. Direct rollovers
    b. Premature distribution penalty

5. Non-qualified Retirement Plans

    a. Paid to non-employee spouse via QDRO
    b. Paid via employee
        - Effective tax rate vs marginal rate
        - Tax true-up

6. Stock issues:
    a. Reporting on tax returns
    b. Vested vs. non-vested
    c. Revenue Rulings
    d. Power of Attorney
    e. Dividends/ Partial Shares
    f. Payment on death

VI. Questions and Answers

Faculty Biographies

Maria McKeon, McKeon Law Group LLC

Maria McKeon practices in the area of marital law as well as employment law, corporate law, mediation and arbitration. She has an extensive corporate law background having worked as in-house counsel for Aetna, Inc., and outside counsel for Prudential, Travelers, The Hartford and other corporations. Her background is in securities, tax, and investments. She also works with qualified and non-qualified employee benefits. Her work includes executive compensation benefits, including non-qualified and qualified pensions, 401K plans, tophat plans, stock options, restricted stock, phantom stock and other non-qualified plan benefits. She provides strategic advice regarding the tax impact of various benefits and structuring dissolution agreements to take advantage of strategic tax provisions to benefit clients. Maria is a graduate of UCONN (1979) and UCONN Law School (1987).

Linda A. Ursin, Law Offices of Linda A. Ursin LLC

Attorney Ursin is a sole practitioner in East Hampton, Connecticut since 2005. She has more than 30 years of experience in ERISA Law and focuses on matters related to employee retirement benefits, including federal, state and municipal plans, military plans, ERISA plans and nonqualified pensions. Attorney Ursin is trained in collaborative divorce and works with family law attorneys to help clients divide retirement assets, participating in prejudgment mediation to identify and divide pension benefits, 401(k), 403(b), and 457 accounts, as well as IRAs, nonqualified pensions and deferred compensation arrangements. Her work includes advising clients on pension and tax issues, drafting related separation agreement language, and preparing and filing qualified domestic relations orders (QDROs). She also handles benefit related post-judgment matters, negotiates benefit disputes and provides expert testimony.

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752 A.2d 978 (Conn. 1998)
245 Conn. 508
Marina BORNEMANN
v.
Richard BORNEMANN.
No. 15821.
Supreme Court of Connecticut
July 21, 1998

Argued Feb. 20, 1998.

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[245 Conn. 509] Lori Welch-Rubin, with whom was Jane Grossman, Certified Legal Intern, for appellant (defendant).

William H. Cashman, New Haven, for appellee (plaintiff).

Before CALLAHAN, C.J., and BORDEN, NORCOTT, KATZ and McDONALD, JJ.

KATZ, J.

The defendant, Richard Bornemann, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Marina Bornemann, awarding joint legal custody of the parties' minor child, ordering a [245 Conn. 510] property distribution pursuant to General Statutes § **46b-81**, [1] and awarding rehabilitative alimony and attorney's fees to the plaintiff. The issues to be decided on appeal are whether: (1) the trial court properly determined that certain stock options were available for equitable distribution pursuant to § **46b-81** although the options were not exercisable at the time of dissolution and the defendant's ability

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eventually to exercise the options on their respective maturity dates was contingent upon his adhering to the terms of an agreement with his former employer; (2) the trial court abused its discretion in awarding those stock options to the plaintiff; (3) the trial court abused its discretion in awarding rehabilitative alimony to the plaintiff; (4) the trial court abused its discretion in awarding attorney's fees to the plaintiff; and (5) the trial court properly awarded items to the defendant that neither party owned but as to which the defendant held a contractual [245 Conn. 511] right to purchase. Following the trial court's judgment, the defendant appealed to the Appellate Court. We transferred the appeal to this court pursuant to Practice Book § 4023, now Practice Book (1998 Rev.) § 65-1, and General Statutes § 51-199(c). We affirm the judgment of the trial court.

The facts that are relevant to this appeal are undisputed. The parties were married on December 17, 1990, when the plaintiff was twenty-two years of age and the defendant was thirty-four years of age. Both parties were college graduates at that time. The parties have one child, Maximillian Marshall Bornemann (Marshall), who was born prematurely on January 25, 1991, and as a result has experienced developmental delays and has special needs. Throughout most of the marriage, the defendant was employed full-time and he has extensive employment experience in the areas of management and lobbying. His most recently held position as a government affairs representative was obtained in July, 1992, and terminated in July, 1995. In that position, he earned approximately $128,000 per year in base compensation and received stock options and bonuses as additional compensation. The plaintiff's employment experience is limited. Prior to the birth of Marshall, the plaintiff briefly was employed full-time, at one point earning an annual salary of $27,000. After Marshall's birth, the plaintiff assumed the role of homemaker and primary caretaker of Marshall. Occasionally, she also worked on a part-time basis as a tennis instructor, tennis club membership recruiter, high school lacrosse coach, and mystery shopper, and volunteered at various charity events.

Approximately three and one-half years into their marriage, the parties separated. A two year pendente lite period followed, during which the parties shared responsibility for Marshall, each caring for him three and one-half days per week. The defendant resided in [245 Conn. 512] Washington, D.C., where his employment was based, from Tuesday through Saturday of every week while the plaintiff, on those days, occupied the family home in Madison with Marshall. From Saturday through Tuesday of every week, the defendant returned to the family home to stay with Marshall, while the plaintiff vacated the family residence and went to reside with a man with whom she had become involved during the marriage. During the pendente lite period, the defendant paid child support to the plaintiff in the amount of $250 per week, pendente lite alimony in the amount of $1070 per month and, in addition, paid all of the other household expenses, including the home mortgage and taxes, home maintenance expenses, credit card debt, and automobile expenses, and maintained health insurance for the family and a life insurance policy on himself.

In July, 1995, the defendant's employer, Kansas City Southern Industries (Southern Industries), decided to terminate the defendant's employment. The defendant and his employer entered into negotiations as to the terms of his termination, and eventually reached an agreement in December, 1995. The agreement was structured so as to preserve for the defendant the opportunity to exercise certain stock options that had been issued to him as part of his initial employment agreement. As part of that initial agreement, the defendant had received options to purchase 30,000 shares of Southern Industries' stock that became exercisable at the rate of 6000

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shares per year subject to the condition that the defendant continued to be employed with Southern Industries at the time the options became exercisable. In July, 1995, when negotiations concerning the termination agreement began, only the first two flights of options had become exercisable. The third flight became exercisable in October, 1995, prior to the actual signing of the agreement in December, 1995. The termination agreement provided that the defendant [245 Conn. 513] would remain employed through October 1, 1997, although beginning on January 1, 1997, his salary would be reduced to $1 per year. The agreement also required that the defendant not accept other employment if such employment would conflict with the interests of Southern Industries during the period covered by the agreement, that the defendant refrain from revealing any of Southern Industries' trade secrets, and that the defendant release any and all claims against Southern Industries arising Before the date of the agreement. In return, the defendant would continue to be an employee of Southern Industries through October 1, 1997, so that as the fourth and fifth flights of stock options became exercisable, he would be able to exercise them.

As of the date of the dissolution proceedings, the defendant had not yet succeeded in obtaining new employment. The plaintiff admitted that she had not seriously sought employment during the two year pendente lite period. She indicated, however, that she intended to seek full-time employment in the fall of 1997 when Marshall was scheduled to enter a full day program at school.

In dissolving the parties' marriage, the trial court determined that neither party was at fault for the demise of the marriage. Further, it found that while both parties presently were underemployed, only the plaintiff was underemployed as that term is used in the Child Support and Arrearage Guidelines. Regs., Conn. State Agencies § 46b-215a-1 et seq. [2] The court stated that, in setting the amount of child support to be paid by the defendant at $247 per week, it was deviating from the guidelines on [245 Conn. 514] the basis of the plaintiff's underemployment and on the basis of the equal access schedule under which the plaintiff and the defendant would have physical custody of Marshall for an equal amount of time each week. [3] The court awarded the family residence, the family automobile, all of the shares

of stock in Southern Industries currently owned by the defendant, and one half of the stock options associated with the first four flights of options to the plaintiff. In addition, the court ordered the defendant to pay $400 per week for eighteen months to the plaintiff as rehabilitative alimony, and $16,000 toward the plaintiff's attorney's fees. The court awarded the defendant the remaining fifth flight of stock options, one half of the first four flights of stock options, and the right to purchase the contents of his rented Washington, D.C. residence. Each party was also awarded miscellaneous other assets as shown on their respective financial affidavits, which included small bank accounts, to be retained free of any claim by the other.

I

The defendant first claims that the trial court's distribution of the "unvested" fourth and fifth flights of stock options--

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options that were not yet exercisable at the time of dissolution--was improper under § **46b-81**. Specifically, the defendant argues that the fourth and fifth flights of stock options were intended as compensation for future services to be performed by him after the date of dissolution and, therefore, were not marital assets available for distribution to the plaintiff. The plaintiff disputes the defendant's contention that the stock options were intended as compensation for future services, arguing that they were received as compensation for past services and constituted an asset of the [245 Conn. 515] marital estate. We conclude that, under the circumstances, the fourth and fifth flights of options properly were distributed as marital property.

Whether the fourth and fifth flights of stock options were properly characterized as marital property available for distribution to the plaintiff under § **46b-81** is a matter of statutory interpretation. Statutory interpretation is a matter of law and, therefore, our review is plenary. *Pandolphe's Auto Parts, Inc. v. Manchester,* 181 Conn. 217, 221-22, 435 A.2d 24 (1980). In interpreting statutes, our analysis is guided by well established principles of statutory construction. In construing statutes, "[o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature.... In seeking to discern that intent, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Internal quotation marks omitted.) *Conway v. Wilton,* 238 Conn. 653, 663, 680 A.2d 242 (1996).

A

As a preliminary matter, we note that this court has not previously considered whether stock options that have been granted but have not yet become exercisable at the time of a dissolution and can be exercised at a future date only if certain conditions are met by the employee to whom they were granted are a property interest encompassed within the meaning of property under § **46b-81**. Neither § **46b-81** nor any other closely related statute defines property or identifies the types of property interests that are subject to equitable distribution in dissolution proceedings. Our prior cases interpreting § **46b-81** indicate, however, that in enacting § **46b-81**, the legislature acted to expand the range of [245 Conn. 516] resources subject to the trial court's power of division, and did not intend that property should be given a narrow construction. *Simmons v. Simmons,* 244 Conn. 158, 165, 708 A.2d 949 (1998); *Krafick v. Krafick,* 234 Conn. 783, 797, 663 A.2d 365 (1995).

We considered the definition of property in Krafick in the context of determining whether vested pension benefits represented a type of property interest subject to distribution under § **46b-81**. In concluding that the vested pension benefits at issue were property that could be distributed under § **46b-81**, we reasoned that a broad definition of property is consistent with the purpose of § **46b-81** of recognizing that "marriage is, among other things, a shared enterprise or joint undertaking in the nature of a partnership to

which both spouses contribute--directly and indirectly, financially and nonfinancially--the fruits of which are distributable at divorce." (Internal quotation marks omitted.) *Krafick v. Krafick,* supra, 234 Conn. at 795, 663 A.2d 365. We also acknowledged, however, that our broad definition of property was not entirely without limitation, and that property under § **46b-81** includes only interests that are presently existing, as opposed to mere expectancies. *Rubin v. Rubin,* 204 Conn. 224, 230-31, 527 A.2d 1184 (1987). Therefore, we analyzed the contingent nature of the pension benefits at issue in order to determine whether the contingency to which the benefits were subject rendered them a mere expectancy. *Krafick v. Krafick,* supra, at

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797, 663 A.2d 365. We concluded that the pension benefits represented a presently existing interest because they created in their holder an enforceable contract right, and such a right represents more than a mere expectancy. Id. "The fact that a contractual right is contingent upon future events does not degrade that right to an expectancy." (Internal quotation marks omitted.) Id.

[245 Conn. 517] Employing the same type of an analysis in *Simmons v. Simmons,* supra, 244 Conn. at 173, 708 A.2d 949, we concluded that a medical degree earned by one spouse during a marriage is not property subject to distribution within the meaning of § **46b-81**. We found the medical degree at issue to be distinguishable from the unmatured pension benefits at issue in Krafick because the medical degree entailed no presently existing, enforceable right to receive income in the future. Id., at 167, 708 A.2d 949. Instead, the medical degree represented only an opportunity for the degree holder to earn income in the future. Id. In other words, the benefit to be derived from the medical degree represented a mere expectancy interest and, as such, was not distributable under § **46b-81**. Id., at 170, 708 A.2d 949.

Stock options are analogous to pension benefits in that they bestow a right upon the holder to receive a promised benefit under prescribed conditions. 2A Research Institute of America, Benefits Coordinator (1995) pp. 31, 101. Generally speaking, much like the right of a pension beneficiary to collect a pension once the particular conditions under which the pension was offered have been satisfied--typically, the attainment of a prescribed age and the fulfillment of a required number of years of service for the employer--the holder of a stock option possesses the right to accept, under certain conditions and within a prescribed time period, the employer's offer to sell its stock at a predetermined price. Id. Should the employer attempt to withdraw the offer, the employee has a "chose in action" in contract against the employer. See *Ross v. Ross,* 90 Md.App. 176, 183, 600 A.2d 891 (1992). Conversely, "[t]he defining characteristic of an expectancy is that its holder has no enforceable right to his beneficence." (Internal quotation marks omitted.) *Krafick v. Krafick,* supra, 234 Conn. at 797, 663 A.2d 365.

Despite the fact that the stock options at issue in this case had not yet "matured" or "vested" at the time of [245 Conn. 518] dissolution, the options created an enforceable right in the defendant. The termination agreement that the defendant entered into with his employer, Southern Industries, provided him with the right to remain classified as an employee until October, 1997, under certain conditions, so as to afford him the opportunity to exercise the fourth and fifth flights of stock options that remained unvested at the time of the agreement. Although the defendant's failure to abide by the conditions contained in the agreement would have constituted a breach of the agreement that might have resulted in forfeiture of the stock options, and although the fourth and fifth flights of options were not presently exercisable at the time of dissolution, the defendant's interest in the options amounted to more than a mere expectancy. Certainly, as long as the defendant abided by the terms of the termination agreement--i.e., as long as he did not accept employment that conflicted with the interests of Southern Industries, did not reveal any of Southern Industries' trade secrets during the operative period, and did not bring any

claim against Southern Industries for conduct proceeding the date of the agreement, or violate any of the other provisions of the agreement--he was entitled to exercise the options on their respective maturity dates, and would have had a cause of action for breach of contract if Southern Industries had refused to allow him to exercise the options. Such a presently existing, contractual interest is an interest in property that is encompassed within the broad definition of property under § **46b-81**. Id. Therefore, we conclude that the unvested stock options

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properly were distributed under that section.

Our conclusion is in accord with the conclusions of several other jurisdictions that have considered whether unvested stock options are property subject to distribution at the time of dissolution. The trend in other jurisdictions has been to treat unvested stock [245 Conn. 519] options as property on the basis that the options create a contractual right in the employee who holds them that is a valuable form of intangible property. [4] Analogously, jurisdictions that have not yet considered whether unmatured stock options are property have decided that similar sources of deferred income, such as pension benefits and trust interests, whether vested or not, constitute property subject to distribution in a dissolution action, provided that the contingent nature of the interest does not render the interest a mere expectancy. [5] In [245 Conn. 520] our view, the modern trend toward recognizing all forms of presently existing interests as property subject to distribution at the time of dissolution is well considered. The failure to interpret property broadly under § **46b-81** could, and likely would, result in substantial inequity in light of the numerous and varied forms of employment compensation that are in use today. Such a result clearly would be contrary to the purposes of § **46b-81** and would not be in keeping with the equitable nature of dissolution proceedings under that section.

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B

The defendant does not disagree with the conclusion that the unvested stock options can represent a property interest subject to distribution under § **46b-81**. Instead, he argues that, under the facts of this case, the fourth and fifth flights of options should not have been distributed because they were not entirely marital property. Specifically, he contends that the fifth flight of stock options was not a marital asset because he earned it entirely after the date of dissolution, and the fourth flight of stock options was only in part a marital asset, because he earned it in part subsequent to the dissolution. Therefore, he argues, the fifth flight was not available for distribution to the plaintiff, and the fourth flight was only partially available. We are not [245 Conn. 521] persuaded that the fourth and fifth flights of options were provided in exchange for services to be performed after the date of dissolution.

Although § **46b-81** (a) employs very broad language in providing for the distribution of property in a dissolution proceeding and grants the court authority to "assign to either the husband or wife all or any part of the estate of the other," this court previously has determined that "[§] **46b-81** (a) involves the assignment of marital assets." (Emphasis in original.) *Sunbury v. Sunbury,* 216 Conn. 673, 676, 583 A.2d 636 (1990). After the judgment of dissolution in Sunbury, the case was remanded for redetermination of the financial orders because the trial court had calculated the defendant husband's income incorrectly. The plaintiff wife appealed the new orders, arguing that the trial court should have valued the parties' assets as of the date of remand, rather than the date of dissolution. In the interim between the date of dissolution and the proceedings on remand, the value of the defendant husband's profit sharing plan had quadrupled. This court held that, under § **46b-81**, the date of dissolution is the appropriate date on which to value the parties' assets, and that "[t]o the extent that the plaintiff seeks consideration of a postdecree appreciation in the value of property, such appreciation, having

occurred after the termination of the marriage, is no longer a marital asset." Id., at 676, 583 A.2d 636.

Thus, Sunbury requires that in dissolution proceedings, the court must determine whether an asset was earned prior to or subsequent to the date of dissolution in order to determine whether the asset is marital property. This approach is common in other jurisdictions that have considered the extent to which unvested stock options represent marital property, for the reason that state statutes commonly distinguish between assets earned or acquired prior to separation or dissolution [245 Conn. 522] and assets earned or acquired subsequent to separation or dissolution. [6] In determining when unvested stock options were earned, or will be earned, the purpose for which the options were granted must be considered. Stock options may be awarded for a variety of purposes--including to compensate

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the employee for past or present services, or to provide an incentive for future service--that may or may not relate in whole or in part to the period of the marriage. Decisions from other jurisdictions that have performed such analyses are informative.

In *Pascale v. Pascale,* 140 N.J. 583, 660 A.2d 485 (1995), the court considered whether unvested stock options that were awarded to the wife in conjunction with a promotion she received shortly after the date on which she filed for divorce were marital property distributable to her spouse. In New Jersey, the filing date is the date on which the marital estate is fixed. The wife argued that the options were awarded as an incentive for her future service in the new position to which she was promoted. The court determined, however, that the unvested options were awarded as [245 Conn. 523] a result of, and as additional compensation for, past services that were rendered prior to the filing date. The court reasoned that the past services to which the options related, having been performed during the marriage, were the product of the joint effort of both parties to the marriage and, therefore, the benefits that flowed from those services constituted marital property.

In *In re Marriage of Short,* 125 Wash.2d 865, 890 P.2d 12 (1995), the husband claimed that unvested stock options granted to him by his employer as an incentive for future service were determined incorrectly to be community property. The court determined that options granted as an incentive for services to be rendered entirely after the date of dissolution do not constitute marital property because the acquisition of those options will be the result of the efforts of one spouse after the dissolution of the marriage. Id., at 875, 890 P.2d 12. Similarly, in In re Marriage of Miller, 915 P.2d 1314 (Colo.1996), the Colorado Supreme Court, following In re Marriage of Short, decided that "an employee stock option granted in consideration of future services does not constitute marital property until the employee has performed those future services"; id., at 1319; and concluded that the case had to be remanded for additional fact-finding as to whether the options were awarded for past or future services Before the options could be distributed. Id.

In In re Marriage of Miller, the court also recognized that options may be granted in part as compensation for past service and in part as an incentive for future service. Id., at 1318. Several other jurisdictions also have been called upon to classify unvested options that were granted for a purpose or purposes that did not correspond to services performed wholly during or wholly after the marriage. The majority of these courts have concluded that, under such circumstances, the [245 Conn. 524] unvested options contain elements of both marital and nonmarital property and, therefore, should be apportioned between marital and nonmarital assets through application of a "time rule" [7] or other method.

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[8] The New York Court of Appeals explained the approach it adopted, based on In re Marriage of Miller, as follows: "[T]he marital portion of stock plans is a function of four separate calculations: (1) the relative shares traceable to past and future services must be

determined; (2) any portions of the stock plans which are intended as compensation for past services are deemed marital property to the extent that the marriage coincides with the period of the titled spouse's employment up until the time of the grant; (3) of that portion intended as incentive for future services, the marital portion is [245 Conn. 525] determined by a time rule ... and (4) all portions found to be marital property may be divided between the spouses." *DeJesus v. DeJesus,* 90 N.Y.2d 643, 650, 687 N.E.2d 1319, 665 N.Y.S.2d 36 (1997).

By contrast, a minority of jurisdictions have adopted per se rules applicable to unvested stock options that do not require a fact specific analysis of when the options were earned. A few have decided that regardless of the purpose for which they were granted, stock options that are not exercisable at the end of a marriage are not marital property; see *Hann v. Hann,* 655 N.E.2d 566 (Ind.App.1995); *Hall v. Hall,* 88 N.C.App. 297, 363 S.E.2d 189 (1987); *Ettinger v. Ettinger,* 637 P.2d 63 (Okla.1981); and others have decided that stock plans granted during a marriage are wholly marital property. See *Green v. Green,* 64 Md.App. 122, 494 A.2d 721 (1985); *Smith v. Smith,* 682 S.W.2d 834 (Mo.App.1984); *Chen v. Chen,* 142 Wis.2d 7, 416 N.W.2d 661 (App.1987).

We are persuaded that the majority approach that apportions unvested stock options between marital and nonmarital property according to when the options were earned provides the most appropriate method of classification under § **46b-81**. The majority approach is analogous to the approach adopted in Sunbury wherein this court considered how and when the asset at issue was earned in classifying it as nonmarital property. *Sunbury v. Sunbury,* supra, 216 Conn. at 676-77, 583 A.2d 636. In addition, by allowing for apportionment of the options between marital and nonmarital property based upon the contributions of each spouse toward their acquisition, the majority approach advances the equitable purpose underlying § **46b-81** of recognizing the contributions of both spouses in a joint enterprise.

In this case, the plaintiff and the defendant disagree as to when the fourth and fifth flights of stock options were earned. The plaintiff contends that the options [245 Conn. 526] were earned during the marriage when the defendant performed employment services as a government affairs representative and, therefore, contends that the options are marital property in their entirety. According to the plaintiff, the defendant's termination agreement is evidence that the stock options were intended solely as additional compensation for past services rather than as consideration for future services, because, under the termination agreement, the defendant's prospective responsibilities represented only contingencies, not affirmative obligations to be performed after the date of dissolution. The defendant argues that only the fourth flight of stock options contained an element of marital property, and that the fifth flight was earned entirely after the dissolution. Specifically, the defendant contends that he was allowed to

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retain the opportunity to exercise the fourth and fifth flights of stock options in exchange for his promise to abide by the terms of the termination agreement--including the promise not to accept employment that conflicts with the interests of Southern Industries and the promise not to divulge Southern Industries' trade secrets--which he was to perform in part prior to and in part subsequent to the dissolution. Therefore, he argues, that only a portion of the fourth flight of options and none of the fifth flight was available for distribution to the plaintiff. For the reasons that follow, we agree with the plaintiff's argument, and conclude that the trial court properly determined that the fourth and fifth flights of stock options represented marital property in their entirety.

The trial court did not state explicitly that it determined the fourth and fifth flights of options to be marital property. Implicit in its decision to distribute the options without identifying any portion of them as after-acquired property, however, is its conclusion that the options were marital property in their entirety. Because [245 Conn. 527] we have already concluded that the

options would constitute marital property if they were earned during the marriage, we review whether the trial court properly could have concluded that the options were earned entirely during the marriage. Our review is guided by the well established principle that "[t]he resolution of conflicting factual claims falls within the province of the trial court ... [and][t]he trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole." (Internal quotation marks omitted.) Herbert S. Newman & Partners v. CFC Construction Ltd. Partnership, 236 Conn. 750, 762, 674 A.2d 1313 (1996).

The evidence Before the trial court consisted of the following: (1) undisputed evidence demonstrating that the fourth and fifth flights of options were granted to the defendant during the marriage; (2) undisputed evidence demonstrating that the termination agreement, which allowed him to retain the options, was entered into during the marriage; (3) undisputed evidence demonstrating that the performance of the terms of the agreement commenced during the marriage; (4) undisputed evidence demonstrating that the defendant was required to adhere to the terms of the termination agreement for approximately fifteen months beyond the date of dissolution of the marriage; and (5) undisputed evidence that, under the terms of the agreement, the defendant ceased to have any other employment related responsibilities after December, 1995.

The trial court also had Before it a copy of the defendant's termination agreement. That agreement, in substance, contained the following mutual covenants: (1) the defendant and his employer mutually agreed to release each other from any and all claims and causes of action of any kind arising Before the date of the agreement; (2) the defendant promised not to disclose [245 Conn. 528] or use any trade secret of the employer; (3) the defendant promised not to obtain any employment that conflicts with the interests of the employer; (4) the employer promised to continue the defendant's employment in a technical sense until October 1, 1997, although after December 31, 1996, that employment would be compensated in the amount of $1 for the entire period from January 1, 1997, through October 1, 1997, without life, health, or dental insurance benefits, but with the opportunity to qualify for profit sharing and stock option benefits; (5) the defendant promised to continue such employment; (6) the defendant acknowledged that his position as vice president of government affairs terminated in July of 1995, although his employment continued after that date; and (7) the parties mutually agreed to cause no injury to the other party or that party's reputation or in any way harm, embarrass, or reflect negatively upon the

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other party, or damage the other party's business in any way.

On the basis of the evidence, the trial court properly determined that the fourth and fifth flights of options constituted marital property in their entirety. [9] Although the defendant was subject under the agreement to certain restrictions beyond the date of dissolution, the defendant alone had complete control over whether he would abide by those restrictions. The options could not be unilaterally withdrawn by Southern Industries. Furthermore, the defendant did not have to perform any affirmative acts in order to retain the options, but only had to refrain from certain actions for a limited period. Under the circumstances, the restrictions qualitatively were more closely analogous to other contingencies typically associated with deferred benefits, such as the requirement that a pension beneficiary [245 Conn. 529] attain a certain age Before the benefits will be paid or the requirement that under a trust the beneficiary be alive at the time when the trust corpus is to be distributed, than they were to future services. Such contingencies do not provide the consideration for which the deferred benefits are granted, and are not indicative that the benefits will be earned in part after the date of dissolution. See *In re Marriage of Grubb,* 745 P.2d 661 (Colo.1987) (where husband's right to receive pension benefits was contingent on his continued employment and

survival to retirement age court considered benefits to have already been earned; contingency affected only present value of benefits); *Moore v. Moore,* 114 N.J. 147, 553 A.2d 20 (1989) (cost of living increases associated with pension are property accrued during marriage because they relate to past contributions rather than to future personal efforts of beneficiary). Indeed, in this case, the very fact that the agreement allowing the defendant to retain the options was a termination agreement requiring no further services indicates that the options were earned by the defendant during the marriage when he provided past services and that it was in exchange for those services that the defendant was paid his salary through December, 1996, and was offered the opportunity to retain the options. [10] Therefore, we conclude that the trial court properly determined that the fourth and fifth flights of stock options were distributable under § **46b-81**. [11]

[245 Conn. 530] II

The defendant next claims that, even if the fourth and fifth flights of stock options represented marital property subject to distribution under § **46b-81**, the trial court nevertheless abused its discretion when it distributed a portion of those options to

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the plaintiff. The defendant's argument is twofold. First, the defendant contends that there was insufficient evidence Before the trial court to allow it to value the fourth and fifth flights of options. Second, the defendant contends that even if the court properly could have valued the fourth and fifth flights of options, the equities of the case precluded it from awarding any portion of those options to the plaintiff. Although the plaintiff does not address the issue of valuation, she contended at oral argument that the defendant's financial affidavit contained enough information to allow the court to estimate the value of the fourth and fifth flights of options. The plaintiff also disputes that the fourth and fifth flights of options were the product of the defendant's efforts alone and argues that the equities of the case entitled her to a share of those benefits. We conclude that the record contained enough evidence to allow the court to estimate the value of the fourth and fifth flights of stock options, and that it was not inequitable for the court to award a portion of those options to the plaintiff.

"With respect to the financial awards in a dissolution action, great weight is given to the judgment of the trial court because of its opportunity to observe the parties and the evidence." (Internal quotation marks omitted.) *Holley v. Holley,* 194 Conn. 25, 29, 478 A.2d 1000 (1984). [245 Conn. 531] "Our function in reviewing such discretionary decisions is to determine whether the decision of the trial court was 'clearly erroneous in view of the evidence and pleadings in the whole record.' Practice Book § 4061 [now Practice Book (1998 Rev.) § 60-5]." Turner v. Turner, 219 Conn. 703, 709, 595 A.2d 297 (1991). In other words, "judicial review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the [trial] court correctly applied the law and could reasonably have concluded as it did." (Internal quotation marks omitted.) *Holley v. Holley,* supra, at 29, 478 A.2d 1000. In making those determinations, we allow "every reasonable presumption ... in favor of the correctness of [the trial court's] action." (Internal quotation marks omitted.) *Charpentier v. Charpentier,* 206 Conn. 150, 154-55, 536 A.2d 948 (1988).

A

We first address the defendant's claim that the evidence in the record was insufficient to allow the court to value the fourth and fifth flights of options. In distributing the assets of the marital estate, the court is required by § **46b-81** to consider the estate of each of the parties. Implicit in this requirement is the need to consider the economic value of the parties' estates. The court need not, however, assign specific values to the parties' assets. *Burns v. Burns,* 41 Conn.App. 716, 721, 677 A.2d 971 (1996); *Puris v. Puris,* 30 Conn.App. 443, 450, 620 A.2d 829 (1993); *Oneglia v. Oneglia,* 14 Conn.App. 267, 271-72, 540 A.2d 713 (1988). In assessing the value of

the assets that comprise the marital estate, the trial court functions as the trier of fact. "The trial court has the right to accept so much of the testimony ... as [it] finds applicable...." Turgeon v. Turgeon, 190 Conn. 269, 274, 460 A.2d 1260 (1983). "[It] arrives at [its] own conclusions by weighing the opinions of the [245 Conn. 532] appraisers, the claims of the parties, and [its] own general knowledge of the elements going to establish value, and then employs the most appropriate method of determining valuation." Id. In selecting and applying an appropriate valuation method, the trial court has considerable discretion. *Krafick v. Krafick,* supra, 234 Conn. at 799, 663 A.2d 365. The trial court's findings will be overturned only if it "misapplies, overlooks, or gives a wrong or improper effect to any test or consideration which it was [its] duty to regard." (Internal quotation marks omitted.) *Turgeon v. Turgeon,* supra, at 274, 460 A.2d 1260. "As with other questions of fact, unless the determination by the trial court is clearly erroneous, it

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must stand." Id., at 275-76, 460 A.2d 1260; *Kaplan v. Kaplan,* 186 Conn. 387, 392, 441 A.2d 629 (1982).

In this case, the defendant submitted very little evidence pertaining to the value of the fourth and fifth flights of stock options, and the plaintiff submitted no such evidence. Specifically, the record contained: (1) the financial affidavits of each of the parties; (2) a copy of the defendant's termination of employment agreement; and (3) the testimony of the parties as to their knowledge of the stock options.

The stock options were all either owned or to be acquired on a future date by the defendant. As a result, the plaintiff did not list any of the stock options as an asset on her financial affidavit. The defendant's affidavit included the stock options under the section designated for deferred compensation plans. The defendant listed the sum of $250,128 under the section designated for the total value of all deferred compensation, and included the following description under the remainder of the section: "ESOP--stock options vest at end of each year for 5 years if the employee remains w/ co.--30K shares total--3/5 vested for 18K shares at $42.66 (N.Y.SE) purchased at $19.50 per contract--18K X $23.16 = $416,880.00 less capital gains--vested options [245 Conn. 533] have not yet been exercised--$250,128.00." This entry provided a value and corresponding method of calculation only for the first three flights of stock options that had already vested as of the time of trial. Although the description acknowledged that the defendant possessed other options that had not yet vested, it did not attempt to assign a present value to the defendant's interest in those options.

At trial the defendant's attorney did not question him directly about the value of the fourth and fifth flights of stock options. The plaintiff's attorney did elicit testimony from the defendant regarding the stock options. Specifically, the defendant was asked about the vesting dates of all of the options and whether the defendant considered all of his assets, including the options, to have been earned during the marriage. In response to the questioning, the defendant testified as follows: "The house was not earned during the course of the marriage, but the other assets--it depends on how you look at it. For instance, the stock options only triggered at a certain date. By the time [the plaintiff] filed for dissolution only one fifth of the original 30,000 share grant had triggered. I've never known in my own mind--or recall a nonavailable asset that is a nonvested stock option--whether you call that an option or not. It's not like you can go to the bank and spend it or call up somebody and say 'give me my stock' or 'I want to trade that today.' I've never known how to consider that in my own mind." The plaintiff's attorney also inquired about the terms of the termination agreement under which the options were to be received. The defendant testified: "I have no ongoing duties [with Southern Industries]. I have a severance agreement.... I am allowed to remain on the payroll at a rate of $1 per year until October 1, 1997.... So I can technically be called an employee, and the last flight of my stock [245 Conn. 534] options can vest, which can only happen if I am an employee."

The court itself inquired about the stock options as follows: "Mr. Bornemann, you indicated that you are going to stay on at $1 a year so that some stock options will vest ... by October 1, 1997.... [Y]ou said those stock options are not your ESOP [employee stock ownership plan] options because those options are five years in options and on a deferred [compensation] plan ... but you also told [the plaintiff's attorney] that this [affidavit] includes everything you have, and [there are] no stock options listed anywhere else on your financial. Did you just not list them ... ?" In response to the court's questioning, the defendant explained that the stock options listed on his financial affidavit were the same options that were

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referred to in his termination agreement, and were improperly labeled as "ESOP" options. In addition, two days Before the court issued its ruling, the defendant testified that the stock had closed on the previous day at "[f]orty and an eighth, down two."

Although the evidence Before the court as to the value of the fourth and fifth flights of stock options certainly could have been provided in much greater detail and with much greater precision--perhaps by an expert witness who could have offered projections as to the present value of the fourth and fifth flights of options--neither party chose to introduce such evidence. The defendant, as the beneficiary of the contract under which the right to exercise the options was granted, was required to list and did list the options on his financial affidavit. Practice Book (1998 Rev.) § 25-30, formerly § 463. The defendant cannot claim that he lacked notice that the fourth and fifth flights of options might be distributed by the court. The fact that he held a contractual right to those options was part of the record in the case and his right to exercise the options [245 Conn. 535] was explored during the proceedings. That he opted not to provide an estimate of the present value of the fourth and fifth flights of options, but chose instead to indicate in his testimony that he did "not know how to consider" the unvested options and imply by his failure to value them that the options were worth nothing, is not a matter that he can complain about at this late date. The court was not required to accept his implicit indication that the unvested shares were worth nothing or were not capable of valuation in light of the other evidence to the contrary, namely, the termination agreement which placed within the defendant's control the ability eventually to exercise the unvested options, the fairly imminent dates on which the fourth and fifth flights of options would vest, the contract price at which the options could be exercised, and the price at which the stock was currently trading. Instead, on the basis of that evidence, the court reasonably could have estimated the present value of the fourth and fifth flights of options.

In Krafick, we noted that "although not expressly required by statute, a trial court, when utilizing a method to ascertain the value of a [deferred benefit], should reach that value on the record. Casting the judgment in specific amounts will make the result more comprehensible for the litigants and will facilitate appellate review as often as such review may become necessary." (Internal quotation marks omitted.) *Krafick v. Krafick,* supra, 234 Conn. at 804, 663 A.2d 365. In the present case, our intention is not to indicate that we are retreating from that advice. Rather, we determine only that when neither party in a dissolution proceeding chooses to introduce detailed information as to the value of a given asset, neither party may later complain that it is not satisfied with the court's valuation of that asset. Both parties in a dissolution proceeding are required to itemize all of their assets in a financial affidavit and to [245 Conn. 536] provide the court with the approximate value of each asset. Practice Book (1998 Rev.) § 25-30, formerly § 463. If the parties fail to do so, the equitable nature of the proceedings precludes them from later seeking to have the financial orders overturned on the basis that the court had Before it too little information as to the value of the assets distributed. In this case, it was not a misapplication of the law for the trial court to have valued the asset on the basis of the scant evidence provided and to have distributed the

asset on the basis of that valuation. The fact that neither party advocated a sophisticated method of valuation nor provided any particularly detailed or precise evidence of value in regard to the fourth and fifth flights of stock options did not preclude the trial court from equitably distributing those options.

B

The second element of the defendant's claim that the trial court abused its discretion

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in distributing the fourth and fifth flights of stock options is that the equities of the case precluded the distribution of any portion of those assets to the plaintiff. Specifically, the defendant argues that because the plaintiff did not contribute to the defendant's negotiation of the termination agreement that allowed him to retain the opportunity eventually to exercise the fourth and fifth flights of options, and because the plaintiff did not contribute to his performance of the terms of that agreement, she was not entitled to share in the benefits of that agreement. The basis of the defendant's claim is that he alone earned the fourth and fifth flights of stock options after the date of his separation from the plaintiff.

Although § **46b-81** indicates that it is the date of dissolution, rather than the date of separation, on which the parties marital assets are to be determined; *Sunbury v. Sunbury,* supra, 216 Conn. at 676, 583 A.2d 636; [245 Conn. 537] the date of separation may be of significance in determining what is equitable at the time of distribution. In distributing property pursuant to § **46b-81**, the court is instructed to consider the contribution of each spouse in the acquisition, preservation and appreciation of the marital estate. After the date of separation, it is not difficult to conceive that one spouse may acquire a particular asset without any contribution from the other spouse.

In this case, the plaintiff filed for divorce in January, 1994, and the parties officially separated in July, 1994. Beginning in August, 1994, the parties assumed equal responsibilities with respect to Marshall's care, each acting as caretaker for three and one-half days per week. The defendant argues that from that point in time onward, the plaintiff's role as family homemaker and primary caretaker of Marshall came to an end, such that the plaintiff no longer contributed to the defendant's ability to fulfill his employment responsibilities. As a result, the defendant argues, by the time his employment as government affairs representative terminated in July, 1995, and he had negotiated the terms of his termination agreement, any contributions by the plaintiff to his employment accomplishments had long since ceased. The defendant contends that, as a result, there was no basis for awarding the plaintiff one half of the fourth flight of stock options, and that the fourth and fifth flights of options should have been awarded to the defendant in addition to an equitable share of the remaining assets because they were the product of his efforts alone.

Although it certainly would have been within the court's discretion to decide that the plaintiff had not contributed to the acquisition, preservation or appreciation of the fourth and fifth flights of stock options under the particular circumstances, we cannot say that it was an abuse of discretion for the court not to have reached [245 Conn. 538] that conclusion. As we have already discussed, the court reasonably determined, based upon the evidence in the record, that those flights of options were awarded as compensation for past services performed prior to the defendant's termination. The court also reasonably could have determined that the past services performed by the defendant between July, 1994, the date of separation, and July, 1995, the date of termination, had been made possible by the plaintiff's earlier contributions as homemaker and primary caretaker of Marshall and that, therefore, she was entitled to share in the resulting benefits. In any event, although the court was required to consider the contributions of each spouse toward the acquisition, preservation or appreciation of their estates, this consideration was not the controlling factor. In distributing property in a

dissolution proceeding, "[t]he court must consider all of [the statutory] criteria." (Emphasis in original.) *Caffe v. Caffe,* 240 Conn. 79, 82, 689 A.2d 468 (1997). "[N]o single criterion is preferred over the others, and the court is accorded wide latitude in varying the weight placed upon each

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item under the peculiar circumstances of each case." (Internal quotation marks omitted.) *Sunbury v. Sunbury,* 210 Conn. 170, 174, 553 A.2d 612 (1989); see *Valante v. Valante,* 180 Conn. 528, 531, 429 A.2d 964 (1980). Therefore, we conclude that the trial court's award of one half of the fourth flight of stock options to the plaintiff did not constitute an abuse of discretion.

III

The defendant next claims that the trial court abused its discretion in awarding rehabilitative alimony to the plaintiff. Specifically, the defendant contends that no rehabilitative alimony was warranted because the plaintiff had the opportunity, during the two year long period of separation throughout which she received pendente lite support, to search for employment and attain self-sufficiency, and that in light of the plaintiff's college [245 Conn. 539] education and experience in both paid employment and charitable service the award of an additional eighteen months of alimony was unreasonable. The plaintiff argues, conversely, that the court's decision to award a limited amount of rehabilitative alimony was reasonable in light of the fact that she had not been employed full-time in several years, had acquired only limited employment experience after graduating from college Before marrying, giving birth to a child, and leaving her employment to become a homemaker, and during the two year period of separation she had continued to work part-time and as a volunteer and to provide 50 percent of the care for the parties' special needs child. We conclude that the trial court's decision did not constitute an abuse of discretion.

Section 46b-82 governs awards of alimony. That section requires the trial court to consider "the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section **46b-81**, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability of such parent's securing employment" in ordering either party to pay alimony to the other. In awarding alimony, "[t]he court must consider all of these criteria.... It need not, however, make explicit reference to the statutory criteria that it considered in making its decision or make express findings as to each statutory factor." (Citation omitted; emphasis in original.) *Caffe v. Caffe,* supra, 240 Conn. at 82-83, 689 A.2d 468. In particular, rehabilitative alimony, or time limited alimony, is alimony that is awarded primarily for the purpose of allowing the spouse who receives it to obtain further education, training, or other skills necessary to attain self-sufficiency. *Cooley v. Cooley,* 32 Conn.App. 152, 164-65, 628 A.2d 608, [245 Conn. 540] cert. denied, 228 Conn. 901, 634 A.2d 295 (1993). Rehabilitative alimony is not limited to that purpose, however, and there may be other valid reasons for awarding it. *Roach v. Roach,* 20 Conn.App. 500, 506, 568 A.2d 1037 (1990).

In this case, the trial court's opinion demonstrates that the court considered the statutory criteria when it decided to award rehabilitative alimony to the plaintiff and that it awarded the alimony for a valid reason--namely, to allow the plaintiff to obtain employment that would lead to self-sufficiency. Indeed, the record contains explicit references to virtually all of the statutory criteria. The court announced its decision to award alimony as follows: "Let this court emphasize that this is a short marriage. It has been [in pendente lite status] for two years now and the court has already made findings about working abilities. The court orders commencing September 1, 1996, [the defendant] to pay [the plaintiff] alimony in the amount of $400 per week for eighteen months to sooner terminate on either party's death, [the plaintiff's] remarriage

or

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her living with another man.... This is a very short window of opportunity for [the plaintiff] to [obtain] employment...."

The record demonstrates that, in addition to the criteria that the court referred to in the preceding statement, the court had already considered the remaining statutory criteria. The record contains references to the court's determination that neither party was at fault for the breakdown of the marriage, and contains findings that the court had made as to the age of the parties, the family health concerns pertaining to Marshall, the station in life that the parties had achieved as well as the station in life to which they had aspired, their present employability, employment history and employment skills, the amount and sources of their respective [245 Conn. 541] incomes, the estate and needs of each of the parties, and the desirability of each party securing employment in light of the arrangement awarding joint physical custody. Furthermore, distribution of the parties' property was announced at the same time and all of the financial orders appear to have been fashioned as an integrated whole. The court's statement demonstrates that it took the two year period of separation into account in assessing the plaintiff's needs in achieving self-sufficiency. The trial court's conclusion that rehabilitative alimony was appropriate will not be disturbed unless it resulted from an incorrect application of the law or is not reasonably supported by the record. In this case, the record supports the correctness of the court's application of the law as well as the reasonableness of the court's decision. We conclude, therefore, that the award of rehabilitative alimony did not constitute an abuse of discretion.

IV

The defendant also claims that the trial court abused its discretion in awarding attorney's fees to the plaintiff. The defendant contends that the award was improper because: (1) in awarding the attorney's fees, the court failed to find explicitly that denial of an award would undermine its other financial orders; (2) the plaintiff had ample liquid funds with which to pay her own attorney's fees; and (3) the effect of the award is to reward the plaintiff for misusing funds that were previously ordered by the court to be set aside for attorney's fees and costs. The plaintiff disputes that she had ample liquid funds with which to pay her own attorney's fees and contends that the court was not required to make an explicit finding that the denial of an award of attorney's fees would undermine the other financial awards Before awarding attorney's fees on the basis of a party's lack of liquid funds with which to pay their own fees. The plaintiff also argues that the court took [245 Conn. 542] into consideration that both parties had violated the pendente lite orders in misusing funds designated for attorney's fees and, therefore, the award of attorney's fees was not improper on that basis.

General Statutes § 46b-62 [12] governs the award of attorney's fees in dissolution proceedings. That section provides in part that "the court may order either spouse ... to pay the reasonable attorney's

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fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82...." The criteria set forth in § 46b-82 are "the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section **46b-81**, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability of such parent's securing employment." In making an award of attorney's fees under this section, "[t]he court is not obligated to make express findings on each of these statutory criteria." *Weiman v. Weiman,* 188 Conn. 232, 234, 449 A.2d 151 (1982).

[245 Conn. 543] "Courts ordinarily award

counsel fees in divorce cases so that a party ... may not be deprived of [his or] her rights because of lack of funds.... Where, because of other orders, both parties are financially able to pay their own counsel fees they should be permitted to do so." (Internal quotation marks omitted.) *Koizim v. Koizim,* 181 Conn. 492, 501, 435 A.2d 1030 (1980). An exception to the rule announced in Koizim is that an award of attorney's fees is justified even where both parties are financially able to pay their own fees if the failure to make an award would "undermine its prior financial orders...." (Internal quotation marks omitted.) *Eslami v. Eslami,* 218 Conn. 801, 820, 591 A.2d 411 (1991). "Whether to allow counsel fees [under § 46b-82], and if so in what amount, calls for the exercise of judicial discretion." (Internal quotation marks omitted.) Holley v. Holley, supra, 194 Conn. at 33-34, 478 A.2d 1000. " 'An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did.' " Unkelbach v. McNary, 244 Conn. 350, 374, 710 A.2d 717 (1998), quoting *Cook v. Bieluch,* 32 Conn.App. 537, 544, 629 A.2d 1175, cert. denied, 228 Conn. 910, 635 A.2d 1229 (1993).

In this case, the court ordered the defendant to pay $16,000 toward the plaintiff's attorney's fees, which amounted to $27,000 in total. The court ordered the award as part of a laundry list of financial orders and did not explain why it was awarding attorney's fees. The other financial orders awarded to the plaintiff the family residence in Madison along with some of its contents, the family automobile, certain shares of stock and stock options, and miscellaneous other assets, such as the $500 in her checking account. The plaintiff was also awarded $400 per week in alimony for eighteen months, and the defendant was ordered to pay her $247 [245 Conn. 544] per week in child support and to maintain various insurance policies for the benefit of Marshall.

The defendant relies on *Maguire v. Maguire,* 222 Conn. 32, 608 A.2d 79 (1992), for the proposition that it constitutes an abuse of discretion for the court to award attorney's fees when both parties are financially able to pay their own fees without finding explicitly in the record that the award is justified because without it the court's other financial orders would be undermined. In Maguire, this court reversed an award of attorney's fees because both parties possessed substantial liquid assets and were financially able to pay their own attorney's fees and the court had not made a finding that the award was necessary in order to avoid undermining its other financial awards. Id., at 44-45, 608 A.2d 79. An award of $50,000 in attorney's fees had been issued to the plaintiff wife, who possessed more than $500,000 in liquid assets even Before the financial award associated with the dissolution was made, and the financial orders divided the marital estate, which was valued in excess of $7,000,000, equally between the parties. In overturning the award, this court stated that "there is nothing in the record that would support ... a finding" that the failure to award attorney's fees would undermine the

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court's other financial orders. Id., at 45, 608 A.2d 79.

The present case is distinguishable from Maguire because here the record would support a finding by the trial court either that the plaintiff lacked sufficient liquid assets with which to pay her own attorney's fees, or that the failure to award attorney's fees would have undermined its other financial orders. In addition to owing $27,000 to her own attorneys, the plaintiff was ordered to pay one half of the attorney's fees for the parties' minor child, and one half of the fees for two expert witnesses. Of the significant assets that the plaintiff received in the distribution, only the shares of stock would have been easily convertible to liquid form; the [245 Conn. 545] family residence and automobile were not liquid assets, the first three flights of stock options had not yet been exercised, and the fourth flight was not yet exercisable as of the date of dissolution. Further, the shares of stock owned outright that were awarded to the plaintiff were not worth an

amount sufficient to cover all of the fees owed. As a result, the court reasonably could have concluded that unless it awarded attorney's fees to the plaintiff, its other financial orders would be undermined, or that the plaintiff lacked the liquidity necessary to enable her to pay her own fees. We conclude, therefore, that the award of attorney's fees did not constitute an abuse of the court's discretion.

V

The defendant's final claim is that the trial court improperly awarded to him as part of the property distribution items that neither he nor the plaintiff owned but as to which the defendant held only a contractual right to purchase. In light of our conclusion in part I of this opinion that contractual rights represent intangible property interests that are subject to distribution under § **46b-81**, we conclude that the right to purchase the contents of the defendant's rented apartment was property subject to distribution under § **46b-81** and, therefore, was properly distributed by the trial court.

The judgment is affirmed.

In this opinion CALLAHAN, C.J., and BORDEN and NORCOTT, JJ., concurred. [13]

McDONALD, J., dissenting.

I dissent from the release of this opinion.

The listing of the justices at the beginning of the majority opinion would indicate that I fully participated in this decision and the majority opinion notes [1] that I [245 Conn. 546] will file an opinion at a later time. [2] THIS OPINION WAS Released, however, Before i was able to carEfully and completely consider the issues and fully express my views.

I believe no opinion should be released Before each justice has an opportunity to consider and decide the issues and compose an opinion. I believe I have an obligation to consider the views of each justice.

As a member of the court of last resort, wielding tremendous power to affect the lives and future of Connecticut's people, I believe this is my constitutional and statutory duty.

Notes:

[1] General Statutes § **46b-81** provides: "Assignment of property and transfer of title. (a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the Superior Court may assign to either the husband or wife all or any part of the estate of the other. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either the husband or the wife, when in the judgment of the court is the proper mode to carry the decree into effect.

"(b) A conveyance made pursuant to the decree shall vest title in the purchaser, and shall bind all persons entitled to life estates and remainder interests in the same manner as a sale ordered by the court pursuant to the provisions of section 52-500. When the decree is recorded on the land records in the town where the real property is situated, it shall effect the transfer of the title of such real property as if it were a deed of the party or parties.

"(c) In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party, except as provided in subsection (a) of section 46b-51, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

[2] Under the Child Support and Arrearage Guidelines, the court may deviate from the guidelines based upon a parent's earning capacity if the court determines that the parent's earning capacity is a financial resource that could be used for the benefit of the child or for meeting the parent's own needs. Regs., Conn. State Agencies § 46b-215a-3 (b)(1)(B).

[3] Another basis for deviation from the Child Support and Arrearage Guidelines is a shared custody arrangement where neither parent has primary custody of the minor child or children. Regs., Conn. State Agencies § 46b-215a-3 (b)(6)(A).

[4] The following jurisdictions have decided that stock options that are not presently exercisable at the time of dissolution constitute marital property subject to equitable distribution: Richardson v. Richardson, 280 Ark. 498, 659 S.W.2d 510

(1983); In re Marriage of Hug, 154 Cal.App.3d 780, 201 Cal.Rptr. 676 (1984); In re Marriage of Miller, 915 P.2d 1314 (Colo.1996); In re Marriage of Frederick, 218 Ill.App.3d 533, 161 Ill.Dec. 254, 578 N.E.2d 612 (1991); In re Marriage of Moody, 119 Ill.App.3d 1043, 75 Ill.Dec. 581, 457 N.E.2d 1023 (1983); Goodwyne v. Goodwyne, 639 So.2d 1210 (La.App.1994); *Green v. Green,* 64 Md.App. 122, 494 A.2d 721 (1985); Lomen v. Lomen, 433 N.W.2d 142 (Minn.App.1988); Salstrom v. Salstrom, 404 N.W.2d 848 (Minn.App.1987); *Smith v. Smith,* 682 S.W.2d 834 (Mo.App.1984); Pascale v. Pascale, 140 N.J. 583, 660 A.2d 485 (1995); Callahan v. Callahan, 142 N.J.Super. 325, 361 A.2d 561 (1976); Garcia v. Mayer, 122 N.M. 57, 920 P.2d 522 (App.1996); DeJesus v. DeJesus, 90 N.Y.2d 643, 665 N.Y.S.2d 36, 687 N.E.2d 1319 (1997); In re Marriage of Powell, 147 Or.App. 17, 934 P.2d 612 (1997); Dietz v. Dietz, 17 Va.App. 203, 436 S.E.2d 463 (1993); In re Marriage of Short, 125 Wash.2d 865, 890 P.2d 12 (1995); Kapfer v. Kapfer, 187 W.Va. 396, 419 S.E.2d 464 (1992); Chen v. Chen, 142 Wis.2d 7, 416 N.W.2d 661 (1987); but see Hann v. Hann, 655 N.E.2d 566 (Ind.App.1995) (stock options not exercisable at time of dissolution are not marital property); Hall v. Hall, 88 N.C.App. 297, 363 S.E.2d 189 (1987) (same); Ettinger v. Ettinger, 637 P.2d 63 (Okla.1981) (same).

[5] See *Moore v. Moore,* 114 N.J. 147, 553 A.2d 20 (1989) (uncertainty of postretirement cost of living increases to pension benefit does not render increases so speculative as to be immune from distribution; instead, uncertainties and contingencies are issues that affect only how and when such benefits should be distributed); Kruger v. Kruger, 73 N.J. 464, 375 A.2d 659 (1977) (military retirement pay that may be eliminated or reduced by federal government is property subject to distribution even though it may become worthless in future); Ryan v. Ryan, 261 N.J.Super. 689, 619 A.2d 692 (1992) (severance payment received after date divorce proceedings commenced--date on which estate is determined under relevant statute--was marital property subject to distribution because payment could be characterized as compensation for past labor rather than replacement for future earnings); Chilkott v. Chilkott, 158 Vt. 193, 607 A.2d 883 (1992) (husband's remainder interest in irrevocable trust that gave trustee power to invade principal for mother's health, maintenance and welfare, is form of property subject to distribution because it represents future, contingent interest not so remote as to have no ascertainable present value rather than bare hope of succession); compare Ross v. Ross, 90 Md.App. 176, 600 A.2d 891 (1992) (husband's preemptive right as shareholder to acquire stock owned by other deceased, retiring or terminating shareholders at book value of such shares as of date of corporation's fiscal year end in year that death, retirement or termination occurs in amount proportional to amount of stock already owned in relation to total outstanding shares if two or more shareholders seek to acquire available shares represents mere expectancy interest rather than presently existing property interest).

[6] See, e.g., In re Marriage of Hug, 154 Cal.App.3d 780, 782-85 and 784 n. 1, 201 Cal.Rptr. 676 (1984) (unvested stock options correctly allocated between compensation for services prior to and after date of separation because, under California Civil Code § 5118, postseparation earnings are separate property); In re Marriage of Miller, 915 P.2d 1314, 1316 (Colo.1996) (marital property defined as "all property acquired by either spouse subsequent to the marriage" and prior to decree of legal separation); Pascale v. Pascale, 140 N.J. 583, 609, 660 A.2d 485 (1995) (property qualifies for distribution under state statute when it is attributable to efforts expended by either spouse during marriage even if benefit is not received until after dissolution); DeJesus v. DeJesus, 90 N.Y.2d 643, 647, 687 N.E.2d 1319, 665 N.Y.S.2d 36 (1997) (New York Domestic Relations Law defines marital property as "all property acquired by either or both spouses during the marriage"); In re Marriage of Short, 125 Wash.2d 865, 870-75, 890 P.2d 12 (1995) (in community property jurisdictions, assets acquired during marriage are community property, assets acquired after marriage ends are separate property, unvested options are classified according to when acquired, which depends upon purpose for which they were granted).

[7] In In re Marriage of Hug, 154 Cal.App.3d 780, 201 Cal.Rptr. 676 (1984), a time rule method of apportionment of unvested stock options between community and separate property was first approved of by an appellate court. The number of options that constituted community property was determined to equal the "product of a fraction in which the numerator is the period in months between the commencement of the [employee spouse's] employment by the employer and the date of separation of the parties, and the denominator is the period in months between commencement of the employment and the date when each option is first exercisable, multiplied by the number of shares which can be purchased on the date the option is first exercisable." Id., at 782, 201 Cal.Rptr. 676. The remaining options are the separate property of the employee spouse. Id., at 782-83, 201 Cal.Rptr. 676. Since In re Marriage of Hug, other jurisdictions have adopted time rule methods of apportionment. See, e.g., DeJesus v. DeJesus, 90 N.Y.2d 643, 687 N.E.2d 1319, 665 N.Y.S.2d 36 (1997); Salstrom v. Salstrom, 404 N.W.2d 848 (Minn.App.1987); In re Marriage of Short, supra, 125 Wash.2d 865, 890 P.2d 12; Kapfer v. Kapfer, 187 W.Va. 396, 419 S.E.2d 464 (1992).

[8] See In re Marriage of Hug, 154 Cal.App.3d 780, 201 Cal.Rptr. 676 (1984); In re Marriage of Brown, 15 Cal.3d 838, 544 P.2d 561, 126 Cal.Rptr. 633 (1976); In re Marriage of Miller, 915 P.2d 1314 (Colo.1996); In re Marriage of Frederick, 218 Ill.App.3d 533, 161 Ill.Dec. 254, 578 N.E.2d 612 (1991); Goodwyne v. Goodwyne, 639 So.2d 1210 (La.App.1994); Salstrom v. Salstrom, 404 N.W.2d 848 (Minn.App.1987); Garcia v. Mayer, 122 N.M. 57, 920 P.2d 522 (App.1996); DeJesus v. DeJesus, 90 N.Y.2d 643, 687 N.E.2d 1319, 665 N.Y.S.2d 36 (1997); In re Marriage of Powell, 147 Or.App. 17, 934 P.2d 612 (1997); Dietz v. Dietz, 17 Va.App. 203, 436 S.E.2d 463 (1993); In re Marriage of Short, supra, 125 Wash.2d 865, 890 P.2d 12; Kapfer v. Kapfer, 187 W.Va. 396, 419 S.E.2d 464 (1992).

[9] The defendant did not argue, and there was no other indication, that Southern Industries allowed him to retain the

ability to exercise the unvested options in lieu of a severance package intended to replace lost future income.

[10] In concluding that the stock options were earned wholly during the marriage, we do not mean to indicate that the contingencies to which the options were subject would have been irrelevant to the trial court's property distribution. In this case, the contingencies could have been factored into the court's decision as an element affecting their valuation. For example, the possibility that in the event of a breach of the agreement the defendant might never have received the options, and the fact that the present value of the options could not be predicted with complete certainty due to unknown factors, such as the price at which the stock would be trading on the dates when the options become exercisable, would be an appropriate factor to consider in valuing the options.

[11] The defendant argued that, if we were to determine that the stock options were earned in part prior to and in part subsequent to the date of dissolution, we should apply a time rule method of apportionment such as the method set forth in In re Marriage of Hug, 154 Cal.App.3d 780, 782, 201 Cal.Rptr. 676 (1984), to determine the portion of the fourth and fifth flights of options that represent marital property. Because, however, we have already determined that the options are marital property in their entirety, there is no need to employ a time rule in this case.

[12] General Statutes § 46b-62 provides: "Orders for payment of attorney's fees in certain actions. In any proceeding seeking relief under the provisions of this chapter and sections 17b-743, 17b-744, 45a-257, 46b-1, 46b-6, 46b-204, 47-14g, 51-348a and 52-362, the court may order either spouse or, if such proceeding concerns the custody, care, education, visitation or support of a minor child, either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82. If, in any proceeding under this chapter and said sections, the court appoints an attorney for a minor child, the court may order the father, mother or an intervening party, individually or in any combination, to pay the reasonable fees of the attorney or may order the payment of the attorney's fees in whole or in part from the estate of the child. If the child is receiving or has received state aid or care, the reasonable compensation of the attorney shall be established by, and paid from funds appropriated to, the Judicial Department."

[13] A separate opinion on the merits by Justice McDonald will follow at a later date.

[1] Footnote 13 of the majority opinion, when released, stated: "A separate opinion on the merits by Justice McDonald will follow at a later date."

[2] After the release of this opinion, the defendant filed a motion to reargue, based in part on the fact that I did not participate in the resolution of the case. If that motion had been granted, I would have participated in the reconsideration by joining the majority opinion or filing a separate opinion. During the pendency of the motion to reargue, the parties settled their differences and the defendant withdrew his motion. Because the issues in the case have become moot, I decline to file any supplemental opinion. "Where the actions of the parties themselves cause a settling of their differences, the case becomes moot." Sobocinski v. Freedom of Information Commission, 213 Conn. 126, 134, 566 A.2d 703 (1989).

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983 A.2d 293 (Conn.App. 2009)
118 Conn.App. 325
Susan CIFALDI
v.
Anthony CIFALDI, Jr.
No. 30109.
Court of Appeals of Connecticut.
December 8, 2009

Argued Sept. 23, 2009.

Linda H. Ursin, for the appellant (plaintiff).

Matthew R. Potter, with whom, on the brief, was Melissa M. Donahue, Manchester, for the appellee (defendant).

HARPER, ALVORD and FOTI, Js.

HARPER, J.

[118 Conn.App. 327] The matter before us stems from the parties' divorce in 1993. The plaintiff, Susan Cifaldi, appeals from the judgment of the trial court denying her postjudgment request for an order that the defendant, Anthony Cifaldi, Jr., pay to the plaintiff her share of pension disbursements made to him. On appeal, the plaintiff claims that (1) the order requested was necessary to effectuate and to preserve the integrity of the original dissolution judgment and (2) the court improperly applied the defense of laches. After careful consideration of the plaintiff's claims, we hold that under the allocation of marital property per the marriage dissolution judgment, the plaintiff became entitled to a defined portion of the defendant's pension benefits. The defendant has received the plaintiff's portion of his pension benefits. Therefore, the court should have fashioned an order compelling the defendant to pay the moneys to her. Additionally, we hold that the court improperly relied on laches as an alternate ground to deny the relief requested. Accordingly, the judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

The following facts and procedural history are relevant to the plaintiff's appeal. The parties' marriage was dissolved on October 25, 1993. On that date, the court approved a separation agreement between the parties and incorporated the terms of the separation agreement into the dissolution judgment. Pursuant to that agreement, the parties agreed that two qualified domestic relations orders (QDROs) [1] would

be executed, [118 Conn.App. 328] assigning to the plaintiff a portion of the defendant's pension benefits under two pensions. The first QDRO was to be entered " against [the defendant's] Travelers

[Corporation] pension,[2] in an amount equal to one-half the benefits payable to [the defendant] as of the date of dissolution." The second QDRO was to be entered " against [the defendant's] military pension,[3] in an amount equal to [five sixteenths] of the current value of said pension as of the date of judgment, whether or not vested." The agreement further provided that " the court shall retain jurisdiction regarding the foregoing QDROs and of said pensions pursuant to the foregoing provisions so as to effectuate the foregoing terms and conditions." The agreement stipulated that the " [p]laintiff's attorney shall prepare said QDROs."

In their respective briefs, both parties agree that the defendant retired in 2005 and began receiving retirement benefits from both the Travelers Corporation pension and the military pension shortly thereafter. The parties also agree that, as of the date the defendant retired, neither pension administrator had processed QDROs against the defendant's pensions.[4] As such, the [118 Conn.App. 329] payments the defendant began receiving from each pension included the portions that had been allocated to the plaintiff in the parties' separation agreement.

Not having received her portion of the defendant's pension benefits, the plaintiff filed a motion to open the judgment on February 1, 2008. In her motion to open the judgment, the plaintiff sought to require the defendant to sign new QDROs to be submitted to the administrators of the defendant's pension plans so that she could begin to receive, prospectively, the payments promised to her under the dissolution judgment.[5] The plaintiff also sought to require the defendant to " reimburse to [the plaintiff] the amount of payments retained by [the defendant] that are the

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property of [the plaintiff]." A hearing was held on April 8, 2008, regarding the motion to open the judgment. On that date, the plaintiff also filed a motion for contempt against the defendant. In the plaintiff's motion for contempt, she asked the court, in relevant part, to find the defendant in contempt for " failure to pay to [the] [p]laintiff the portion of his pension payments he has received that are the property of [the][p]laintiff...." The plaintiff also asked the court to order the defendant to pay to her an amount equal to the portion of his benefits that she would have received had the QDROs properly been in place at the time the defendant retired and began receiving benefits.[6]

[118 Conn.App. 330] The court denied the plaintiff's requests that the defendant pay to the plaintiff her portion of his pension benefits. The court found that its decision declining to order the defendant to pay to the plaintiff her share of the pensions did not constitute a modification of the property settlement that had been incorporated into the dissolution judgment. As an alternate ground, the court went on to find that, even if the plaintiff were entitled to the moneys at issue, the defense of laches had been established, and the plaintiff was not entitled to the relief sought. The plaintiff appealed.

I

The plaintiff first claims that the order she requested, namely, that the defendant pay to her portions of the prior pension disbursements, was necessary to effectuate and to preserve the integrity of the dissolution judgment. We agree with the plaintiff.

We begin by setting forth our standard of review. " The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented.... In determining whether a trial court has abused its broad discretion in

domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action.... Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the [118 Conn.App. 331] record as a whole.... A finding of fact is clearly erroneous when there is no evidence in the record to support it ... or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Kaczynski v. Kaczynski,* 109 Conn.App. 381, 385, 951 A.2d 690 (2008), rev'd on other grounds, 294 Conn. 121, 981 A.2d 1068 (2009).

When an agreement of the parties to the dissolution of marriage is incorporated into the judgment, it becomes a contract of the parties. *Sachs v. Sachs,* 60 Conn.App. 337, 341-42, 759 A.2d 510 (2000). " [T]he construction of a written contract is a question of law for the court.... The scope of review in such

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cases is plenary.... Because our review is plenary, involving a question of law, our standard of review is not the clearly erroneous standard used to review questions of fact found by a trial court. Our review of the parties' agreement is plenary...." (Citations omitted; internal quotation marks omitted.) *Id.,* at 342, 759 A.2d 510. Thus, our review of whether the plaintiff was entitled to the pension payments under the separation agreement that was incorporated into the judgment by the parties is plenary.

As an initial matter, we must determine whether there was a distribution of property and whether this distribution has been violated. It is well established that pension benefits are a form of property under General Statutes § 46b-81. Our Supreme Court has held " that ‘ property’ as used in § 46b-81, includes the right, contractual in nature, to receive vested pension benefits in the future." *Krafick v. Krafick,* 234 Conn. 783, 798, 663 A.2d 365 (1995). There is no question that a party's property interest in a pension is an important consideration in an allocation of property pursuant to a dissolution judgment. " Pension benefits are widely recognized as among the most valuable assets that parties have when a [118 Conn.App. 332] marriage ends.... Pension benefits are an economic resource acquired with the fruits of the wage earner spouse's labors which would otherwise have been utilized by the parties during the marriage to purchase other deferred income assets.... Both [spouses] have the same retirement goals and expectancies regarding the pension benefits as they would if they provided for their later years by using wage income to purchase other investments.... It would be unfair and contrary to the purpose of the statute to strip the nonemployee spouse of the value of the retirement asset by precluding [the trial court] from evaluating its worth prior to adjudicating the property rights of the estranged marriage partners." (Citations omitted; internal quotation marks omitted.) *Id.,* at 796-97, 663 A.2d 365.

Section 12 of the parties' separation agreement is titled " Pensions." Subsection A of § 12 of the agreement states that " [a] [QDRO], shall enter, in favor of [the plaintiff], against [the defendant's] Travelers [Corporation] pension, in an amount equal to one-half the benefits payable [to the defendant] as of the date of dissolution." Subsection B of § 12 states that " [a] QDRO shall enter, in favor of [the plaintiff], against [the defendant's] military pension, in an amount equal to [five sixteenths] of the current value of said pension as of the date of judgment, whether or not vested." The clear import of § 12 of the agreement is that one half of the defendant's pension from the Travelers Corporation, determined as of the date of judgment, and five sixteenths of the military pension, also valued as of the date of judgment, are the property of the plaintiff. A QDRO is merely an

administrative tool used to effectuate the transfer of marital property, in this case pension benefits, from an employee to a nonemployee spouse. Given the well recognized importance of pension benefits as a piece of marital property, the obvious significance of pension benefits to any property allocation [118 Conn.App. 333] made as part of a dissolution judgment and the expectations of the parties to that judgment, we do not read the parties' agreement in the case before us to make the vesting of the plaintiff's property interest in a portion of the defendant's pension benefits to be in some way contingent on the successful processing of the QDROs.[7]

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To put it simply, we conclude that the plaintiff's property interest in portions of the defendant's pension benefits was not predicated on the processing of paperwork; the plaintiff cannot be deprived of this important asset on the basis of a mere administrative error. We hold that the plaintiff was entitled to her portion of the defendant's pension benefits.

Having held that the defendant received marital property that belonged to the plaintiff, the remaining inquiry before us is whether the defendant is obligated to return the plaintiff's property. The defendant concedes in his appellate brief that the court lacks jurisdiction to modify property division orders. Our Supreme Court has held that " [b]y its terms, [§ 46b-81] deprives the Superior Court of continuing jurisdiction over that portion of a dissolution judgment providing for the assignment of property of one party to the other party under General Statutes § 46b-81." *Bunche v. Bunche,* 180 Conn. 285, 289, 429 A.2d 874 (1980). The plaintiff essentially claims that the failure of the court to issue orders that were necessary to effectuate its original assignment of property in the parties' marital dissolution action was tantamount to an impermissible modification of the original property division. We agree.

[118 Conn.App. 334] " A modification is [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact." (Internal quotation marks omitted.) *Roos v. Roos,* 84 Conn.App. 415, 422, 853 A.2d 642, cert. denied, 271 Conn. 936, 861 A.2d 510 (2004). In keeping with this reasoning, we hold that when a party has been denied marital property to which the party is entitled as part of the allocation of property pursuant to a judgment of dissolution of marriage, and the aggrieved party seeks relief from the court, the court is under an affirmative obligation to issue financial orders effectuating the existing allocation of marital property to protect the integrity of the original judgment, subject to equitable defenses. To hold otherwise would allow a court to modify a property distribution simply by its own silence or inaction. See *Rosato v. Rosato,* 77 Conn.App. 9, 15, 822 A.2d 974 (2003) (reasoning that, where husband was in arrears in paying to wife her share of his pension payments, " [i]f the [trial] court had not determined an amount due ... but simply had ordered payments prospectively ... the court would have been in violation of § 46b-81, which requires that property orders be made at the time of marital dissolution"). Accordingly, the court should have granted the relief requested by ordering the defendant to return to the plaintiff her share of the defendant's pension benefits that he had received.

II

We next address the issue of laches. [8] Laches is an equitable defense

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that consists of two elements. " First, [118 Conn.App. 335] there must have been a delay that was

inexcusable, and, second, that delay must have prejudiced the defendant.... The mere lapse of time does not constitute laches ... unless it results in prejudice to the defendant ... as where, for example, the defendant is led to change his position with respect to the matter in question." (Citation omitted; internal quotation marks omitted.) *Burrier v. Burrier,* 59 Conn.App. 593, 596, 758 A.2d 373 (2000). Thus, prejudicial delay is the principal element in establishing the defense of laches. *Id*.

" The standard of review that governs appellate claims with respect to the law of laches is well established. A conclusion that a plaintiff has been guilty of laches is one of fact.... We must defer to the court's findings of fact unless they are clearly erroneous." (Internal quotation marks omitted.) *Caminis v. Troy,* 112 Conn.App. 546, 552, 963 A.2d 701, cert. granted on other grounds, 291 Conn. 909, 969 A.2d 171 (2009). The court found that " [t]he defendant, because of the plaintiff's inaction or error, has paid taxes on the pension he received and would indeed be prejudiced now by having to return a portion of that income to the plaintiff...." We disagree with the court's finding that because the defendant has paid taxes on the pension payments he has received already, he would be prejudiced by being required to pay to the plaintiff the portion he received in error.

[118 Conn.App. 336] We first note that in our review of the record, we cannot find any evidence that the defendant has in fact paid taxes on the pension payments he received. Although the defendant's attorney made statements to the effect that the defendant has paid taxes, " [t]he court [can] not properly rely on argument by the defendant's attorney or on matters not in evidence in finding prejudice to the defendant." *Burrier v. Burrier, supra*, 59 Conn.App. at 597, 758 A.2d 373. Furthermore, even if we assume arguendo that the defendant has paid taxes on the pension benefits he received, no evidence was presented as to whether the defendant, upon demonstration that he had received income in error, would be able to recoup such taxes from the government. Additionally, the plaintiff, in argument before the court regarding her request for payment, conceded that " [t]here may need to be adjustments for ... taxes." The court could, as the plaintiff requested, determine the amount of taxes, if any, that the defendant paid on the overpayments he received and reduce the plaintiff's remuneration accordingly. This would eliminate any potential claim of prejudice by the defendant. The mere fact that the defendant might have paid taxes on property he received in error does not immunize him from being required to repay the plaintiff altogether.[9]

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We hold that because the defendant did not show prejudicial delay, it was clearly erroneous for the court to have found that he had established the defense of laches.[10]

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

Notes:

[1] " A QDRO is the exclusive means by which to assign to a nonemployee spouse all or any portion of pension benefits provided by a plan that is governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq." *Krafick v. Krafick,* 234 Conn. 783, 786 n. 4, 663 A.2d 365 (1995).

[2] This refers to a Travelers Corporation pension plan in which the defendant was a participant. Due to a merger between the Travelers Corporation and Citigroup, the defendant's Travelers Corporation pension is now administered by Citigroup. We will continue to refer to this pension as the Travelers Corporation pension throughout this opinion.

[3] This refers to a pension plan that the defendant was a part of through his military service. The defendant's military pension is administered by the United States Department of Defense.

[4] There is some disagreement as to the reason why these QDROs were not processed by the pension plan administrators. The court file contains two QDROs dated October 25, 1993, signed by the plaintiff, the defendant and Judge Klaczak, who rendered the dissolution judgment. The plaintiff testified that she sent the signed QDROs by certified mail to the plan administrators in 1995 and received return receipts indicating that they had been delivered. The plaintiff testified that the return receipts were not available because she had lost them. As such, there are documents in the file showing that the plaintiff prepared the QDROs and that the defendant signed them; however, there is no documentary evidence to support the plaintiff's testimony that she actually submitted the QDROs.

[5] The court found that after the plaintiff filed her motion to open, a QDRO was signed by agreement of the parties, approved by the court and delivered to the Citigroup pension administrator. The court also noted that the parties had drafted a QDRO applying to the defendant's military pension benefits and appeared likely to work out the terms of the QDRO to conform to the original judgment. Therefore, the only issue before us is the pension payments the defendant received before corrective QDROs were put in place to pay benefits to the plaintiff as per the dissolution judgment.

[6] We note that although the plaintiff's April 8, 2008 motion was captioned a motion for contempt, consistent with the relief sought therein, it would have been more accurate for the plaintiff to have captioned the motion as a motion for contempt and for order. Despite the inaccurate label, the court properly considered the substance of relief sought in the subject motion, which requested, in addition to an order for contempt, postjudgment orders for payment to the plaintiff of the portions of the defendant's pensions to which she was entitled. See *Bijur v. Bijur,* 79 Conn.App. 752, 754 n. 1, 831 A.2d 824 (2003).

[7] In any event, subsection E of § 12 of the agreement stated that the " [p]laintiff's attorney shall prepare said QDROs." The file contains two QDROs prepared by the plaintiff's attorney and signed by the parties and the court, dated October 25, 1993. Thus, even if the plaintiff's right to her share of the defendant's pensions was subject to some sort of condition precedent, the plaintiff clearly satisfied that condition when her attorney prepared QDROs that were signed by the court and all parties.

[8] The plaintiff claims that she has brought an action at law, and, therefore, the court improperly applied the defense of laches, which is purely an equitable defense. " Laches is purely an equitable doctrine, is largely governed by the circumstances, and is not to be imputed to one who has brought an action at law.... It is an equitable defense allowed at the discretion of the trial court in cases brought in equity." (Citation omitted; internal quotation marks omitted.) *Giordano v. Giordano,* 39 Conn.App. 183, 214, 664 A.2d 1136 (1995). The issue of whether the nature of the plaintiff's action is equitable or legal is a question of law, and, therefore, our review is plenary. See *Weinstein v. Weinstein,* 280 Conn. 764, 770, 911 A.2d 1077, after remand, 104 Conn.App. 482, 934 A.2d 306 (2007), cert. denied, 285 Conn. 911, 943 A.2d 472 (2008). We repeatedly have held that a court order designed to protect the integrity of the original judgment, which is what the plaintiff has requested here, is an exercise of the court's equitable power. See *Clement v. Clement,* 34 Conn.App. 641, 646, 643 A.2d 874 (1994); *Roberts v. Roberts,* 32 Conn.App. 465, 471, 629 A.2d 1160 (1993); *Niles v. Niles,* 9 Conn.App. 240, 246, 518 A.2d 932 (1986). Therefore, we must disagree with the plaintiff. The relief the plaintiff seeks is equitable in nature, and laches is an available defense.

[9] Beyond the issue of taxes, no other evidence was submitted that the defendant detrimentally relied on the overpayments or was led to change his position.

[10] Because we agree with the plaintiff that no prejudice was established, we do not address the conclusion of the court that the delay was inexcusable.

Connecticut Statutes

Title 46B. FAMILY LAW

Chapter 815j. DISSOLUTION OF MARRIAGE, LEGAL SEPARATION AND ANNULMENT

Part III. SUPPORT OF CHILD AND SPOUSE. TRANSFER OF PROPERTY

Current through the 2020 Third Special Session

§ 46b-81. (Formerly Sec. 46-51). Assignment of property and transfer of title

(a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the Superior Court may assign to either spouse all or any part of the estate of the other spouse. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either spouse, when in the judgment of the court it is the proper mode to carry the decree into effect.

(b) A conveyance made pursuant to the decree shall vest title in the purchaser, and shall bind all persons entitled to life estates and remainder interests in the same manner as a sale ordered by the court pursuant to the provisions of section 52-500. When the decree is recorded on the land records in the town where the real property is situated, it shall effect the transfer of the title of such real property as if it were a deed of the party or parties.

(c) In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.

Cite as Conn. Gen. Stat. § 46b-81

Source:

(P.A. 73-373, S. 20; P.A. 75-331; P.A. 78-230, S. 36, 54; P.A. 13-213, S. 2.)

Case Notes:

Annotations to former section 46-51:

Court has broad discretion in awarding alimony. 163 C. 345. Imposition of a duty of support pendente lite only on a husband not unconstitutional as a form of sex discrimination; based on common law principle of husband's duty to support wife and on the legislature's concept of family

Court improperly delegated its judicial power by directing the family relations division to divide parties' personal property in the event of their inability to do so. Id., 532. Assignment of property in a marital dissolution rests in the sound discretion of the court. Id., 533. Cited. Id., 705; 181 Conn. 492; Id., 622; 183 Conn. 35. Trial court's transfer of out-of-state realty discussed. Id., 490. Cited. Id., 512; 184 C. 406; 185 C. 141; Id., 156; Id., 275; Id., 491; 186 Conn. 167; Id., 191; Id., 211; Id., 709; 187 C. 70; Id., 249; 188 Conn. 232; Id., 385; Id., 736; 190 C. 173; Id., 491; Id., 657; Id., 813; 191 Conn. 468; 197 C. 1. Award to defendant of a share of plaintiff's expectancy cannot be sustained as a permissible transfer of property under statute; judgment of Appellate Court reversed. 204 C. 224. Cited. 207 Conn. 217; 211 Conn. 485; 213 C. 686; 214 C. 713; 218 Conn. 801; 220 C. 372; 221 C. 698; 222 Conn. 32; 224 Conn. 776; 226 C. 219. Order to pay mortgage installments and taxes was intended by trial court to constitute a division of property. Judgment of Appellate Court in 28 Conn.App. 854 reversed. 228 Conn. 85. Judgment of Appellate Court in 34 CA 930 reversed and case remanded to trial court to assign appropriate valuation to pension benefits and reconsider its financial orders. 234 C. 783. Court need not make explicit references to statutory criteria it considered in its decision resolving property and alimony disputes in a dissolution of marriage action; judgment of Appellate Court in 40 CA 178 reversed. 240 C. 79. Advanced degree (medical degree) is not property subject to distribution upon dissolution of marriage but is properly classified as an expectancy rather than as presently existing property interest; definition of "property" discussed. 244 C. 158. Based on the evidence, unvested stock options were properly distributed as property under section; in accord with prior cases, in distributing property in dissolution proceeding, court must consider all statutory criteria, and no single criterion is preferred over others, but court has latitude to vary weight placed on each item; right to purchase contents of defendant's rented apartment was properly subject to distribution under section; date of dissolution of marriage is date on which to value the parties' assets in accordance with prior cases. 245 Conn. 508. Plaintiff's personal injury award is a property interest subject to equitable distribution under statute. 247 C. 356. Unvested pension benefits are property subject to equitable distribution, which court may value on a case-by-case basis among the present value method, the present division method of deferred distribution, and any other valuation method that it deems appropriate in accordance with Connecticut law. 258 C. 733. Trial court did not abuse its discretion by including in the marital property estate the entire amount received by defendant in an employment case. 265 C. 669. For purposes of determining an equitable distribution of property, the court may consider evidence that a spouse dissipated marital assets prior to the couple's physical separation as long as the actions constituting dissipation occur either in contemplation of divorce or separation, or while the marriage is in serious jeopardy or is undergoing an irretrievable breakdown. 287 C. 491. The portion of defendant's state employment retirement benefit under Sec. 5-192p attributable to actual years of service is distributable, while the portion attributable to the additional amount received as a consequence of being disabled is not distributable. 292 C. 597. Parties to a dissolution of marriage proceeding must disclose all potentially distributable retirement or employment benefits and may not decide for themselves whether such benefits constitute property subject to disclosure; when reviewing a dissolution of marriage judgment that pre-dates 258 Conn. 733, courts must consider what impact, if any, the knowledge of unvested pension benefits would have had on the outcome of the proceeding. 312 C. 428. Section and rules of practice provide significant remedies when a party to a dissolution action has been found to dissipate assets, and Connecticut does not recognize a separate cause of action against a party to a dissolution action for failing to take affirmative steps to recover marital assets from a third party. 317 C. 223.

Cited. 1 Conn.App. 158; Id., 604; 2 Conn.App. 179; Id., 425; Id., 635; 3 CA 249; 4 CA 275; Id., 575; Id., 611; Id., 663; 5 CA 198; 6 CA 143; Id., 471; Id., 632; 8 CA 356; 9 CA 240; Id., 432; 11 CA 195; Id., 369; Id., 610; Id., 653; 12 CA 525; 13 CA 185; Id., 270; Id., 300; Id., 651; 14 CA 195; Id., 296; Id., 541; 15 CA 292; 16 Conn.App. 193; Id., 412; Id., 680; 17 CA 480; 18 CA 166; Id., 333; Id., 622; 19 CA 65; 20 CA 812; 22 Conn.App. 136; Id., 248; Id., 337; Id., 392; Id., 410; Id., 806; 23 Conn.App. 330; 24 CA 509; 25 Conn.App. 41; Id., 595; 26 Conn.App. 527; 27 CA 364; 28 Conn.App. 208; Id., 854; judgment reversed, see 228 Conn. 85; 30 Conn.App. 292; Id., 443; Id., 560; 31 CA 736; 32 Conn.App. 152; Id., 465; Id., 537; 33 Conn.App. 214; Id., 536; 34 CA 328; Id., 641; Id., 785; judgment reversed, see 235 Conn. 45; 36 Conn.App. 305; 37 Conn.App. 397; 39 CA 57; 40 Conn.App. 178; judgment reversed, see 240 Conn. 79; Id., 533; Id., 562; Id., 697; 41 Conn.App. 716; Id., 728; Id., 861. In determining parties' relative contributions within meaning of statute, court should consider nonmonetary as well as monetary contributions; court not required to make explicit reference to statutory criteria considered in arriving at decision or to make express findings as to each statutory factor. 48 CA 732. Court has authority to order distribution of property even if neither party requested such order in its prayer for relief. 54 CA 304. Personal injury award in name of both spouses is a property interest within meaning of "property" under section; section authorizes one party to assume joint liabilities of the parties. 57 Conn.App. 165. Although court must consider all statutory criteria when determining appropriate property distribution, it need not give equal weight to or explicitly address each factor. 59 CA 167. Stock options taken as incentive for future services to be performed after final separation not a marital asset. Id., 452. Reaffirmed previous holdings that date of separation may be significant in determining value of assets at date of dissolution; no presumption under Connecticut Constitution Art. I, Sec. 20 that property be equally divided between the spouses. Id., 656. Section provides court with jurisdiction to divide the parties' property. 60 Conn.App. 337. Court properly classified defendant's business and share bank accounts as "property". 61 CA 791. Court not required to assign a present value to defendant's pension before distributing it. 69 CA 472. Not error for court to award plaintiff a portion of defendant's retirement benefits. Id., 482. Although court has jurisdiction to assign property in connection with section, that assignment is not modifiable. 70 CA 212. Court does not have continuing jurisdiction over property distributed at the time of dissolution. Id., 772. Pension benefits subject to equitable distribution. 74 CA 120. Assignment of property may only be made at the time of the marital dissolution and is not thereafter subject to modification as are periodic orders. 77 CA 9. Statute authorizes court to issue orders respecting marital property only at the time of dissolution; it does not authorize postjudgment orders for the division of marital property. 79 CA 812. Financial orders cannot be logically inconsistent with factual findings. 82 CA 378. Court did not abuse discretion by awarding plaintiff a portion of stock that vested in defendant after the date of separation. 83 CA 53. Trial court's order requiring sale

Based on plain language, there is no presumption that marital property should be divided equally prior to applying the statutory criteria; the specified criteria are not exhaustive, and court properly may consider other equitable factors when crafting property distribution and alimony orders. 167 CA 138. Vested pension benefits in pay status at time of dissolution constitute property for the purposes of equitable distribution. 180 CA 64.

Unliquidated personal injury action is subject to award under section. 41 CS 115. Cited. 43 CS 400; 44 Conn.Supp. 431.

Subsec. (a):

Cited. 181 C. 248; 216 C. 673; 236 Conn. 582.

Cited. 3 Conn.App. 25; 17 Conn.App. 431; 18 CA 589; 39 Conn.App. 162; 46 Conn.App. 87. Principal payments defendant received on purchase money mortgage he held on real estate awarded to him pursuant to dissolution decree is merely an exchange of assets and may not be included in calculation of his income in postdissolution modification proceeding. 53 CA 378. Court rendering a dissolution judgment may order one party to assume joint liabilities of both parties. 57 CA 807. Court was within its discretion, as part of the overall equitable distribution of assets, to divide defendant's 401(k) equally between the parties even if part of it had accrued prior to the marriage. 97 CA 122. Trial court's award of marital residence and 100 per cent of equity in the residence to plaintiff wife did not constitute abuse of discretion where defendant husband was not ordered to pay alimony and retained his pensions free from any claim of plaintiff wife. 101 CA 106. Court does not have authority to modify division of property once the dissolution becomes final; court's subsequent modification of arbitrator's decision and award concerning transfer of property and court's order to defendant to pay a specific monetary amount rather than to transfer the actual stock and options that had been previously awarded to plaintiff was improper. 132 CA 291.

Subsec. (b):

Cited. 185 Conn. 180.

Ascribing a current value to the home, in combination with an order to sell the home, is neither absurd nor prohibited by section. 99 CA 145.

Subsec. (c):

Cited. 183 C. 96; 184 Conn. 36; Id., 513; 186 Conn. 311; Id., 709; Id., 773; 187 C. 142; Id., 144; 189 C. 570; 190 C. 126; 197 Conn. 1; 206 C. 150; 210 C. 170; 231 Conn. 168; 236 Conn. 582. Appellate Court's conclusion that trial court improperly relied on total length of parties' relationship in crafting its financial orders was supported by record; under this Subsec. and Sec. 46b-82(a), a court shall consider length of parties' marriage, which does not include prior marriages or cohabitation preceding marriage. 280 C. 632. "Dissipation" is the antithesis of "preservation", and a party that dissipates assets detracts from the preservation of those assets, and a trial court has the authority to consider a spouse's dissipation of marital assets when determining the nature and value of property to be assigned to each respective spouse. 287 Conn. 491.

Cited. 2 CA 416; 3 Conn.App. 25; Id., 704; 4 Conn.App. 504; 5 CA 185; Id., 484; Id., 681; 7 Conn.App. 41; Id., 119; 12 CA 596. "Contemplates nonmonetary as well as monetary contributions." 13 Conn.App. 300. Cited. 15 CA 318; 17 Conn.App. 431; 20 CA 145; 22 CA 310; 23 CA 111; Id., 287; 25 Conn.App. 693; 26 CA 386; Id., 720; 39 Conn.App. 162. Court must consider all statutory criteria but is free to accord whatever weight it determines appropriate to each statutory factor. 86 CA 665. Prior marriage and cohabitation between parties before their remarriage to each other are not to be included when calculating "length of the marriage" in remarriage divorce proceedings. 93 CA 618. Although court must consider all statutory criteria in dividing property in a dissolution action, it does not need to make an express finding as to each criterion. 97 Conn.App. 122. Defendant's annual bonus constituted an "amount and source of income" that court should have considered when determining division of marital property and awarding alimony and child support, and matter should be remanded for recalculation of all awards even though child support award was calculated correctly. 98 CA 706. There is no language of presumption in statute that marital property should be divided equally prior to applying statutory criteria. 99 CA 326.

In dissolution of marriage case, in which plaintiff wife sought greater share in distribution of $25,840 in cash wedding gifts on basis that bride's side had more family and friends in attendance than groom's side, and where there was insufficient evidence of donor's intent, court adopted New York rule for classifying wedding gifts that where there is inadequate evidence of donor's intent, wedding gift is intended as a joint gift unless the gift is appropriate for the use of only one spouse or is earmarked for one particular spouse and because Connecticut is an all property state, money received at wedding is "marital property" within meaning of statute, regardless of the donor. 50 CS 11.

Cross References:

See Sec. 17b-743 re direction of payments under support order to Commissioner of Administrative Services or local welfare department.

Connecticut Statutes

Title 52. CIVIL ACTIONS

Chapter 900. COURT PRACTICE AND PROCEDURE

Current through the 2020 Third Special Session

§ 52-212a. Civil judgment or decree opened or set aside within four months only

Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. The continuing jurisdiction conferred on the court in preadoptive proceedings pursuant to subsection (o) of section 17a-112 does not confer continuing jurisdiction on the court for purposes of reopening a judgment terminating parental rights. The parties may waive the provisions of this section or otherwise submit to the jurisdiction of the court, provided the filing of an amended petition for termination of parental rights does not constitute a waiver of the provisions of this section or a submission to the jurisdiction of the court to reopen a judgment terminating parental rights.

Cite as Conn. Gen. Stat. § 52-212a

Source:

(P.A. 77-576, S. 28, 65; P.A. 82-160, S. 103; P.A. 93-51; P.A. 98-241, S. 14, 18; P.A. 00-137, S. 16.)

Case Notes:

Judgments obtained by fraud may be attacked at any time. 180 C. 129. A motion to open and vacate a judgment is addressed to the court's discretion. 184 C. 461. Cited. 185 Conn. 495; 1 87 Conn. 509; 191 C. 555; 196 C. 517; Id., 579; 211 Conn. 648; 214 C. 23; 215 C. 143; 217 C. 394; 223 Conn. 68; Id., 155. Court held legislature intended provisions of Sec. 17a-112 and this section to coexist so Superior Court has limited jurisdiction to open judgment for termination of parental rights for 4 months after its rendering but not thereafter in absence of waiver or consent. 224 Conn. 263. Cited. 225 Conn. 757; Id., 804. Prohibits trial court from entertaining motion to open and modify divorce decree with respect to nondisability military retired or retainer pay; time limitations on opening not preempted by federal law division of military retirement benefits. 226 C. 219. Cited. Id., 831; 228 C. 85; 232 C. 405. Judgment of Appellate Court in 34 CA 462 reversed. Id., 750. Cited. 236 Conn. 78; 2 39 Conn. 375. Section limits trial court's general authority to grant relief from a judgment, but does not limit its personal jurisdiction over the parties. 249 C. 94. Defendant did not prevail on its claim that, in the absence of a finding of contempt, court lacked jurisdiction to enter postjudgment orders after expiration of the 4-month statutory period for opening a judgment; court's continuing jurisdiction to enter orders in vindication of a prior judgment is grounded in its inherent powers and not its contempt powers and exercise of that jurisdiction in this case not barred by availability of appellate remedies. 260 C. 232. Trial court's clarification of injunctive order 7 months after original order and modification was proper because court had continuing jurisdiction due to nature of injunctive order and internal inconsistencies in prior order. 2 75 Conn. 420. Order restoring case to docket is immediately appealable when challenged on the basis of court's authority to restore case to the docket in light of the limitation period of section; court has continuing jurisdiction to vacate or modify a protective order after expiration of the 4-month limitation period of section. 276 C. 168. Plain language suggests that when a party files a motion to reargue, which would, if granted, alter substantive rights and duties of the parties, the 4-month limitation is measured from the court's decision on the motion to reargue, as opposed to the initial judgment; because plaintiff filed her motion to set aside summary judgment within 4 months of the trial court's denial of her motion to reargue, the motion to set aside was timely under section. 305 C. 654. Parties submitted to the jurisdiction of court by agreement and trial court acted within its authority in opening the dissolution judgment. 328 C. 376.

Cited. 2 CA 543; 5 CA 417; 8 Conn.App. 254; 9 CA 446; 10 CA 160; Id., 669; 11 Conn.App. 171; 15 Conn.App. 308; 18 CA 166; Id., 589; 19 CA 213; 22 Conn.App. 4; Id., 396; Id., 424; 27 Conn.App. 755; judgment reversed, see 225 C. 157; 29 Conn.App. 465; Id., 482; 32 CA 203; 33 CA 197; 34 CA 419; Id., 641; 36 CA 73. Defendant's filing of pleadings after judgment of dismissal could not have constituted a waiver of the 4-month period for opening judgment of dismissal. 37 CA 56. Cited. Id., 397; 38 CA 340; Id., 745; 39 CA 258; 40 Conn.App. 115; Id., 590; Id., 733; 42 Conn.App. 119; Id., 409; 44 CA 588; Id., 771; 45 Conn.App. 137; Id., 352; 46 Conn.App. 54; Id., 614. In absence of fraud, mistake, duress or accident, trial court was without jurisdiction to order rescission of stipulated judgment where request for rescission was made more than 4 months

decision within 120 days under Sec. 51-183b. 125 CA 207. Section does not abrogate court's common-law authority to open a judgment beyond the 4-month limitation upon a showing that the judgment was obtained by fraud, duress or mutual mistake; common-law reasons for opening a judgment seek to preserve fairness and equity. 146 CA 214. Trial court had authority to open summary judgment under section, and such motion was not the equivalent of a motion for a new trial or a motion to reargue. 150 CA 842. Section applicable to restoration of a withdrawn case. 154 CA 605. Court had authority to open judgment of dismissal pursuant to this section, rather than Sec. 52-212, where judgment of dismissal was rendered in response to failure of plaintiff's counsel to attend dormancy status conference; section does not require a supporting affidavit. 161 Conn.App. 594. Section does not preclude court from granting plaintiff's motion to correct a technical defect in a party's name pursuant to Sec. 52-123 filed beyond four months. 180 CA 461. Four month period for filing motion to open was not tolled by filing of prior appeal and said period had run when motion to open was filed. 180 CA 818.

Roberta K. Hillinski

v.

Theodore Hillinski

FA 03-0482302S

Superior Court of Connecticut, New Haven

September 15, 2006

Caption Date: September 15, 2006

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh): Frazzini, Stephen F., J.

Opinion Title: MEMORANDUM OF DECISION

The plaintiff, Roberta Hillinski, has brought this action seeking a dissolution of her twenty-nine year marriage to Theodore Hillinski, custody of their one minor child, and other relief. The parties appeared with counsel for trial of this limited contested matter on two days in February and April of this year. The principal issues are the amount and duration of alimony to be paid by the husband and whether that portion of the husband's pension with the City of North Haven earned before the marriage should be considered in equitable division of property. The parties have agreed to share joint legal custody of their minor child, who will reside primarily with the wife. Following the conclusion of evidence the court requested the parties to submit briefs on the court's authority to consider or award premarital portions of the husband's pension. Both briefs had been filed by July 13th of this year, but the plaintiff then filed a motion to open the evidence to allow the record to include the value of an inheritance expected by the plaintiff from her recently deceased mother. A stipulation between the parties that the expected inheritance was part of the marital estate subject to equitable distribution was filed on this date, and the matter is now ready for decision.

The court has heard and carefully weighed all of the evidence according to the standards required by law. The court has scrutinized and evaluated the credibility and demeanor of the witnesses. The court has carefully considered the parties' arguments, briefs and proposed orders.

The parties were married on December 11, 1976, in East Haven, Connecticut. Both have lived in Connecticut for more than a year prior to the bringing of this action. They have one minor child, Amanda Rose, who was born on August 8, 1989, and will be a senior this fall at Cheshire Academy. The parties have not received any state or municipal financial assistance. The marriage between the parties has broken down irretrievably with no reasonable hope of reconciliation. All statutory stays having expired, the court has jurisdiction to dissolve the marriage.

The husband has worked for the North Haven Fire Department since March of 1970, in a supervisory position for the last six years. For many years during the marriage he also operated home construction and landscaping businesses, but physical limitations now prevent him from doing so. His base salary is $53,400 per year and he also gets overtime pay averaging approximately $20,000 per year. His average weekly income is $1,424 gross and $1,043 net. The wife worked early in the marriage at Macy's, Blue Cross, and as a real estate broker, and after that helped in the husband's side businesses. For the last three years she has worked as a customer service representative for Agway, where she earns $500 per week gross and $460 net. Based on their respective incomes, the presumptive child support amount is for the husband to pay $185 per week plus 45% of unreimbursed medical expenses and any qualifying childcare expenses.

Both parties testified at trial that in the summer of 2003 Mr. Hillinski began an intimate relationship with a woman living in Montreal and that shortly afterwards he told his wife that he wanted a divorce. They also agreed that for many years they had different bedrooms and that Mr. Hillinski had gone out two to three evenings a week by himself. But they gave significantly different accounts about the other events leading up to this action. According to Ms. Hillinski, the parties continued to enjoy frequent sexual relations even after having different bedrooms and despite Mr. Hillinski spending many evenings

away from home. She testified that until he told her he wanted a divorce she thought that they were happily married-although she also testified that she suspected him of having had several affairs before then, including with her former best friend and with at least one other woman. Mr. Hillinski, on the other hand, described the marriage as "a Hell house" and "a continual stressful environment." He testified that the parties never got along and that "no matter what I did it . . . was grounds for argument," which he said usually escalated into screaming matches that he described as "all-consuming" and name-calling, often in front of their daughter or other family members. He denied any affairs before the 2003 relationship and also claimed the parties had been sexually intimate only a few times after taking separate bedrooms in the early 1990s. He said he went out at nights to get away from the stress. The husband's denials of his wife's claims that he had engaged in earlier marital affairs were credible, and the wife's testimony that he had engaged in such was not. The affair that began in 2004 was probably the result of a broken-down marriage, as the court finds credible the husband's accounts of the tension and strife between the parties.

The wife has asked for the marital home, which both parties value at $348,000 and has equity of somewhere between $248,000 and $266,000, and half of the defendant's deferred compensation. The husband has agreed to quitclaim the house to his wife, but only as part of what he called a 50-50 division of marital assets. He proposes to transfer to her his interest in a 401K and IRA that are together worth approximately $75,000, but he wants to retain his Town of North Haven pension free of any claim from her. The defendant submitted a valuation of that pension as worth $612,024.95 as of May 3, 2006, and plaintiff has submitted a stipulation accepting that amount. The value of the portion accrued during the marriage is $505,165.39. The other significant assets are a Chevy Trailblazer worth $15,750 and a sailboat worth $2,500.

After considering the evidence in this case and the statutory criteria for equitable division of property, the court awards each party half the net value of their combined assets.[1] Although the husband asks that the wife receive only 50% of a coverture share of his pension, in view of the length of the marriage and the other facts of this case, the court finds that the entire pension amount should be considered in an equitable division. The law in this state is that property brought by a party to the marriage may be considered marital property or awarded in an equitable division. In *Ricciuti v. Ricciuti,* 74 Conn.App. 120, 810 A.2d 818 (2002), cert. denied 262 Conn. 946, 815 A.2d 676 (2003), for example, the court upheld a trial court's decision to award a wife portion of a pension earned during 22 years in the military, three of which were before the marriage. The Appellate Court recently reaffirmed that ruling in *Tracey v. Tracey*, 97 Conn.App. 122 (2006), where the court held that the trial court "was within its discretion, as part of the overall equitable distribution of assets, to divide the defendant's 401(k) equally between the parties even if part of it had accrued prior to the marriage." Here, the pension is the largest asset available to the parties for their financial support in their retirement. The total value of the parties' assets is less than one million dollars, an amount that, while certainly considerable, is not so substantial as to ensure that, when divided between them, the parties will be able to continue to maintain their current standards of living. There are significant disparities in the parties' vocational skills and experience, their present and future earning abilities, and their ability to acquire additional capital assets. In view of all these factors and the proven facts of this case, the court finds, upon consideration of the statutory factors set forth in General Statutes §46b-81(d), that an equitable division of property should include all assets owned by both parties. Since both parties agree that the wife can retain the marital home and the Trailblazer that she drives, the remainder necessary to award her half can be effectuated though division of the husband's deferred compensation.

The wife has debt of $30,000 for their daughter's tuition and expenses at Cheshire Academy. Amanda's attendance there has been

a source of disagreement between the parties. Originally the husband agreed to pay for private secondary school for Amanda when he believed she was willing to attend a school that would have cost about $10,000 per year, but she ended up attending Cheshire, which will cost $26,000 next year and which the husband testified that he always believed they could never afford. The wife testified that she had agreed to pay the annual difference between the cost of Cheshire Academy and the $10,000 that the husband originally was willing to pay for private school, but that the husband has never made any contributions. Instead, she said, she has used funds from a retirement plan and credit cards to pay for Cheshire, which has cost her $75,000 so far. Although the court finds that the defendant should share equally that debt and the cost for her senior year at Cheshire, in view of the fact that the only significant asset awarded to him is a portion of his pension plan, the court will effectuate that intent by instead ordering him to pay all of Amanda's tuition and other reasonable and customary educational expenses for the present academic year, and leave the wife responsible for the existing debt for prior years.

The wife also asks for alimony for 15 years, declining from $300 per week for 5 years, to $275 for the next five years, and $250 for the final five years. The husband, on the other hand, while acknowledging the wife's need for alimony, proposes to pay $150 per week for 13 years. After leaving Anthem in the mid-1980s, the wife did not work full-time again until three years ago when she obtained the job at Agway. But she has had a real estate license and helped manage the husband's landscaping business in the past. It seems likely that, with time and effort, she can obtain more remunerative employment than her present position. In view of the court's property division here, the other statutory factors for awards of alimony, and the facts of this case, the court awards the wife alimony of $200 per week for 15 years.

The plaintiff has also requested an award of counsel fees in the amount of $10,000. Section 46b-62 of the General Statutes permits awards of counsel fees in family matters, but requires that the court consider the parties' "respective financial abilities and the criteria set forth in section 46b-82." Moreover, the court must take care that its determination of this question does not substantially undermine its other financial orders.

In determining whether to award counsel fees the trial court must consider the total financial resources of the parties in light of the statutory criteria. The statutory criteria are to be applied in light of the following three broad principles: First, such awards should not be made merely because the obligor has demonstrated an ability to pay. Second, where both parties are financially able to pay their own fees and expenses, they should be permitted to do so. Third where, because of other orders, the potential obligee has ample liquid funds, an allowance of counsel fees is not justified. If, on the basis of the total financial resources of the parties, the trial court concludes that denying an award of counsel fees would not undermine its purpose in making its prior financial orders, the court should allow each party to pay his or her own counsel fees.

(Citations omitted; quotations omitted.) *Miller v. Miller*, 16 Conn.App. 412, 418, 547 A.2d 922 (1988). Both parties filed financial affidavits during this proceeding. Based on the evidence offered, and after considering the parties respective financial positions in light of the statutory factors set forth in §46b-82, as elucidated by the court in *Miller v. Miller,* the court declines to award counsel fees.

I-ORDERS

After considering all of the evidence and information presented in light of the statutory criteria for dissolving a marriage and entering orders regarding child support, alimony, equitable distribution of property and division of debt, and award of counsel fees, together with applicable case law, the court hereby enters the following

orders:

A. Dissolution of marriage

The marriage of the patties, having broken down irretrievably, is hereby dissolved.

B. Parenting orders

The parties will have joint legal custody of the minor child, Amanda, who will live primarily with her mother and with whom her father shall enjoy liberal, reasonable, and flexible parenting time.

C. Financial Orders

1. The husband shall quitclaim his interest in the marital home to the wife, who shall indemnify and hold him harmless thereon. The wife shall refinance the existing debt on the marital home within three years from the date of judgment to remove the defendant from the mortgage; if unable to do so, she shall immediately place the home on the market for sale and accept any reasonable offer within 5 percent of its fair market value. The court retains jurisdiction over the provisions of this paragraph.

2. All of the husband's 401K and IRA shall be transferred to the wife by way of qualified domestic relations order. The plaintiff is further awarded the sum of $123,888 from defendant's present pension with the Town of North Haven, by way of qualified domestic relations order if necessary. The plaintiff shall be responsible for preparing any orders necessary to effectuate the provisions of this paragraph, but the parties shall split equally the cost of preparation. The court retains jurisdiction over the provisions of this paragraph.

3. Personal property and household furnishings and effects from the marital home shall be divided equally. The parties shall first attempt to divide such property by agreement. If the parties are unable to agree on the division, they shall use mediation services from family services. If they still cannot agree, each party shall submit a list of the party in dispute to the court with a brief statement as to why each party claims each such item, and its approximate value, and the court shall award such property. The court retains jurisdiction to resolve any disputes regarding this process.

4. The plaintiff is awarded title and exclusive use of the Chevy Trailblazer, and the husband is awarded full interest in the Saturn motor vehicle and the sailboat.

5. Except as otherwise herein ordered, (i) all other property on each party's financial affidavit is awarded to that party and (ii) each party will be responsible for the debt listed on its financial affidavit and indemnify and hold the other harmless thereon.

6. The husband shall pay alimony of $200 per week for 15 years. Alimony will terminate on death of either party or the wife's remarriage. If the wife cohabits with another, as that term is defined by statute and has been construed by the courts, then alimony may be modified or terminated as the factual circumstances warrant.

7. The husband shall pay child support of $185 per week plus 45 percent of unreimbursed medical and dental expenses and qualifying childcare expenses. Child support will terminate when Amanda turns 18 if she has graduated from high school by then, or at age 19 if she is in high school.

8. The husband will pay for Amanda's tuition, books, and other customary and reasonable academic expenses for her last year of secondary school education at Cheshire Academy. To the extent that the wife has already paid any of these expenses, the husband shall promptly reimburse her for any payments she has made.

9. The parties shall alternate the dependency exemption for Amanda for so long as legally entitled to do so, the husband claiming her

for the year 2006.

10. The parties shall file joint tax returns for the years 2003 through 2005 and share any refunds, liabilities, and fines or penalties equally.

11. The court will retain jurisdiction over post-secondary educational support for the minor child.

12. The defendant shall keep the minor child on his health insurance so long as available to him at a reasonable cost through his employment. He will also cooperate with the defendant if she wants to obtain health insurance for herself under COBRA through his employer, but she shall be fully responsible for all costs of her own insurance.

13. The husband shall maintain the $50,000 in life insurance listed on his financial affidavit, and name his wife as the exclusive beneficiary for as long as he has a child support or alimony obligation.

BY THE COURT

STEPHEN F. FRAZZINI, J.

_____

Footnotes

[1]. By stipulation of the parties, the marital estate subject to equitable distribution includes $19,000 in an inheritance expected by the wife from the estate of her recently deceased mother.

*Editor's Note: Child Support Guidelines have not been reproduced herein.

Maria Kaluzka

v.

Leslaw Kaluzka

No. HHBFA134033980S

Superior Court of Connecticut, Judicial District of New Britain, New Britain

May 5, 2015

MEMORANDUM OF DECISION

Lisa K. Morgan, J.

This dissolution of marriage action was commenced by the plaintiff, Maria Kaluzka, against the defendant, Leslaw Kaluzka, by summons and complaint dated November 7, 2013, and made returnable to this court on December 3, 2013.[1] The case was tried before the court on November 18, 2014 and April 28, 2015. The plaintiff was represented by Katarzyna Maluszewski, Esq. through the first day of trial. The plaintiff represented herself for the second day of trial. Attorney Monika Gradzki, Esq. represented the defendant. The court heard testimony from both parties. Numerous exhibits were entered into evidence.

Upon careful consideration of the evidence presented and the pertinent statutory law, in particular General Statutes § 46b-82 (alimony) and § 46b-81 (assignment of the marital estate), and the relevant case law, and having observed the demeanor and assessed the credibility of the parties at trial, the court finds and orders as follows.

I

Jurisdiction

The plaintiff and the defendant were married on May 8, 1999 in New Britain, Connecticut. Both parties were married previously. The parties lived continuously in the State of Connecticut for at least one year before this action was filed. All statutory stays have expired. The court has jurisdiction over this matter.

II

Discussion

The parties have been married for 15 years. There are no minor children issue of the marriage. The plaintiff has five adult children from a prior relationship, the defendant has two. Neither party received public assistance during the term of the marriage.

The plaintiff is 73 years old. She describes her health as " very, very, very poor." She requires surgery for both knees and one leg. She has diabetes and a heart arrhythmia. The plaintiff attended school through the eighth grade. She is not currently employed. Her current income consists of $217 per week in Social Security benefits and $27 per week in benefits from Poland, for a total gross and net income of $244 per week ($12, 688 annualized).

The defendant is 82 years old. He complains of back pain and has been on heart medication for many years. The defendant attended school through the fifth grade. He is not currently employed. His current income consists of $403 per week in Social Security benefits and $68 per week in benefits from Poland, for a total gross and net income of $471 per week ($24, 492 annualized). The benefits the defendant receives from Poland are deposited in a bank in Poland and used in part to support his son (who was deported from the United States and is homeless in Poland) and in part to purchase medication for himself from Poland.

Upon their marriage the parties resided together in a single-family house located at 295 East Street, New Britain, Connecticut. The property was owned by the plaintiff before the parties married and remains titled in her name only. The plaintiff has owned the home since 1981; she originally purchased it with her prior husband and thereafter acquired sole title to the property after they divorced. The current fair market value of the East Street property is $98, 000. The property is not presently encumbered by any mortgages or liens. The plaintiff continues to reside in the home alone. The defendant rents a room in a house in New Britain.

The plaintiff claims that the East Street property is not part of the marital estate subject to equitable distribution by this court because the property is a pre-marital asset. This is not the law in Connecticut. General Statutes § 46b-81 provides that at the time of entering a decree dissolving a marriage, the court " may assign to either the husband or the wife all or any part of the estate of the other." See also *Tracey v. Tracey*, 97 Conn.App. 122, 132, 902 A.2d 729 (2006) (trial court was within its discretion, as part of the overall equitable distribution of assets, to divide the defendant's 401(k) equally between the parties even if part of it had accrued prior to the marriage). The statute does not distinguish between property that was acquired by a party prior to the marriage in question. Rather, the division of property is designed to be an equitable one, taking into account all of the statutory factors enumerated in Gen. Stat. § 46b-81. Consequently, the East Street property, as well as any other premarital assets owned by either of the parties, is subject to the court's power of distribution in this dissolution action.

At the time of their marriage, the defendant had savings of approximately $100, 000 and a home in Wallingford. In September 1999, the plaintiff received a workers' compensation settlement in the amount of $20, 000. Thereafter, in November 1999, the defendant paid off the plaintiff's mortgage on the East Street property in the approximate amount of $28, 000. The defendant also performed and paid for many upgrades and repairs on the East Street property during the parties' marriage. In January 2000, the defendant sold his Wallingford home, netting $105, 000 from the sale. While a significant portion of the proceeds from the sale of the Wallingford property was used to support the defendant's adult children, some of the funds were used to support the plaintiff's adult children with the balance being used to support the parties' own household.

It was not uncommon for the defendant to keep large sums of cash in the house during the parties' marriage. Amid growing concerns regarding the U.S. economy, the defendant withdrew money from his retirement accounts and stored it in boxes in the basement of the East Street property. Sometime in August 2012, the plaintiff discovered a few boxes filled with approximately $65, 000 in cash. The plaintiff took the boxes from the basement and hid them in the attic. Thereafter, she removed between $30, 000 and $35, 000 of the cash and spent it on herself.[2] The remaining funds, totaling somewhere between $30, 000 to $35, 000, were unaccounted for at the time of trial. The plaintiff claims that she does not know what happened to the rest of the money; she suspects the defendant found it and stashed it in his safe. The defendant denies that he ever received any of the $65, 000 that was " found" by the plaintiff in the basement.

On the morning of the first day of trial, the plaintiff filed an emergency motion seeking an order that the parties, their counsel and a private investigator (hired by the plaintiff and standing by in court) immediately travel to the defendant's home to conduct a surprise inspection of his safe in order to determine whether the " missing" $30, 000 to $35, 000 was concealed there. After a brief but spirited hearing, the court granted the motion, but ordered further that if the surprise inspection did not reveal significant sums of money in the defendant's safe, the plaintiff would pay the defendant's attorneys fees occasioned by the delay in the trial. The parties, their counsel and the private investigator thereafter left the courthouse to conduct the inspection. Upon their return to court, counsel reported that only $500 was found in the safe. Consequently, the court awarded the defendant $690 in attorneys fees and advised that payment of the fee award would be considered by the court when it issued its decision dissolving the parties' marriage.[3]

The parties have few assets other than the East Street property and the now missing cash. Each has a car, a bank account and the furnishings in his/her respective residence. The plaintiff owns a 2002 Nissan Maxima valued at $7, 000. She has less than $1, 000 combined in cash, a safety deposit box and her checking account. The defendant owns a 1996 Toyota Previa valued at $2, 000. He has approximately

$1, 100 combined in cash and his checking account. He also gave $10, 000 to a third party (the plaintiff's son) to hold for his funeral expenses. The whereabouts of the " missing" $30, 000 to $35, 000 remain unknown, at least to the court. The parties agree that each should be responsible for the debts listed on his/her respective financial affidavit, although neither financial affidavit lists any debts.

As for alimony, the plaintiff initially requested that the parties' income be equalized for ten years. At the conclusion of the trial, she asked that the court award her alimony in the amount of $300 a month for the rest of her life. The defendant proposes that neither party pay nor receive alimony from the other.

The plaintiff claims that the parties' marriage broke down because the defendant began acting strangely and no longer wanted to live with her. The defendant claims that the marriage broke down because the plaintiff told him to move out. There is insufficient evidence before the court from which it could determine whether one party is more responsible than the other for the breakdown of their marriage. It is clear, however, that the marriage has broken down irretrievably with no hope of reconciliation. The court finds that the allegations of the complaint and cross complaint are proven and true.

A

Alimony

" An award of alimony is based primarily on a spouse's continuing duty to support." *Martone v. Martone*, 28 Conn.App. 208, 216, 611 A.2d 896, cert denied, 224 Conn. 909, 617 A.2d 166 (1992). In determining whether to award alimony and the duration and amount of the award, the court " shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . .., the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81." Gen. Stat. § 46b-82. " There is no absolute right to alimony . . . Awards of alimony incident to a marital dissolution rest in the sound discretion of the trial court." (Citations omitted.) *Weinstein v. Weinstein*, 18 Conn.App. 622, 637, 561 A.2d 443 (1989).

As noted above, the court cannot determine on the evidence before it whether one party is more culpable than the other for the irretrievable breakdown of the parties' fifteen-year marriage. The defendant is almost ten years older than the plaintiff. The parties are of comparable station and have similar educational backgrounds. Neither speaks fluent English; both were assisted by Polish interpreters throughout these proceedings. The parties appear to be in comparable, albeit failing, health. Both are retired and living off Social Security benefits as well as benefits from Poland. Neither has significant retirement or other assets. Under all of the facts of this case and having considered the statutory criteria cited above, including the distribution of the marital estate made below pursuant to Gen. Stat. § 46b-81, the court finds that neither party should pay alimony to the other.

B

Assignment of the Marital Estate

" [T]he assignment of property in a marital dissolution rests in the sound discretion of the court." (Citation omitted.) *Ridgeway v. Ridgeway*, 180 Conn. 533, 429 A.2d 801. " In fixing the nature and value of the property, if any, to be assigned, the court . . . shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . .., the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates." Gen. Stat. § 46b-81(c).

As noted above, the only substantial asset

subject to equitable distribution in these proceedings is the East Street property. Although the property was brought to the marriage by the plaintiff, the defendant has contributed substantially to the preservation and appreciation of the property as well as the parties' overall marital estate. Consequently, in considering all of the statutory factors, the court finds that the defendant is entitled to a share of the East Street property's value. As for the " missing" $30, 000 to $35, 000, the court finds that the funds, if ever found, rightfully belong to the defendant. The plaintiff plainly admits that she took about half of the $65, 000; the defendant is entitled to any remainder. In entering the final orders below, the court has considered the statutory criteria cited above as well as the parties' respective claims and agreements regarding distribution of the marital estate.

III

Orders

1. *Dissolution* :

The marriage of the parties is dissolved on the ground of irretrievable breakdown. The parties are declared single and unmarried.

2. *Alimony* :

No alimony is awarded to either party.

3. *Real Property* :

The East Street property is awarded to the plaintiff, subject to a lien in favor of the defendant in the amount of $35, 000. The defendant's lien may be paid in full by the plaintiff at any time, but shall become due and payable upon the first of the following events to occur: (a) the plaintiff's sale of the East Street property; (b) the plaintiff's remarriage; or (c) the plaintiff's death. Upon the request of the defendant, the plaintiff shall execute such documents as may be required by the defendant to secure his lien on the East Street property, including, without limitation, a promissory note and mortgage. The defendant shall prepare all documents necessary to secure his lien and pay for all fees and costs associated therewith, including attorneys fees and recording fees.

4. *Motor Vehicles* :

(a) The 2002 Nissan Maxima is awarded to the plaintiff, free and clear of any claim by the defendant. The plaintiff shall be solely responsible for all costs associated with the ownership and operation of said vehicle, including personal property taxes and insurance, and shall indemnify and hold harmless the defendant from any liability therefrom.

(b) The 1996 Toyota Previa is awarded to the defendant, free and clear of any claim by the plaintiff. The defendant shall be solely responsible for all costs associated with the ownership and operation of said vehicle, including personal property taxes and insurance, and shall indemnify and hold harmless the plaintiff from any liability therefrom.

5. *Bank Accounts/Cash* :

Each party is awarded, free and clear of any claim by the other, the bank accounts and cash listed on his/her respective financial affidavit. The " missing" $30, 000 to $35, 000 addressed above is awarded to the defendant, in the event those funds are ever located.

6. *Other Personal Property* :

Each party is awarded all personal property currently in his/her possession.

7. *Debts and Liabilities* :

Each party shall be solely liable for the debts listed on his/her respective financial affidavit and shall hold the other party harmless and indemnified therefrom.

8. *Health Care Insurance* :

Each party shall be responsible for the procurement and cost of his/her own health care insurance.

9. *Attorneys Fees and Costs* :

(a) Within sixty (60) days from the date of this decision the plaintiff shall pay the defendant the sum of $690 for attorneys fees previously awarded to the defendant by order dated 11/18/14 and entered in connection with the plaintiff's motion for examination of the defendant's safe.

(b) Except as expressly provided in subparagraph (a) above, each party shall be responsible for the payment of his/her own attorneys fees and costs.

Notes:

[1]The original complaint sought a legal separation. On the first day of trial, the complaint was orally amended upon consent of the parties to seek dissolution of their marriage. Thereafter, on March 19, 2015, the defendant filed a cross complaint in which he also sought dissolution of the marriage. Accordingly, this action was tried on the parties' respective claims seeking dissolution of marriage rather than the plaintiff's original claim seeking legal separation.

[2]The plaintiff spent the majority of the money as follows: $12, 000 for a Volvo plus $800 for taxes and registration; $3, 500 for a tombstone at the cemetery; $6, 000 to have two teeth repaired; $1, 000 for car repairs; and an unspecified amount for utilities, household expenses, insurance and her own medical bills.

[3]The hearing on the emergency motion and the trip to the defendant's residence to inspect the safe took approximately three hours. The defendant's attorney's hourly rate is $230 for this case.

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838 A.2d 1026 (Conn.App. 2004)
81 Conn.App. 135
Janet P. KREMENITZER
v.
Martin W. KREMENITZER.
No. 23677.
Appellate Court of Connecticut.
January 20, 2004.

Argued Oct. 17, 2003.

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[81 Conn.App. 136] Dianne M. Andersen, Danbury, for the appellant (defendant).

William J. Kupinse, Jr., Bridgeport, for the appellee (plaintiff).

FOTI, SCHALLER and DUPONT, Js.

DUPONT, J.

The defendant, Martin W. Kremenitzer, appeals from the judgment of the trial court that granted the motion filed by the plaintiff, Janet P. Kremenitzer, to correct a qualified domestic relations order (QDRO). [1] The defendant claims that the court incorrectly granted the plaintiff's postjudgment motion to correct the QDRO by valuing his 401(k) plan as of the date of the dissolution of the marriage of the parties rather than as of the "last valuation date prior to the date distribution is to occur," as provided in the QDRO. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the defendant's appeal. The plaintiff and the defendant signed a separation agreement, dated May 22, 2001, which was incorporated on the same date into the judgment of dissolution of their marriage. One of the terms of the agreement provided for a division of retirement assets. The issue in this appeal involves the interpretation of § 11.1, "Article XI: Retirement," of the agreement. It dictates the division of various retirement accounts and states in relevant part: "These [retirement] accounts shall be totaled and an equalization shall be accomplished. A Qualified Domestic Relations Order will be necessary to accomplish the division.... [T]he Court shall retain jurisdiction, with regard to the order, until such time as the division has been implemented. [81 Conn.App. 137] The division shall be made on the basis of values as of the day of dissolution or as close to that date as values can be obtained." [2]

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The court approved the QDRO on January 23, 2002. [3] Paragraph four of the QDRO states that "[p]ayment to the [plaintiff] pursuant to this Order shall occur as soon as administratively possible after this Order is deemed a QDRO by the Plan Administrator." In paragraph five, the QDRO states that "50% of the [defendant's] account balance as of May 22, 2001, adjusted for gains and losses from such date to the last valuation date prior to the date distribution is to occur, shall be disbursed to the [plaintiff]...." Between May 22, 2001, the date of the judgment of the dissolution of the parties' marriage, and the proposed date of distribution as described in the QDRO, the value of the assets in the defendant's possession decreased significantly. The plaintiff's motion to correct the QDRO was granted prior to any distribution of the defendant's 401(k) plan. The court corrected the QDRO, striking the language that required an adjustment for gains and losses from May 22, 2001, to the last valuation date prior to distribution.

The defendant's sole claim on appeal is that the court incorrectly granted the plaintiff's postjudgment motion to correct. We are unaware of any appellate decision that directly controls the outcome of the defendant's claim. The defendant contends that the court impermissibly modified a property award. According to the defendant, the language of the QDRO as executed [81 Conn.App. 138] "clearly confirms the intent of the separation agreement and the judgment." Thus, it is the defendant's contention that the QDRO as executed and the judgment of dissolution, which incorporated the parties' agreement, are in harmony as to intent, and that the correction by the court of the QDRO to delete the language

adjusting the valuation to reflect gains and losses since the date of dissolution was an impermissible assignment of property after the judgment of dissolution.

We agree that a property award is nonmodifiable and that except for fraud, a court has no continuing jurisdiction over that portion of a dissolution judgment providing for the assignment of the property of one party to the other. See *Billings v. Billings,* 54 Conn.App. 142, 148, 732 A.2d 814 (1999). We do not agree, however, that the intent of the parties as stated in the separation agreement is synonymous with the language of the QDRO that is at issue.

In deciding the motion to correct, the court was faced with two contradictory documents. Neither, when viewed separately, is ambiguous. The separation agreement signed by the parties provides for a valuation of the assets as of the date of dissolution; the QDRO signed by counsel for both parties provides for a valuation as of the date of the last valuation prior to distribution. The right of the plaintiff to a portion of the defendant's retirement benefits was created by the separation agreement. The QDRO was necessary to implement the judgment that had incorporated the parties' agreement. The QDRO was the vehicle for enforcing the judgment of the court. Beyond our determination that the language of the QDRO differed from the language of the separation agreement and the judgment of dissolution as to the date of valuation, there is no necessity to discuss the intent of the signatories as to

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the QDRO. It is the intent of the parties when executing the separation agreement that controls our discussion.

[81 Conn.App. 139] The plaintiff in this case did not seek a correction of the agreement or of the judgment, but of the QDRO. Thus, the claim of the defendant that the court impermissibly opened and modified a judgment must fail. See *Taylor v. Taylor,* 57 Conn.App. 528, 531, 752 A.2d 1113 (2000); *Holcombe v. Holcombe,* 22 Conn.App. 363, 576 A.2d 1317 (1990).

As background to our discussion of the issue to be resolved, we note certain principles. "In a marriage dissolution action, an agreement of the parties executed at the time of the dissolution and incorporated into the judgment is a contract of the parties." (Internal quotation marks omitted.) *Sullivan v. Sullivan,* 66 Conn.App. 501, 504, 784 A.2d 1047 (2001); see also *Issler v. Issler,* 250 Conn. 226, 235, 737 A.2d 383 (1999). Separation agreements incorporated by reference into dissolution judgments are to be interpreted consistently with accepted principles governing contracts. *Sweeny v. Sweeny,* 9 Conn.App. 498, 500-501, 519 A.2d 1237 (1987). A court has an affirmative obligation to determine that a separation agreement is fair and equitable Before incorporating it by reference into a dissolution judgment. General Statutes § 46b-66 (a); *Jucker v. Jucker,* 190 Conn. 674, 676, 461 A.2d 1384 (1983).

Although in this case we are concerned with the interpretation of a separation agreement, it is useful to review cases where no separation agreement exists, and a court determines the distribution of assets. In the absence of any exceptional intervening circumstances, the date a dissolution of marriage is granted is the proper time to determine the value of the parties' estate upon which to base division. An increase in the value of property following the date of dissolution does not constitute an exceptional circumstance. *Sunbury v. Sunbury,* 216 Conn. 673, 676, 583 A.2d 636 (1990). [4] [81 Conn.App. 140] Logically, there is no reason why the same date should not be used when there has been a decrease in the value of property. The usual rule in the interpretation of dissolution judgments, when no separation agreement exists, is that financial awards are based on the parties' *current* (date of the judgment) financial circumstances. *Wendt v. Wendt,* 59 Conn.App. 656, 661, 757 A.2d 1225, cert. denied, 255 Conn. 918, 763 A.2d 1044 (2000); *Cuneo v. Cuneo,* 12 Conn.App. 702, 709, 533 A.2d 1226 (1987).

In this appeal we are concerned with the intent of the parties as expressed in the separation agreement. If a contract is

unambiguous within its four corners, the intent of the parties is a question of law, requiring plenary review. *Issler v. Issler,* supra, 250 Conn. at 235, 737 A.2d 383. If, however, a contract is ambiguous, the clearly erroneous standard of review is used because the intent of the parties is a question of fact. [5] *Amodio v. Amodio,*

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56 Conn.App. 459, 470, 743 A.2d 1135, cert. granted on other grounds, 253 Conn. 910, 754 A.2d 160 (2000) (appeal withdrawn September 27, 2000).

A word is ambiguous when it is "capable of being interpreted by reasonably well-informed persons in either of two or more senses." (Internal quotation marks omitted.) *Aetna Life & Casualty Co. v. Braccidiferro,* 34 Conn.App. 833, 840, 643 A.2d 1305 (1994), cert. granted on other grounds, 232 Conn. 901, 651 A.2d 743 [81 Conn.App. 141] 1995) (appeals withdrawn September 1, 1995) . Ambiguous also means "unclear or uncertain ... [or] that which is susceptible of more than one interpretation" or "understood in more ways than one." (Citation omitted; internal quotation marks omitted.) *Lopinto v. Haines,* 185 Conn. 527, 538, 441 A.2d 151 (1981).

The plain words of the agreement in this case are not ambiguous. They unmistakably provide that the intent of the parties, as evidenced in the separation agreement, was to divide the asset "on the basis of values as of the day of dissolution or as close to that date as values can be obtained." See *Perritt v. Perritt,* 54 Conn.App. 95, 730 A.2d 1234 (1999). That intent, as a matter of law, controls the date of valuation of the asset, which is the date of the judgment of dissolution of the marriage.

The judgment is affirmed.

In this opinion the other Judges concurred.

Notes:

[1] A qualified domestic relations order is an order of the court assigning to an alternate payee, in compliance with the Internal Revenue Code, 26 U.S.C. § 414(p), the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1056(d)(3), and General Statutes § 46b-81, a portion or all of the benefits payable to a participant in a retirement plan. In this case, the defendant is the participant in a 401(k) retirement plan, and the plaintiff is the alternate payee.

[2] The separation agreement also provides that the agreement was to settle all claims and demands, and "any and all claims which either of [the] parties may have upon or against the property and estate of the other for maintenance, alimony, support and for any other matters whatsoever." Article IV of the agreement provides that "it is the intention of the parties that this agreement be absolute, unconditional and irrevocable...."

[3] Another QDRO also was approved by the court, but it did not involve the 401(k) plan and is not the subject of this litigation.

[4] In *Sunbury,* an initial appeal had concerned periodic alimony; *Sunbury v. Sunbury,* 13 Conn.App. 651, 662, 538 A.2d 1082 (1988); but our Supreme Court's subsequent remand of the matter required the trial court to consider all financial orders, including the division of assets. *Sunbury v. Sunbury,* 210 Conn. 170, 174-75, 553 A.2d 612 (1989). After the required hearing, a second appeal was brought to determine the appropriate date for valuation of assets. In deciding on the date of the judgment of dissolution of the marriage, the second *Sunbury* case notes the need for a fixed benchmark for valuation in most dissolution of marriage cases. *Sunbury v. Sunbury,* supra, 216 Conn. at 677, 583 A.2d 636.

[5] The defendant, in his reply brief, stresses that no evidence was taken or offered by the parties as to intent. If the separation agreement language were ambiguous, the intent of the parties would be a question of fact to be determined on remand in an evidentiary hearing. See *Page v. Page,* 77 Conn.App. 748, 749, 825 A.2d 187 (2003).

Raymond F. Loiseau

v.

Margaret J. Loiseau

FA 06 4005144

Superior Court of Connecticut, Litchfield

June 11, 2008

Caption Date: June 11, 2008

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh): Marano, Richard M., J.

Opinion Title: MEMORANDUM OF DECISION RE MOTION FOR ORDER #109

The plaintiff and former husband, Raymond Loiseau, filed a motion for order postjudgment dated March 27, 2008, against the defendant and former wife, Margaret Loiseau. On May 12, 2008, the defendant filed a motion for order postjudgment, which the court accepts as the response to the plaintiff's motion.

In the plaintiff's motion, he "represents" to the court that their marriage was dissolved on June 22, 2007; that pursuant to the separation agreement which was incorporated by reference into the judgment, the defendant is entitled to receive 20 percent of his pension with the state of Connecticut valued as of the date of the dissolution of the marriage and payable in monthly installments at the time the defendant is eligible to receive those funds under the plan's regulations; that the parties arrived at the 20 percent figure by reducing his pension plan to a present value, which included a cost of living increase (COLA), and then divided that present value figure to arrive at the 20 percent to be paid to the defendant; and that the defendant refuses to execute the qualified domestic relations order (QDRO)[1] on the ground that she is entitled to 20 percent of an additional cost of living increase of the plaintiff's pension plan each year. The defendant in response makes the identical first two representations made by the plaintiff to the court. She further "represents" to the court that the State of Connecticut cannot establish a separate account for the defendant, and, therefore, a survivorship provision should be established and that the court should enter an order that 20 percent of the plaintiff's pension should be in survivorship.

HEARING

A hearing on the plaintiff's motion was held on May 12, 2008. At that time, the plaintiff argued that he is seeking an order to compel the defendant to execute the QDRO based on the valuation of the pension at the time of the dissolution as set forth in the separation agreement with no additional cost of living adjustment to the pension.[2] On the date of dissolution, June 22, 2007, the plaintiff's defined state pension plan was valued. As part of the valuation of the pension, the cost of living increase adjustments that the plaintiff was to receive was added to his pension to arrive at a present value of the asset for division of the property. To equalize the value of the property accumulated between the plaintiff and defendant, it was agreed that the plaintiff would provide the defendant with an additional 20 percent of the defined pension benefit. The defendant is now eligible to receive those funds but has refused to sign the requisite QDRO because she maintains that she is entitled to receive a COLA on the pension once it goes into pay status. In other words, she now wants a COLA to be included as part of the 20 percent of the pension as it is paid out to her for each year.

During the hearing, the plaintiff provided the court with three arguments as to why the defendant should be compelled to sign the QDRO for the pension benefits. First, since a pension is an asset distributed as a part of a property division, it is not modifiable. Second, the separation agreement specifically states that the asset is valued as of the date of the dissolution of the marriage and that she is to receive 20 percent of the fixed amount valued as of that date; and third, the value of the pension included the cost of living adjustments, which was stipulated to by the parties.

In response, the defendant agreed that the value of the defined benefit pension was

approximately $585,000 which included the COLA when valued. The defendant pointed out that to equalize the property division of their assets, she was given an additional 20 percent of the plaintiff's pension with the COLA to offset this inequality. The defendant further argued that the plaintiff now does not want to include the COLA value for the 20 percent of the pension plan for each year.

DISCUSSION

Although filed as a motion for order postjudgment, it is the plaintiff's position that he is requesting the court to compel the defendant to sign the QDRO to receive her benefits from his pension as set out in their separation agreement. Paragraph eight of the separation agreement subparagraph two is at issue and provides: "The Wife shall be entitled to receive 20 percent of the Husband's pension with the State of Connecticut valued as of the date of the dissolution of the marriage and payable in monthly installments at the time the defendant is eligible to receive those funds under the plan's regulations. The party shall retain the services of Attorney Elizabeth McMahon to prepare the Qualified Domestic Relations Order necessary to effectuate this provision and the parties shall share her fees equally."

"The distribution of assets in a dissolution action is governed by [General Statutes] §46b-81, which provides in pertinent part that a trial court may 'assign to either the husband or wife all or any part of the estate of the other . . . In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party . . . shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.' . . . This approach to property division is commonly referred to as an 'all-property' equitable distribution scheme . . . It does not limit, either by timing or method of acquisition or by source of funds, the property subject to a trial court's broad allocative power. 7 A. Rutkin, E. Effron & K. Hogan, Connecticut Practice Series: Family Law and Practice with Forms (1991) §27.1, pp. 398-400.

"There are three stages of analysis regarding the equitable distribution of each resource: first, whether the resource is property within §46b-81 to be equitably distributed (classification); second, what is the appropriate method for determining the value of the property (valuation); and third, what is the most equitable distribution of the property between the parties (distribution)." (Citation omitted.) *Krafick v. Krafick*, 234 Conn. 783, 792-93, 663 A.2d 365 (1995). In a lengthy and well reasoned discussion, the court in *Krafick* considered whether pension benefits should be classified as property pursuant to §46b-81 and concluded that "'property' as used in §46b-81, includes the right, contractual in nature, to receive vested pension benefits in the future." *Id.*, 798. "Our conclusion that vested pension benefits, as contract rights to payment in the future, constitute property subject to distribution on divorce is in accord with the overwhelming majority of jurisdictions-including common law, equitable and community property-reaching the issue." *Id.*, 798 n.23.

Thus, vested pension benefits for payment in the future are a part of a property award. A property award is "nonmodifiable and . . . except for fraud, a court has no continuing jurisdiction[3] over that portion of a dissolution judgment providing for the assignment of the property of one party to the other." *Kremenitzer v. Kremenitzer*, 81 Conn.App. 135, 138, 838 A.2d 1026 (2004). In *Kremenitzer*, the court noted that "the separation agreement signed by the parties provide[d] for a valuation of the assets as of the date of dissolution; the QDRO signed by counsel for both parties provide[d] for a valuation as of the date of the last valuation prior to distribution. The

right of the plaintiff to a portion of the defendant's retirement benefits was created by the separation agreement. The QDRO was necessary to implement the judgment that had incorporated the parties' agreement. The QDRO was the vehicle for enforcing the judgment of the court." *Id.*

"In a marriage dissolution action, an agreement of the parties executed at the time of the dissolution and incorporated into the judgment is a contract of the parties . . . Separation agreements incorporated by reference into dissolution judgments are to be interpreted consistently with accepted principles governing contracts . . . [Moreover] [a] court has an affirmative obligation to determine that a separation agreement is fair and equitable before incorporating it by reference into a dissolution judgment. General Statutes §46b-66(a) . . ." (Citations omitted; internal quotation marks omitted.) *Kremenitzer v. Kremenitzer, supra*, 81 Conn.App 139.

To interpret a separation agreement, the court must apply contract principles to effectuate the intent of the parties as expressed by the language used in the four corners of the agreement. *Id.*, 140. "[T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract." (Internal quotation marks omitted.) *Tallmadge Bros., Inc. v. Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 498, 746 A.2d 1277 (2000). "A contract is unambiguous when its language is clear and conveys a definite and precise intent . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Citations omitted; internal quotation marks omitted.) *United Illuminating Co. v. Wisvest-Connecticut, LLC,* 259 Conn. 665, 670, 791 A.2d 546 (2002). "In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself . . . [A]ny ambiguity in a contract must emanate from the language used by the parties . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *B&D Associates, Inc. v. Russell*, 73 Conn.App. 66, 71, 807 A.2d 1001 (2002).

Connecticut courts have consistently held that the time to value marital property is the date of marital dissolution. *Sunbury v. Sunbury*, 216 Conn. 673, 674, 583 A.2d 636 (1990); accord *Kremenitzer v. Kremenitzer*, *supra*, 81 Conn.App 139 (date dissolution of marriage is granted is proper time to determine value of the parties' estate upon which to base division). Absent any exceptional intervening circumstances, the court will not deviate from Connecticut case law and the policy behind Connecticut's property division statutes and value the pension benefits other than on the date of dissolution of the marriage. See *Sunbury v. Sunbury*, *supra*, 676.

In the present case, first, a pension plan is property not income. Thus, the award is not modifiable. Next, the plain words in paragraph eight of the agreement are not ambiguous. The language provides that the intent of the parties, as evidenced in the separation agreement, was to divide the assets such that the defendant would receive 20 percent of the plaintiff's pension valued as of the date of the dissolution of the marriage and payable in monthly installments at the time the defendant was eligible to receive those funds. The valuation on the date of dissolution was stipulated to by both parties and their respective counsel. The valuation included a COLA and based on that inclusion, the defendant would receive 20 percent of the pension. The distribution of the benefits was to be delayed in accordance with the QDRO until the pension came into pay status for the defendant. The defendant cannot now rewrite the separation agreement to change the calculation of the valuation of the pension. The relief requested by the plaintiff for the defendant to sign the QDRO is granted.

So Ordered.

BY THE COURT,

Marano, J.

Footnotes

[1]. A qualified domestic relations order is an order of the court assigning to a non-employee spouse all or any portion of pension benefits in compliance with the Internal Revenue Code, 26 U.S.C. §414(p), the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1056(d)(3), and General Statutes §46b-81, a portion or all of the benefits payable to a participant in a retirement plan. In this case, the plaintiff is the participant in the state pension plan and the defendant is the non-employee spouse.

[2]. Also included in the separation agreement is that the defendant was entitled to the plaintiff's entire deferred compensation plan 457. This plan is not at issue and is set forth in the first subparagraph of paragraph eight of the separation agreement which provides: "The Husband shall transfer his entire Connecticut Defined Contribution Plan 457 to the Wife. In the event a Qualified Domestic Relations Order is required for this transfer, the parties agree to retain the services of Attorney Elizabeth McMahon and share her fees equally."

[3]. Usually, language that the court shall retain jurisdiction for the purposes of preparation and issuance of the QDRO when it is time for the pay out of the pension is included in the separation agreement. The QDRO is then prepared for the transfer of the pension plan. See *Krafick v. Krafick*, 234 Conn. 783, 663 A.2d 365 (1995).

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920 A.2d 340 (Conn. App. 2007)
101 Conn.App. 106
Marie Claire France MARTIN
v.
Francis Walter MARTIN.
No. 27514.
Court of Appeals of Connecticut
May 8, 2007

Argued January 3, 2007.

Appeal from Superior Court, judicial district of New London at Norwich, Hon. Paul M. Vasington, judge trial referee.

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[Copyrighted Material Omitted]

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[Copyrighted Material Omitted]

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Kevin B. F. Emerson , for the appellant (defendant).

Jean M. Stawicki , for the appellee (plaintiff).

Flynn, C.J., and Schaller and Hennessy, Js.

OPINION

SCHALLER, J.

[101 Conn.App. 107] In this marital dissolution action, the defendant, Francis Walter Martin, appeals from the judgment of the trial court with respect to the court's financial orders. Specifically, the defendant claims that the court abused its discretion by (1) awarding the plaintiff, Marie Claire France Martin, 100 percent of the equity in the former marital residence, (2) awarding the plaintiff 100 percent of the equity in the residence as an offset against an award of alimony on the basis of erroneous findings, (3) valuing the residence as of the date of the parties' separation instead of the date of dissolution and (4) valuing the residence without any appraisal or expert testimony. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the defendant's appeal. The parties were married on August 8, 1987, in Quebec, Canada. Although the parties did not have any issue of the marriage, for a period of time the plaintiff's children [101 Conn.App. 108] from a prior relationship resided with the parties. The defendant, a former Connecticut state police trooper, had received two disability pensions (pensions) since 1981, prior to his marriage to the plaintiff. The parties stipulated that, as of November 30, 2005, the value of the defendant's pensions was $363,000.

In 1998, the parties purchased a condominium located at 64 Highland Circle (residence) in Colchester. The purchase price for the residence was $147,900, and the parties financed $133,100. The defendant, with the help of the plaintiff, made numerous improvements to the residence. The parties stipulated that, as of November 30, 2005, the value of the residence was $272,500, subject to a mortgage of approximately $99,723.77, resulting in equity in the amount of $172,777. The defendant moved out of the residence in December, 2003, and did not contribute to the mortgage, the plaintiff's living expenses or the expenses associated with the residence.

The plaintiff commenced the dissolution action on February 4, 2004. After a one day trial, the court issued its memorandum of decision on December 20, 2005. The court found that the marriage had broken down irretrievably without hope of reconciliation, with the defendant having been more at fault for the breakdown. After considering the pertinent statutory factors, the court dissolved the marriage and issued various financial orders. Specifically, the court ordered that the "defendant shall quitclaim any interest he had in the [residence] to the plaintiff. She shall assume all indebtedness on said [residence], and pay all expenses connected thereto and hold the defendant harmless there from." Further, the

court awarded no alimony to either party and stated that ''[t]he defendant shall retain his life insurance and his pensions, which the court finds to be a premarital asset, free of any claim from the plaintiff.''

[101 Conn.App. 109] On January 4, 2006, the defendant, pursuant to Practice Book § 11-11, filed a

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motion to reargue, which the court denied with respect to the issues on appeal. [1] The defendant filed the present appeal on March 27, 2006. On May 22, 2006, the defendant moved for an articulation of the court's decision, which was denied on June 9, 2006. [2] Additional facts will be set forth as necessary.

As a preliminary matter, we set forth the standard of review and legal principles applicable to the defendant's claims on appeal. ''In fashioning its financial orders, the court has broad discretion, and [j]udicial review of a trial court's exercise of [this] broad discretion . . . is limited to the questions of whether the . . . court correctly applied the law and could reasonably have concluded as it did.... In making those determinations, we allow every reasonable presumption . . . in favor of the correctness of [the trial court's] action.... That standard of review reflects the sound policy that the trial court has the unique opportunity to view the parties and their testimony, and is therefore in the best position to assess all of the circumstances surrounding a dissolution action, including such factors as the demeanor and the attitude of the parties.'' (Internal quotation marks omitted.) *Sander v. Sander,* 96 Conn.App. 102, 105, 899 A.2d 670 (2006); see also *Purnell v. Purnell,* 95 Conn.App. 677, 685, 897 A.2d 717, cert. denied, 280 Conn. 903, 907 A.2d 91 (2006).

''In distributing the assets of the marital estate, the court is required by [General Statutes] § 46b-81 to consider the estate of each of the parties.... General Statutes § 46b-81 (a) provides in relevant part: At the time of entering a decree . . . dissolving a marriage [101 Conn.App. 110] . . . the Superior Court may assign to either the husband or wife all or any part of the estate of the other.... Courts are not required to ritualistically recite the criteria they considered, nor are they bound to any specific formula respecting the weight to be accorded each factor in determining the distribution of marital assets.'' (Citation omitted; internal quotation marks omitted.) *Mann v. Miller,* 93 Conn.App. 809, 812, 890 A.2d 581 (2006); *Raso v. Raso,* 92 Conn.App. 678, 681, 886 A.2d 863 (2005).

Last, we recite our standard with respect to the court's factual findings. ''Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole.... A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'' (Internal quotation marks omitted.) *Gervais v. Gervais,* 91 Conn.App. 840, 844, 882 A.2d 731, cert. denied, 276 Conn. 919, 888 A.2d 88 (2005); *Chyung v. Chyung,* 86 Conn.App. 665, 667–68, 862 A.2d 374 (2004), cert. denied, 273 Conn. 904, 868 A.2d 744 (2005). Guided by these principles, we address each of the defendant's claims presented on appeal.

I

The defendant first claims that the court abused its discretion by awarding the plaintiff 100 percent of the equity in the residence. Specifically, he argues that it was improper for the court to offset his

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pensions, a premarital asset, against all of the equity in the residence, a marital asset, which was awarded to the plaintiff. We are not persuaded.

[101 Conn.App. 111] As we previously

noted, among other orders, the court awarded the plaintiff the residence and the defendant his pensions. Pension benefits constitute a form of deferred compensation for services rendered. *Thompson v. Thompson,* 183 Conn. 96, 100, 438 A.2d 839 (1981). ''Pension benefits are widely recognized as among the most valuable assets that parties have when a marriage ends.'' (Internal quotation marks omitted.) *Ricciuti v. Ricciuti,* 74 Conn.App. 120, 124, 810 A.2d 818 (2002), cert. denied, 262 Conn. 946, 815 A.2d 676 (2003); *Stamp v. Visconti,* 51 Conn.App. 84, 86, 719 A.2d 1223 (1998). Nevertheless, there is no set formula that a court must follow when dividing the parties' assets, including pension benefits. *Casey v. Casey,* 82 Conn.App. 378, 386–87, 844 A.2d 250 (2004).

Our Supreme Court has stated ''that the purpose of property division is to unscramble the ownership of property, giving to each spouse what is equitably his [or hers].... The bare legal title to property acquired or accumulated by the spouses during marriage often does not correspond to their real rights in such property. H. Clark, Law of Domestic Relations (1968) § 14.8, p. 450.'' (Citation omitted; internal quotation marks omitted.) *Watson v. Watson,* 221 Conn. 698, 711, 607 A.2d 383 (1992); see also A. Rutkin & K. Hogan, 7 Connecticut Practice Series: Family Law and Practice (1999) § 26.3, p. 472 (''[g]iven the broad scope of the Connecticut equitable distribution statute, attorneys are spared the effort or need to distinguish between 'marital' and 'non-marital' assets''). This process is not bound by a well defined blueprint but rather is molded to the needs of justice. See *Lawler v. Lawler,* 16 Conn.App. 193, 204, 547 A.2d 89 (1988), appeal dismissed, 212 Conn. 117, 561 A.2d 128 (1989).

''The distribution of assets in a dissolution action is governed by § 46b-81, which provides in pertinent part that *a trial court may assign to either the husband or* [101 Conn.App. 112] *the wife all or any part of the estate of the other.* . . .In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party . . . shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.... *This approach to property division is commonly referred to as an all-property equitable distribution scheme.* See 3 Family Law and Practice (A. Rutkin ed., 1995) § 37.01 [2] [a] [v], p. 37-19. [*Section 46b-81*] *does not limit, either by timing or method of acquisition or by source of funds, the property subject to a trial court's broad allocative power.* A. Rutkin, E. Effron & K. Hogan, 7 Connecticut Practice Series: Family Law and Practice with Forms (1991) § 27.1, pp. 398–400.'' (Emphasis added; internal quotation marks omitted.) *Bender v. Bender,* 258 Conn. 733, 741–42, 785 A.2d 197 (2001); see also *North v. North,* 183 Conn. 35, 38–40, 438 A.2d 807 (1981); *Karen v. Parciak-Karen,* 40 Conn.App. 697, 702, 673 A.2d 581 (1996); *Tyc v. Tyc,* 40 Conn.App. 562, 565–66, 672 A.2d 526, cert. denied, 237 Conn. 916, 676 A.2d 398 (1996).

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A

The defendant first contends that it was improper for the court to consider his pensions when distributing the property because he had acquired the right to them prior to the marriage. This contention is without merit. As we have noted, a court's power to allocate property is not limited by timing or method of acquisition. See, e.g., A. Rutkin & K. Hogan, 7 Connecticut Practice Series: Family Law and Practice (1999) § 26.1, p. 470 [101 Conn.App. 113] (''The Connecticut statute is also unlike the provisions in effect in many other jurisdictions in that it does not limit distribution to property acquired during a particular time. For example, the statute does not limit distribution to items which were acquired after the date of the marriage, prior to the commencement of the action, or prior to the

separation of the parties''). Moreover, our Supreme Court expressly has stated that the trial court has the authority to distribute individually held property as well as jointly held property. *Lopiano v. Lopiano,* 247 Conn. 356, 370, 752 A.2d 1000 (1998). ''Although it is not improper for the trial court to consider the actual source or ownership of an asset, these are but two factors to be considered in reaching an equitable division in dissolution proceedings. The fact that a particular asset belongs to one spouse may cause the trial court to be predisposed to awarding it to its owner; however, if the marital estate is otherwise insufficient to maintain the other spouse, the court must be able to exercise its discretion in arriving at an equitable distribution, taking into consideration the needs and assets of both parties. The failure to interpret property broadly pursuant to § 46b-81 could result in substantial inequity where, for example, a spouse who recovers a substantial amount in a personal injury action is left with income-producing assets, bought solely with money from the award, and the uninjured spouse is left destitute. Such a result clearly would be contrary to the purposes of § 46b-81 and would not be in keeping with the equitable nature of dissolution proceedings under that section.'' *Id.*, at 370–71, 752 A.2d 1000. We conclude, therefore, that the court properly considered the defendant's pensions when it crafted the financial orders.

B

The defendant also argues that the court improperly found that his pensions had appreciated during the [101 Conn.App. 114] course of the marriage. The court stated that the defendant's pensions ''increase by 3 [percent] each year'' and that the present value of the pensions was $363,000. We conclude that the court's finding was not clearly erroneous.

The following additional facts are necessary for our discussion. The parties stipulated to the value of the defendant's pensions rather than present expert testimony. The following colloquy then transpired:

"The Court: You are telling me it makes no difference what the value of the pension was at the time of the marriage because prior to that it would be his?

''[The Defendant's Counsel]: My position for the court is [that] it makes no difference what the value is now either because it is a premarital asset—

''The Court: All I will deal with is the $363,000?

"[The Defendant's Counsel]: That is the present value as of today.

"The Court: All right."

Despite this apparent agreement, counsel for the defendant later indicated that he was unsure whether the annual 3 percent cost of living increases applied to the

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original value of the pensions or to what was remaining in the pensions. Nevertheless, the parties subsequently submitted a joint exhibit indicating that the defendant is entitled to an annual 3 percent cost of living adjustment, which, over the course of an eighteen year marriage, resulted in a 54 percent increase in monthly payments.

On the basis of these facts, we cannot say that the court's finding that the defendant's pensions increases by 3 percent each year was clearly erroneous. The amount received by the defendant from his pensions in fact does increase by 3 percent on an annual basis. [101 Conn.App. 115] The defendant speculates that the court's statement means that the actual value of the pensions increases. We do not agree with this speculation. [3] In the sentence immediately preceding the discussion of the annual increase of his payments from the pensions, the court noted that ''[a]fter his marriage is terminated, [the defendant] will lose about $300 per month in benefits.'' Reading the two sentences together, it is apparent that the court was referring to the 3 percent increase in payments to the defendant

and not a 3 percent increase in the total value of the pensions. We conclude, therefore, that the court's finding regarding the cost of living adjustment to the defendant's pensions was not clearly erroneous.

C

The defendant next argues that the court reasonably could not have concluded that awarding him his pensions was an offset against the value of the residence. Specifically, he maintains that the court failed to abide by its statutory obligation to consider the ''contribution of each party in the acquisition, preservation or appreciation in value'' of an asset, as set forth in § 46b-81. We do not agree.

The court stated that it considered ''the pertinent statutes, the requests of the parties and the financial [101 Conn.App. 116] conditions of the parties, their respective ages, their income streams and ability to earn income, etc....'' [4] The court further indicated that if it were to award the plaintiff alimony, it then would award the defendant a portion of the residence. The court ultimately decided, however, to forgo an alimony award in favor of awarding the plaintiff the residence and the defendant his pensions.

''In fashioning its financial orders, the court has broad discretion, and [j]udicial review of a trial court's exercise of [this] broad discretion . . . is limited to the questions of whether the . . . court correctly applied the law and could reasonably have concluded as it did.... In making those

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determinations, we allow every reasonable presumption . . . in favor of the correctness of [the trial court's] action.... That standard of review reflects the sound policy that the trial court has the unique opportunity to view the parties and their testimony, and is therefore in the best position to assess all of the circumstances surrounding a dissolution action, including such factors as the demeanor and the attitude of the parties.'' (Internal quotation marks omitted.) *Farrell-Williams v. Williams,* 99 Conn.App. 453, 455, 913 A.2d 1136 (2007).

The court awarded the defendant his entire pensions, providing him with an undivided monthly stream of income. The court then balanced the financial interests of the plaintiff by awarding her the total interest in the residence, which was subject to a mortgage. In reviewing the court's actions, we are limited by our standard of review and do not contemplate whether we would reach the same result. Instead, we limit our review to whether the court correctly applied the law [101 Conn.App. 117] and reasonably could have awarded the defendant his pensions and the plaintiff the residence. Mindful of this deferential standard, after reviewing the entire record, we conclude that the court's financial orders did not constitute an abuse of discretion. In other words, the defendant failed to carry his burden that the court did not consider the proper criteria. See *Rummel v. Rummel,* 33 Conn.App. 214, 222–23, 635 A.2d 295 (1993).

II

The defendant next claims that the court abused its discretion by awarding the plaintiff 100 percent of the equity in the residence as an offset against an award of alimony on the basis of an erroneous finding regarding the termination of the plaintiff's employment. Specifically, he argues that the court erroneously found that the plaintiff had been discharged from her employment in a restaurant two years prior to the trial. We agree that the court's finding was clearly erroneous. Nevertheless, we conclude that this erroneous finding constituted harmless error.

The following additional facts are necessary for our discussion. The plaintiff testified that she had been employed at several different restaurants. She then indicated that she had been laid off by her employer on November 18, 2005, twelve days Before the trial. In its memorandum of decision, however, the court stated: ''[The plaintiff's] last employment was as a waitress at Marianni's Restaurant. This ended about two years ago when she was laid off.'' [5]

[101 Conn.App. 118] As we previously

stated, a finding of fact is clearly erroneous when there is no evidence in the record to support it. See *Gervais v. Gervais,* supra, 91 Conn.App. at 844, 882 A.2d 731. We have reviewed the entire record and conclude that there is no

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evidence to support the finding that the plaintiff's employment was terminated two years prior to the trial. We agree, therefore, that this finding is clearly erroneous.

Although one of the court's findings was clearly erroneous, it does not follow a fortiori that the court's financial orders constituted an abuse of discretion. "Where, however, some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole." (Internal quotation marks omitted.) *Grimm v. Grimm,* 82 Conn.App. 41, 48, 844 A.2d 855 (2004), rev'd in part on other grounds, 276 Conn. 377, 886 A.2d 391 (2005), cert. denied, --- U.S. ----, 126 S.Ct. 2296, 164 L.Ed. 2d 815 (2006); *Owens v. New Britain General Hospital,* 32 Conn.App. 56, 78, 627 A.2d 1373 (1993), aff'd, 229 Conn. 592, 643 A.2d 233 (1994); *DiNapoli v. Doudera,* 28 Conn.App. 108, 112, 609 A.2d 1061 (1992); see *O'Bymachow* v. *O'Bymachow,* 12 Conn.App. 113, 117, 529 A.2d 747, cert. denied, 205 Conn. 808, 532 A.2d 76 (1987).

In the present case, the court considered the respective age and health of the parties. The court noted that the plaintiff lacked any sort of pension benefits and that her only present income was approximately $300 per week from social security, while the defendant received more than $2100 per month. The plaintiff sold [101 Conn.App. 119] property that she had owned prior to the marriage [6] and used the proceeds to purchase a house in Florida in which both parties had lived. After moving to Connecticut, both parties contributed to the residence until the defendant moved out in December, 2003. After that time, the defendant did not assist the plaintiff financially in any way, leaving her to pay the mortgage, her living expenses and the expenses associated with ownership of the residence. After considering the statutory factors, the court, in an effort to untangle the parties' finances, ordered that the defendant quitclaim his interest in the residence to the plaintiff and that the plaintiff solely be responsible for its expenses. Neither party was awarded alimony. The plaintiff was given one motor vehicle, while the defendant received three. The plaintiff was required to give the defendant a painting valued at $12,000. The parties were ordered to pay their own attorney's fees, to provide their own medical insurance coverage and to pay their joint debts equally. Finally, the court awarded the defendant, free from any claim by the plaintiff, his life insurance and pensions.

Despite the court's erroneous finding regarding the timing of the termination of the plaintiff's employment, after reviewing the entire record Before us, we cannot say that the court's financial awards constituted an abuse of discretion. The court considered the relevant statutory criteria and applied its broad allocative [101 Conn.App. 120] authority to distribute the property equitably between the parties. ''An equitable award does not require that the marital estate be divided equally." (Internal

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quotation marks omitted.) *Wendt v. Wendt,* 59 Conn.App. 656, 684, 757 A.2d 1225, cert. denied, 255 Conn. 918, 763 A.2d 1044 (2000); see also *Purnell v. Purnell,* supra, 95 Conn.App. at 681, 897 A.2d 717. In allowing for every reasonable presumption in favor of the correctness of the court's actions, we cannot conclude that the court abused its discretion with respect to its property distribution between the parties in the present case.

III

The defendant next claims that the court abused its discretion by valuing the residence as of the date of the parties' separation instead the date of dissolution. Although it is difficult to discern from his brief, the defendant appears to

argue that the court improperly awarded the plaintiff all of the appreciated value of the residence from the time of the separation. [7] We disagree.

[101 Conn.App. 121] As a general rule, "§ 46b-81 indicates that it is the date of dissolution, rather than the date of separation, on which the [parties'] marital assets are to be determined." (Internal quotation marks omitted.) *Kiniry v. Kiniry,* 71 Conn.App. 614, 624–25, 803 A.2d 352 (2002), aff'd, 79 Conn.App. 378, 830 A.2d 364 (2003); *Benedetto v. Benedetto,* 55 Conn.App. 350, 356, 738 A.2d 745 (1999), cert. denied, 252 Conn. 917, 744 A.2d 437 (2000). In *Wendt v. Wendt,* supra, 59 Conn.App. at 656, 757 A.2d 1225, this court stated that valuation as of the date of dissolution "is simply part of the broader principle that the financial awards in a marital dissolution case should be based on the parties' current financial circumstances to the extent reasonably possible." (Internal quotation marks omitted.) *Id.*, at 661–62, 757 A.2d 1225. Nevertheless, "[t]he principle that requires the court to value assets as of the date of dissolution does not absolutely preclude the court from considering the significance of the date of separation.... [T]he date of separation may be of significance in determining what is equitable at the time of distribution. In distributing property . . . the court is instructed to consider the contribution of each spouse in the acquisition, preservation and appreciation of the marital estate. After the date of separation, it is not difficult to conceive that one spouse may acquire a particular asset without any contribution from the other spouse." (Internal quotation marks omitted.) *Id.*, at 663-64, 757 A.2d 1225.

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The defendant argues that the plaintiff was earning more income in December, 2003, and January, 2004, the time at which he left the residence. As a result of that factor, combined with his age, he maintains that it was equitable to expect the plaintiff to pay the expenses associated with the residence, including the mortgage, while he paid for his own living expenses. The court, however, found that the defendant, after separating from the plaintiff and moving out in December, 2003, ceased paying any of the expenses associated with the [101 Conn.App. 122] residence. Moreover, it heard evidence that the defendant's total income, including his pensions and social security payments, actually was greater than the plaintiff's. Further, during the two year period after the parties separated until the trial, the plaintiff alone maintained the residence, while the defendant purchased various motor vehicles. The court then determined it equitable to award the plaintiff all of the appreciation in the residence. On the basis of the entire record Before us, we cannot conclude that this determination constituted an abuse of discretion.

IV

The defendant's final claim is that the court abused its discretion by valuing the residence without any appraisal or expert testimony. Specifically, the defendant argues in his brief that the "only evidence regarding the value of the residence in 2003 was the self-serving testimony of the [p]laintiff. Pursuant to Connecticut Practice Book § 25-33, the trial court has the authority [to] appoint an expert to value an asset, should the trial court deem it necessary." The defendant concludes that such a valuation was necessary in the present case.

The defendant has provided no citation or legal authority in support of this claim. It is well established that "[w]e are not required to review issues that have been improperly presented to this court through an inadequate brief.... Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failing to brief the issue properly.... Where the parties cite no law and provide no analysis of their claims, we do not review such claims." (Internal quotation marks omitted.) *Wilson v. Jefferson,* 98 Conn.App. 147, 166, 908 A.2d 13 (2006); *Sander v. Sander,* supra, 96 Conn.App. at 114, 899 A.2d 670. Accordingly, we [101 Conn.App. 123] decline to review this claim on the basis of an inadequate brief. [8]

The judgment is affirmed.

In this opinion the other Judges concurred.

Notes:

[1] The court granted the motion with respect to the issue of the division of personal property, which the court referred to arbitration.

[2] The defendant did not seek review of the denial of his motion for articulation.

[3] We also note that the defendant failed to seek an articulation of the court's decision with respect to the issue of the cost of living adjustments to his pension. "It is well settled that [a]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification.... An articulation may be necessary where the trial court fails completely to state any basis for its decision . . . or where the basis, although stated, is unclear.... The purpose of an articulation is to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal." (Citations omitted; internal quotation marks omitted.) *Fantasia v. Milford Fastening System,* 86 Conn.App. 270, 283, 860 A.2d 779 (2004), cert. denied, 272 Conn. 919, 866 A.2d 1286 (2005); see also *Premier Capital, Inc. v. Grossman,* 92 Conn.App. 652, 660 n.1, 887 A.2d 887 (2005).

[4] We are entitled to presume that the court acted properly and considered all of the evidence Before it. *Misinonile v. Misinonile,* 35 Conn.App. 228, 234, 645 A.2d 1024, cert. denied, 231 Conn. 929, 649 A.2d 253 (1994); *Rummel v. Rummel,* 33 Conn.App. 214, 222, 635 A.2d 295 (1993).

[5] The defendant also argues that the court improperly found that the plaintiff most recently had been employed as a restaurant manager and therefore had a higher earning capacity than a waitress. We note that the court was in possession of the plaintiff's most recent financial affidavit, listing her income, and the defendant has not challenged the veracity of that evidence. The defendant, moreover, failed to present any evidence regarding the amount of income earned by the plaintiff as a manager as compared with that of a waitress. "As [our Supreme Court has] observed, [i]t is the function of the trial court, not [an appellate] court, to find facts.... [T]o review [a] claim, which has been articulated for the first time on appeal and not Before the trial court, would result in a trial by ambuscade of the trial judge." (Internal quotation marks omitted.) *Seymour v. Region One Board of Education,* 274 Conn. 92, 105, 874 A.2d 742, cert. denied, --- U.S. ----, 126 S.Ct. 659, 163 L.Ed. 2d 526 (2005).

[6] The defendant argues that the court failed to find that the proceeds from these sales were in Canadian dollars, which "are worth significantly less than American dollars, given the exchange rate." The defendant, however, failed to present any evidence to the trial court regarding the exchange rate between United States and Canadian dollars during the relevant time period. We therefore decline to consider this claim. "We have repeatedly held that this court will not consider claimed errors on the part of the trial court unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim." (Internal quotation marks omitted.) *Urich v. Fish,* 97 Conn.App. 797, 801, 907 A.2d 96 (2006).

[7] To the extent that the defendant challenges the valuation of the residence, we decline to review that claim. The parties stipulated that the value of the residence at the time of trial in 2005 was $272,500, subject to a mortgage of $99,723.77. The court accepted the parties' stipulation. "Ordinarily . . . stipulations of the parties should be adopted by the court. *Central Coat, Apron & Linen Service, Inc. v. Indemnity Ins. Co.,* 136 Conn. 234, 236, 70 A.2d 126 (1949)." *Central Connecticut Teachers Federal Credit Union v. Grant,* 27 Conn.App. 435, 438, 606 A.2d 729 (1992); see also *State v. Phidd,* 42 Conn.App. 17, 31, 681 A.2d 310 (formal stipulation of facts by parties constitutes judicial admission that should normally be adopted by court deciding case), cert. denied, 238 Conn. 907, 679 A.2d 2 (1996), cert. denied, 520 U.S. 1108, 117 S.Ct. 1115, 137 L.Ed. 2d 315 (1997).

Because the defendant stipulated to the value of the residence Before the trial court, he cannot now challenge that finding by the court. "This situation is in the nature of induced error. Actions that are induced by a party ordinarily cannot be grounds for error [on appeal]." (Internal quotation marks omitted.) *Sachs v. Sachs,* 60 Conn.App. 337, 345, 759 A.2d 510 (2000).

Additionally, we note that the court did not value the residence at the time of separation, in 2003. The court expressly stated that it accepted the parties' stipulation that the value of the residence at the time of the trial was $272,500 with equity in the amount of $172,777.

[8] Even if we were to review this claim, we would conclude that it is without merit. As the plaintiff noted in her brief, homeowners are permitted to testify concerning their opinion as to the fair market value of the property. *Gregorio v. Naugatuck,* 89 Conn.App. 147, 156, 871 A.2d 1087 (2005); see also *Pestey v. Cushman,* 259 Conn. 345, 364, 788 A.2d 496 (2002) ("[t]his rule reflects . . . the common experience that an owner is familiar with her property and knows what it is worth" [internal quotation marks omitted]); *Tessmann v. Tiger Lee Construction Co.,* 228 Conn. 42, 47, 634 A.2d 870 (1993); *McCahill v. Town & Country Associates, Ltd.,* 185 Conn. 37, 41, 440 A.2d 801 (1981). The court, therefore, was free to accept the plaintiff's testimony regarding the value of the residence.

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974 A.2d 641 (Conn. 2009)
292 Conn. 597
Jacqueline MICKEY
v.
Darrell D. MICKEY.
No. 18126.
Supreme Court of Connecticut.
July 21, 2009

Argued Sept. 16, 2008.

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Campbell D. Barrett, with whom were Jon T. Kukucka and, on the brief, C. Michael Budlong, Hartford, Kevin W. Hadfield and Felicia C. Hunt, certified legal intern, for the appellant (defendant).

Steven R. Dembo, with whom, on the brief, were P. JoAnne Burgh and Barbara D. Aaron, Hartford, for the appellee (plaintiff).

ROGERS, C.J., and NORCOTT, KATZ, ZARELLA and SCHALLER, Js.

ZARELLA, J.

[292 Conn. 599] The principal issue in this appeal is whether disability benefits awarded under General Statutes § 5-192p[1] as a result of a disability incurred after a marriage has been dissolved constitute distributable marital property under General Statutes § **46b-81**.[2] The defendant, Darrell D. Mickey, appeals [3] from the trial court's judgment denying his motion for clarification of that court's financial orders, pursuant to which the [292 Conn. 600] plaintiff, Jacqueline Mickey, was granted 40 percent of the defendant's monthly retirement benefits. On appeal, the defendant claims that, in denying his motion for clarification, the trial court improperly concluded that it had authority under § **46b-81** to distribute the defendant's potential disability benefits at the time of dissolution. Specifically, the defendant contends that his disability benefits did not constitute distributable property under § **46b-81** because, at the time of dissolution, such benefits were no more than a mere expectancy and not a sufficiently concrete interest. The defendant also asserts that his disability benefits are not distributable because they were not actually awarded until after the date of dissolution, and they represent a substitute for lost wages rather than deferred compensation. We agree with the defendant that his disability benefits are beyond the scope of property subject to distribution under § **46b-81** and, accordingly, reverse the judgment of the trial court.

The record reveals the following relevant facts and procedural history. The marriage of the parties was dissolved on September 21, 2001. At the time of dissolution,

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the defendant had been employed by the state of Connecticut as a correction officer for approximately fourteen years. Pursuant to his employment with the state, the defendant was enrolled in tier II of the state employees retirement system. See General Statutes § 5-192e et seq. Due to the nature of his job, the defendant potentially was eligible for hazardous duty retirement under General Statutes § 5-192n,[4] and, as with all other state employees enrolled in tier II, also was eligible for normal retirement benefits under General Statutes § 5-192 *l,* and disability retirement benefits under § 5-192p [292 Conn. 601] in the event that he became disabled during the course of his employment.

In its memorandum of decision issued in conjunction with the dissolution of the parties' marriage, the trial court, *Dyer, J.,* ordered that " [t]he plaintiff shall be entitled to, and the defendant's ... pension plan shall pay to her, 40

percent of the defendant's monthly retirement benefit payment. It is the court's intention that the plaintiff receive 40 percent of the defendant's monthly retirement benefit payment under the contributory hazardous duty retirement plan should he qualify for [the] same, or 40 percent of the defendant's monthly retirement benefit payment under the noncontributory tier II plan should he fail to qualify for a hazardous duty pension." Despite specifically distributing the defendant's potential hazardous duty retirement benefits, however, the trial court did not mention any potential disability benefits that the defendant may have subsequently become entitled to under the plan.

Following the dissolution of the parties' marriage, the defendant suffered an injury in the course of his employment on February 28, 2002, which rendered him disabled and eventually forced him to retire. The defendant began receiving retirement benefits under the state employees retirement system in June, 2005, which was made retroactive to July 1, 2003, in the amount of $990 per month.[5] The defendant's monthly benefit subsequently was increased to $2382.30 in November, 2005, in recognition of the enhanced [6] benefit that he was [292 Conn. 602] entitled to receive as a result of the state's certification of his disability under § 5-192p.[7] The plaintiff thereafter continued to receive 40 percent of the defendant's entire monthly benefit payment, including that portion attributable to the defendant's disability benefits.

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The defendant subsequently filed a motion for clarification on January 13, 2006, requesting that the trial court clarify that (1) it did not intend to distribute the defendant's disability benefits as part of its original financial orders, and (2) regardless of its intent, the trial court did not have the statutory authority to distribute those benefits because they were acquired after dissolution. After the trial court, *Solomon, J.,* denied the plaintiff's motion to dismiss the defendant's motion for clarification, the trial court, *Dyer, J.,* [8] subsequently denied the defendant's motion for clarification, concluding, on the basis of our decision in *Travelers Ins. Co. v. Pondi-Salik,* 262 Conn. 746, 817 A.2d 663 (2003), that the defendant's disability benefits properly were characterized as being part of his retirement benefits, which the trial court clearly and unambiguously had distributed as part of its financial orders. The trial court further determined that, because retirement benefits are properly distributable under § **46b-81**, the court had the authority to distribute those retirement benefits attributable to the defendant's disability, and that the defendant, therefore, was not entitled to any relief. This appeal followed.

I

As an initial matter, the plaintiff claims that the defendant's appeal is procedurally improper and, therefore, [292 Conn. 603] that we should not address its merits. The plaintiff asserts that (1) the defendant's motion for clarification is an improper collateral attack on the judgment of dissolution, (2) by failing to appeal from the judgment of dissolution, the defendant has waived any claim that the trial court lacked statutory authority to render that judgment, and (3) the defendant has not provided an adequate record for review. We disagree and conclude that the defendant's appeal is properly Before us.[9]

A

The plaintiff first claims that, because the defendant's motion for clarification is more properly characterized as a motion to reopen and modify the terms of the judgment of dissolution, it is an untimely collateral attack on that judgment. We disagree.

It is well established that " [t]he court's judgment in an action for dissolution of a marriage is final and binding [on] the parties, where no appeal is taken therefrom, unless and to the extent that

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statutes, the common law or rules of [practice] permit the setting aside or [292 Conn. 604]

modification of that judgment. Under Practice Book [§ 17-4], a civil judgment may be opened or set aside ... [when] a motion seeking to do so is filed within four months from the date of its rendition.... Absent waiver, consent or other submission to jurisdiction, however, a court is without jurisdiction to modify or correct a judgment, in other than clerical respects, after the expiration of [that four month period].... After the expiration of the four month period provided by [Practice Book § 17-4] a judgment may not be vacated [on] the sole ground that it is erroneous in matter of law, except by a court exercising appellate or revisory jurisdiction, unless such action is authorized by statute or unless the error is one going to the jurisdiction of the court rendering the judgment." (Citation omitted; internal quotation marks omitted.) *Misinonile v. Misinonile,* 190 Conn. 132, 134, 459 A.2d 518 (1983).

Even beyond the four month time frame set forth in Practice Book § 17-4, however, courts have " continuing jurisdiction to fashion a remedy appropriate to the vindication of a prior ... judgment ... pursuant to [their] inherent powers...." (Citation omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc. v. Plan & Zoning Commission,* 260 Conn. 232, 239, 796 A.2d 1164 (2002). When an ambiguity in the language of a prior judgment has arisen as a result of postjudgment events, therefore, a trial court may, at any time, exercise its " continuing jurisdiction to effectuate its prior [judgment] ... by interpreting [the] ambiguous judgment and entering orders to effectuate the judgment as interpreted...." *Id.*, at 246, 796 A.2d 1164. In cases in which execution of the original judgment occurs over a period of years, a motion for clarification is an appropriate procedural vehicle to ensure that the original judgment is properly effectuated. See *id.,* at 244, 796 A.2d 1164 ("[M]otions for interpretation or clarification, although not specifically described in the rules of practice, are [292 Conn. 605] commonly considered by trial courts and are procedurally proper.... There is no time restriction imposed on the filing of a motion for clarification."). Motions for clarification may not, however, be used to modify or to alter the substantive terms of a prior judgment; see *In re Haley B.,* 262 Conn. 406, 413, 815 A.2d 113 (2003); see also *AvalonBay Communities, Inc. v. Plan & Zoning Commission, supra*, at 250, 796 A.2d 1164; and " we look to the substance of the relief sought by the motion rather than the form" to determine whether a motion is properly characterized as one seeking a clarification or a modification. *In re Haley B., supra*, at 413, 815 A.2d 113.

In the present case, the defendant filed a motion for clarification, asserting that postdissolution events revealed a latent ambiguity in the dissolution judgment as to whether the trial court intended to distribute the defendant's disability benefits in connection with its distribution of the parties' marital property. In effect, the defendant asked the court to clarify that it did not and could not have intended to distribute his disability benefits because they are not marital property distributable under § **46b-81** and, therefore, that the trial court lacked statutory authority to distribute them. In other words, the defendant asserted that there was an ambiguity as to whether the trial court intended the term " monthly retirement benefit" to include his disability benefits, which ambiguity arose from the legal question of whether disability benefits are marital property potentially subject to distribution. The trial court concluded that there was no ambiguity in the judgment of dissolution and that the defendant's disability benefits were distributable under § **46b-81**

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on the basis of our decision in *Travelers Ins. Co. v. Pondi-Salik, supra*, 262 Conn. at 746, 817 A.2d 663, in which we held, in a different context, that such benefits are properly characterized as retirement benefits, which we generally have considered to be distributable marital property. The defendant contends [292 Conn. 606] that, because the mere classification of disability benefits as retirement benefits does not adequately resolve the issue of whether those benefits are distributable marital property, the trial court's analysis as to whether there was an ambiguity in the judgment of dissolution was

incomplete and improper.

We conclude that the defendant's use of a motion for clarification was proper in this case. The defendant did not ask the trial court to revisit its original judgment and effectuate its original intent by, for example, reducing the plaintiff's share of his retirement benefits from 40 percent to 20 percent. Such use of a motion for clarification would properly be characterized as a motion to modify because it would represent an attempt to alter the substantive terms of the original judgment. See, e.g., *In re Haley B., supra*, 262 Conn. at 414, 815 A.2d 113 (motion for clarification properly characterized as motion to alter or to modify original judgment when trial court changed, on basis of mistake made at trial, visitation order by reducing frequency of visitation from weekly to monthly visitation in order to effectuate intent of original judgment); *State v. Denya,* 107 Conn.App. 800, 812, 946 A.2d 931 (court modified prior judgment when, in guise of clarifying ambiguity, it changed condition of probation requiring electronic monitoring of defendant at discretion of probation officer to requirement of continuous electronic monitoring for duration of defendant's probation), cert. granted, 288 Conn. 906, 953 A.2d 654 (2008); *Miller v. Miller,* 16 Conn.App. 412, 416-17, 547 A.2d 922 (trial court modified original judgment by subsequently ordering that any securities transferred to plaintiff in satisfaction of $500,000 lump sum alimony award pay dividends of at least $50,000 per year), cert. denied, 209 Conn. 823, 552 A.2d 430 (1988). In the present case, however, the defendant merely asked the trial court to clarify that it never intended to include his disability benefits, which never [292 Conn. 607] were expressly contemplated by the trial court, in the term " monthly retirement benefit" because they do not constitute marital property, regardless of the characterization of such benefits in *Travelers Ins. Co. v. Pondi-Salik, supra*, 262 Conn. at 751, 817 A.2d 663. Moreover, neither the parties nor the trial court could have contemplated that such benefits would in fact be included in the defendant's retirement benefits because we did not decide *Pondi-Salik* until 2003, approximately two years after the financial orders in the present case were issued. We conclude, therefore, that the defendant's motion for clarification was not an improper attempt to reopen and modify the substantive terms of the judgment of dissolution but, rather, was a proper attempt to clarify an existing ambiguity as to the intent of that judgment.

B

We next address the plaintiff's claim that the defendant, in failing to appeal from the judgment of dissolution, has waived any claim that the trial court lacked statutory authority to distribute his disability benefits. Specifically, the plaintiff contends that, because the defendant had ample opportunity to challenge the trial court's authority to distribute his disability benefits, but did not do so at trial or through a timely appeal or motion to reopen and modify the original judgment, he cannot now bring his claim several years after the fact. We conclude that the plaintiff's claim is without merit.

The only precedent that the plaintiff cites in support of her claim is

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Gagne v. Vaccaro, 80 Conn.App. 436, 446-48, 835 A.2d 491 (2003), cert. denied, 268 Conn. 920, 846 A.2d 881 (2004), in which the Appellate Court concluded that the defendant in that case had waived his claim, raised for the first time on appeal, that the unjust enrichment count of the plaintiff's complaint was improperly tried to a jury, when the defendant himself had claimed the matter to the jury in the first place. The [292 Conn. 608] court's decision in *Gagne,* however, is distinguishable from the present case. In *Gagne,* the Appellate Court stated that " [w]aiver is an intentional relinquishment or abandonment of a known right or privilege.... It involves the idea of assent, and assent is an act of understanding.... The rule is applicable that no one shall be permitted to deny that he intended the natural consequences of his acts and conduct.... In order to waive a claim of law it is not necessary ... that a party be certain of the correctness of the claim and its legal efficacy. It is enough if he knows of

the existence of the claim and of its reasonably possible efficacy." (Citations omitted; internal quotation marks omitted.) *Id.*, at 445-46, 835 A.2d 491. Accordingly, the Appellate Court recognized that the defendant, in claiming the matter to the jury, had assented to such an action and had intended such a result. Moreover, he repeatedly had failed to raise any objection throughout the proceedings that a jury trial on that particular claim was improper, despite his undeniable knowledge and intent that that claim be so tried. *Id.*, at 446-47, 835 A.2d 491.

In the present case, however, all of the parties involved at trial were entirely unaware that the trial court's original judgment could possibly contemplate the distribution of the defendant's disability benefits, particularly in view of the fact that *Pondi-Salik* had not yet been decided when the trial court rendered the dissolution judgment. Indeed, in denying the plaintiff's motion to dismiss the defendant's motion for clarification, the trial court, *Solomon, J.,* stated: " I've never had the request made of me in six years on the bench as a family judge. I've never had anybody address, as part of the pension distribution, what happens in a disability situation, either Before or after a trial or as part of an agreement," and that, " as part of the dissolution process itself, either by way of agreement or by way of a trial ... I don't recall an instance where ... the issue of [292 Conn. 609] what happened in the event of disability was ever raised." Thus, in our view, there is insufficient justification to warrant the conclusion that either the parties or the trial court was aware of the potential issue of disability benefits being included in the financial orders, or that the defendant had a chance to litigate that particular issue at trial.[10] Moreover, the defendant filed his motion for clarification within three months of learning that his disability benefits were being apportioned to the plaintiff in conformance with the trial court's financial orders. Accordingly, we conclude that the plaintiff's claim is without merit.

C

Finally, we address the plaintiff's claim that the defendant has not provided

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this court with an adequate record for review of his appellate claims. The plaintiff contends that the defendant has not provided this court with the necessary materials to review his claims because the defendant did not seek an articulation of the judgment of dissolution and has not provided any transcripts from the original trial. We disagree and conclude that the record is adequate for review.

" It is well established that [i]t is the appellant's burden to provide an adequate record for review.... It is, therefore, the responsibility of the appellant to move for an articulation or rectification of the record [when] the trial court has failed to state the basis of a decision ... to clarify the legal basis of a ruling ... or to ask the trial judge to rule on an overlooked matter." [292 Conn. 610] Internal quotation marks omitted.) *Schoonmaker v. Lawrence Brunoli, Inc.,* 265 Conn. 210, 232, 828 A.2d 64 (2003).

The plaintiff does not claim that the defendant has failed to provide an adequate record of the trial court's disposition of the defendant's motion for clarification, or that the trial court's stated basis for its decision was so inadequate as to deprive this court of any meaningful opportunity for review. Indeed, the defendant has provided a full record of that particular decision, including transcripts, memoranda and the trial court's detailed memorandum of decision, which contains its legal reasoning. Rather, the plaintiff bases her claim on the fact that the defendant has not provided this court with transcripts from the proceedings leading up to, or an articulation of, the judgment of dissolution. That the defendant has not provided this court with those materials does not impede our review of this appeal, however, because the defendant does not challenge the rationale supporting the court's decision made in connection with the dissolution judgment. The sole focus of the defendant's appeal is that the trial court improperly denied his motion for clarification on the basis of its legal conclusion that disability benefits acquired after the dissolution constitute marital property distributable under § **46b-81**. We do not see how

the transcripts of the proceedings leading up to the judgment of dissolution, in which the issue regarding the distribution of the defendant's disability benefits was not even contemplated, could be helpful to our review of the defendant's claims. We conclude, therefore, that the defendant has provided this court with an adequate record for review and that this appeal is properly Before this court.

II

A

We turn now to the merits of the defendant's appeal. The defendant first claims that the trial court improperly [292 Conn. 611] relied on our decision in *Travelers Ins. Co. v. Pondi-Salik, supra*, 262 Conn. at 746, 817 A.2d 663, to conclude that there was no ambiguity in the judgment of dissolution, and that the defendant's disability benefits were properly distributed pursuant to that judgment. Specifically, the defendant contends that *Pondi-Salik* is inapplicable because the issue of whether disability benefits are properly labeled as retirement benefits is immaterial to the determination of whether those benefits are distributable as marital property under § **46b-81**. We agree with the defendant that our characterization in *Pondi-Salik* of disability benefits awarded under § 5-192p as retirement benefits is not dispositive of this appeal.

In *Pondi-Salik,* we addressed the issue of whether, in the context of an automobile insurance coverage dispute, disability benefits paid pursuant to § 5-192p are properly characterized as disability benefits or

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retirement benefits. *Id.*, at 747-48, 817 A.2d 663. After engaging in an extensive analysis of the language and legislative history of § 5-192p, the broader statutory scheme in which § 5-192p exists and the existence of a separate and parallel statutory scheme for the provision of pure disability benefits for state employees, we concluded that disability benefits under § 5-192p are " in the nature of retirement benefits and not disability benefits" ; *id.,* at 755, 817 A.2d 663; and that " [d]isability operates only to accelerate the employee's qualification for retirement benefits under § 5-192p." *Id.*

Although the disability retirement benefit statute at issue in *Pondi-Salik* is the same as that in the present case, we conclude that the significant factual and procedural differences between the two cases render *Pondi-Salik* inapposite. In particular, although we previously have concluded that general retirement benefits are distributable under § **46b-81**; see, e.g., *Krafick v. Krafick,* 234 Conn. 783, 798, 663 A.2d 365 (1995); we never have addressed the particular issue that is presented in [292 Conn. 612] this case, namely, whether that portion of a defendant's retirement benefits that is specifically attributable to a postdissolution disability is properly considered marital property under § **46b-81**. The determination of that issue requires an entirely different analysis than that which we applied in *Pondi-Salik.* See part II B of this opinion. In *Pondi-Salik,* we examined § 5-192p to determine whether payments made under that statute could be characterized as a " disability benefit" under an insurance policy between the parties that reduced the amount payable to the defendant by " [a]ll sums paid or payable under any workers' compensation, disability benefits or similar law...." (Internal quotation marks omitted.) *Travelers Ins. Co. v. Pondi-Salik, supra*, 262 Conn. at 753, 817 A.2d 663. Although we determined that " [the] benefits paid pursuant to § 5-192p are in the nature of retirement benefits and not disability benefits" ; *id.,* at 755, 817 A.2d 663; we did not analyze these benefits to determine whether this conclusion was appropriate in the context of an equitable property division in a marital dissolution proceeding. Furthermore, unlike in the present case, in *Pondi-Salik,* this court was examining the nature of the benefits at a point in time when the existence, nature and extent of the disability already were known. Thus, there was no discussion of the speculative nature of such benefits, or how they should be characterized Before a disability actually occurs in light of the policy

considerations underlying our equitable distribution statute. Consequently, we agree with the defendant that *Pondi-Salik* is not dispositive of this appeal.

B

Accordingly, we now address the defendant's principal claim on appeal, namely, that his disability benefits do not constitute distributable marital property and, therefore, that the trial court lacked authority to distribute those benefits under § **46b-81**. Specifically, the defendant contends that his receipt of disability benefits [292 Conn. 613] was too speculative at the time of dissolution to render his interest in those benefits a property interest under § **46b-81**. Even if the disability benefits did constitute property, however, the defendant asserts that they were nevertheless not *marital* property because they (1) were not actually acquired until after the judgment of dissolution was rendered, and (2) represent compensation for lost wages attributable to services that would have been performed postdissolution. We conclude that the defendant's disability benefits did not constitute property subject to distribution within the meaning of § **46b-81** at the time of dissolution under the controlling two part test set forth in *Bender v. Bender,* 258 Conn. 733, 748-49, 785 A.2d 197 (2001).

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We begin our analysis by determining the appropriate standard of review. We are called on in this case to interpret § **46b-81** to determine whether the defendant's disability benefits are property eligible for distribution pursuant to that statute.[11] The question of whether disability benefits received postdissolution constitute marital property distributable under § **46b-81** raises a question of statutory interpretation over which we exercise plenary review. See, e.g., *Dept. of Transportation v. White Oak Corp.,* 287 Conn. 1, 7, 946 A.2d 1219 (2008).

" The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature.... In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply.... In seeking to determine that meaning, General Statutes § 1-2z directs [292 Conn. 614] us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.... When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter...." (Internal quotation marks omitted.) *Friezo v. Friezo,* 281 Conn. 166, 181-82, 914 A.2d 533 (2007).

With respect to § **46b-81**, we previously have determined that the purpose of postdissolution " property division is to unscramble the ownership of property, giving to each spouse what is equitably his." (Internal quotation marks omitted.) *Rubin v. Rubin,* 204 Conn. 224, 228, 527 A.2d 1184 (1987). While undertaking this task, we have considered the nature of the marital relationship: " [M]arriage is, among other things, a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute-directly and indirectly, financially and nonfinancially- *the fruits of which* are distributable at divorce." (Emphasis in original; internal quotation marks omitted.) *Krafick v. Krafick, supra*, 234 Conn. at 795, 663 A.2d 365. To this end, we generally have taken a liberal view of the term " property," while declaring that " the theme running through this area of our jurisprudence ... pays mindful consideration to the equitable purpose of our statutory distribution scheme, rather than to mechanically applied rules of property law. In order to achieve justice, equity looks to

substance, and not to mere form." *Bender v. Bender, supra*, 258 Conn. at 751, 785 A.2d 197.

[292 Conn. 615] Placing each spouse in an equitable postdissolution position, however, requires a court to consider more than merely how to divide the marital property. Through General Statutes § 46b-82,[12] the

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legislature has empowered courts to create in either or both spouses an obligation to provide future financial support to the other through continuing alimony payments. We also must examine this companion statute, therefore, in order to understand more completely the interrelationship between § § **46b-81** and 46b-82. These two statutes, working together, provide the courts of this state with their primary tools for apportioning the property and income of spouses when a marriage dissolves. Indeed, General Statutes § 46b-82 (a) provides in relevant part: " At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other, *in addition to or in lieu of* an award pursuant to section **46b-81**...." (Emphasis added.) Despite their close relationship, however, the purposes and operation of § § **46b-81** and 46b-82 are distinct and, to an extent, complementary, applying under different circumstances for different reasons. Although the purpose of § **46b-81** is to " unscramble" the spouses' *current* property interests; (internal quotation marks omitted) *Rubin v. Rubin, supra*, 204 Conn. at 228, 527 A.2d 1184; the purpose of § 46b-82 is to recognize " the obligation of support that spouses assume toward each other by virtue of the [292 Conn. 616] marriage." *Id.*, at 234, 527 A.2d 1184; see also *Smith v. Smith,* 249 Conn. 265, 275, 752 A.2d 1023 (1999) ("the purpose of both periodic and lump sum alimony is to provide continuing support"). Thus, using both statutes, a court can consider the individual circumstances of each marriage to fashion a fair distribution of *presently* existing marital property as well as ensuring the *future* support of a dependent spouse.

Under § **46b-81**, a court has the authority to divide only the *presently* existing property interests of the parties at the time of dissolution, and such division, once made, cannot be altered. See *Smith v. Smith, supra*, 249 Conn. at 275, 752 A.2d 1023 ("once the marital property is divided, the court has fulfilled its responsibility, and, therefore, continuing jurisdiction over divided marital property does not further the goal of the statutes"). An alimony award made at the time of dissolution, on the other hand, *can* be subsequently modified at any time to account for any significant changes in the circumstances of the parties. General Statutes § 46b-86 (a) provides in relevant part that an alimony award can " be continued, set aside, altered or modified by [the] court upon a showing of a substantial change in the circumstances of either party...." The relevant circumstances for a court to consider in establishing or modifying an alimony award are set forth in General Statutes § 46b-82 (a), which provides in relevant part that, " [i]n determining whether alimony shall be awarded, and the duration and amount of the award, the court ... shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties...." Thus, § § **46b-81** and 46b-82 are complementary in that they ensure that courts will consider all of the relevant circumstances in distributing property and [292 Conn. 617] establishing future support obligations. In the event that these circumstances change substantially, for example, if one of the spouses receives a

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substantial inheritance; *Bartlett v. Bartlett,* 220 Conn. 372, 383, 599 A.2d 14 (1991); or becomes unemployed; see *Simms v. Simms,* 283 Conn. 494, 504, 927 A.2d 894 (2007); § 46b-86 provides courts with flexibility to modify an alimony award to reflect these unexpected or uncertain events.

In order to address fully the defendant's claim that his disability benefits are not subject to equitable distribution, it also is important to

understand the nature of the disability and retirement plan under which those benefits were granted. General Statutes § § 5-192e through 5-192x define the state employee tier II retirement plan of which the defendant was a member. The plan is a noncontributory,[13] comprehensive scheme including provisions for normal retirement; see General Statutes § 5-192 *l* ; hazardous duty retirement; see General Statutes § 5-192n; and disability retirement. See General Statutes § 5-192p. An employee's eligibility and amount of benefits under the normal retirement plan are based on (1) years of state employment, which are defined as " vesting service" ; General Statutes § 5-192i(a); and (2) various qualified periods of nonstate employment, which together with years of state employment are defined as " credited service...." General Statutes § 5-192j (a). An employee may retire voluntarily with a retirement benefit upon reaching a certain age with a defined number of years of accrued vesting service.[14] See generally General Statutes § 5-192 *l* . Upon [292 Conn. 618] retiring under the normal retirement plan, the eligible employee's actual benefit is computed using formulas that primarily account for the employee's amount of credited service and his average annual earnings. See General Statutes § 5-192 *l* (c).

The disability retirement plan is distinct from, and complementary to, the normal retirement plan. If an employee under this plan is disabled prior to applying for retirement, the formula remains the same, except that § 5-192p (c) provides the employee the benefit of an additional number of years of credited service that " he would have at age sixty-five if he continued to work until that age, but limited to a maximum of thirty years," unless his actual credited service as of his disability retirement date is greater, in which case the formula works exactly the same as in normal retirement. In this way, the acceleration clause of § 5-192p (c) serves to reimburse a disabled employee for those years of compensation forgone due to disability, whereas the amount determined under § 5-192 *l* on the basis of the employee's actual years of credited service operates as a standard pension benefit, representing deferred compensation for those years of service actually completed.

With this background of the relevant statutes in mind, we now turn to a more specific examination of the meaning of the term " property" in § **46b-81**. The legislature has not seen fit to define this critical term, leaving it to the courts to determine its meaning through application on a case-by-case basis. " Neither § **46b-81** nor any other closely related statute defines property or identifies the types of property interests that are subject to equitable distribution in dissolution proceedings."

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(Internal quotation marks omitted.) *Bender v. Bender, supra*, 258 Conn. at 742, 785 A.2d 197. As we noted previously, this court has generally taken a rather " broad and comprehensive" view of the meaning of the term " property" for purposes of equitable distribution. [292 Conn. 619] *Krafick v. Krafick, supra*, 234 Conn. at 795, 663 A.2d 365. We have not erased altogether, however, the limitations inherent in the term. We continue to recognize that " the marital estate divisible pursuant to § **46b-81** refers to interests already acquired, not to expected or unvested interests, or to interests that the court has not quantified." *Smith v. Smith, supra*, 249 Conn. at 274, 752 A.2d 1023; see also *Simmons v. Simmons,* 244 Conn. 158, 165, 708 A.2d 949 (1998) ("[§] **46b-81** applies only to presently existing property interests, not mere expectancies" [internal quotation marks omitted]); *Rubin v. Rubin, supra*, 204 Conn. at 230-31, 527 A.2d 1184 ("[p]roperty entails interests that a person has *already acquired* in *specific* benefits" [emphasis added; internal quotation marks omitted]). Our cases thus have generally divided the various contested property interests under § **46b-81** by characterizing them as either " presently existing" and enforceable and, therefore, distributable; *Simmons v. Simmons, supra*, at 165, 708 A.2d 949; or mere expectancies immune from equitable distribution. *Id*.

For instance, in *Krafick,* we addressed the

issue of whether a vested [15] but unmatured pension could be [292 Conn. 620] classified as marital property subject to equitable distribution pursuant to § **46b-81**. See *Krafick v. Krafick, supra*, 234 Conn. at 797-98, 663 A.2d 365. The plaintiff in *Krafick* was contesting the trial court's refusal to consider the defendant's pension benefits alongside other assets in distributing the marital estate. *Id.*, at 791-92, 663 A.2d 365. The defendant's pension vested at twenty years of service, and the benefit, calculated pursuant to a formula based on the employee's total years of service and an average of the employee's three highest years of earnings, was payable, or matured, upon retirement. *Id.*, at 788-89, 663 A.2d 365. At

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the time of the trial, the defendant in *Krafick* was eligible to retire and represented that he intended to do so in approximately two years. *Id.*, at 789, 663 A.2d 365.

Analyzing the plaintiff's claim, we first described the nature of the interest in dispute: " Pension benefits represent a form of deferred compensation for services rendered.... [T]he employee receives a lesser present compensation plus the contractual right to the future benefits payable under the pension plan." (Citations omitted; internal quotation marks omitted.) *Id.*, at 794-95, 663 A.2d 365. We then proceeded to place pension benefits in the broader context of the goals of postdissolution equitable property distribution: " [T]he primary aim of property distribution is to recognize that marriage is, among other things, a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute- directly and indirectly, financially and nonfinancially- *the fruits of which* are distributable at divorce." (Emphasis in original; internal quotation [292 Conn. 621] marks omitted.) *Id.*, at 795, 663 A.2d 365. We concluded that vested pension benefits are " an economic resource acquired with the fruits of the wage earner spouse's labors which would otherwise have been utilized by the parties during the marriage to purchase other deferred income assets" ; (internal quotation marks omitted) *id.,* at 796, 663 A.2d 365; and, thus, distributable as marital property. *Id.*, at 796-97, 663 A.2d 365.

We next had to determine whether treating the defendant's vested, but unmatured, pension as property under § **46b-81** violated our understanding of the limitations of the reach of the statute. *See id.,* at 797, 663 A.2d 365. Recognizing that § **46b-81** " applies only to presently existing property interests, [and] not mere expectancies" ; (internal quotation marks omitted) id.; we concluded that *vested* pension benefits are appropriately characterized as a presently existing property interest because they " represent an employee's right to receive payment in the future, subject ordinarily to his or her living until the age of retirement." *Id*.

Our decision in *Krafick* was followed by several cases expounding on the foundation laid in that opinion. For example, in *Bornemann v. Bornemann,* 245 Conn. 508, 515, 752 A.2d 978 (1998), we confronted the issue of whether " stock options that have been granted but have not yet become exercisable at the time of a dissolution and can be exercised at a future date only if certain conditions are met by the employee to whom they were granted are a property interest encompassed within the meaning of property under § **46b-81**." [16] Analogizing those stock options to the vested pension benefits in [292 Conn. 622] *Krafick,* we concluded that a contractual interest in stock options that were granted but had not yet become exercisable was " property" subject to distribution because " the options created an enforceable right in the defendant." *Id.*, at 518, 752 A.2d 978. In reaching this conclusion, we found it significant that the options would mature as long as the defendant abided by the terms of his contractual arrangement with his former employer. [17]

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Id. In the absence of any breach of the agreement, the defendant " was entitled to exercise the options on their respective maturity dates, and would have had a cause of action for breach of contract if [his former employer] had

refused to allow him to exercise the options. Such a presently existing, contractual interest is an interest in property that is encompassed within the broad definition of property under § **46b-81**." *Id.*[18] Significantly, the defendant in *Bornemann* had a contractual interest in [292 Conn. 623] the stock options that could not be unilaterally modified or terminated by the employer.[19]

There also is a line of cases, at the other end of the spectrum, recognizing that the definition of property interests subject to distribution under § **46b-81**, although broad, is not without limits. For instance, in *Simmons v. Simmons, supra*, 244 Conn. at 164, 708 A.2d 949, we concluded that a spouse's medical degree is not property within the meaning of § **46b-81**. In so holding, we distinguished " presently existing property interest[s]," which are subject to distribution, from " mere expectanc[ies]," which are immune from such treatment; *id.,* at 165, 708 A.2d 949; and declared that " the defining characteristic of property for purposes of § **46b-81** is the present existence of the right and the ability to enforce that right." *Id.*, at 166, 708 A.2d 949. We have characterized interests as " mere expectancies" in several other contexts as well. See, e.g., *Smith v. Smith, supra*, 249 Conn. at 274, 752 A.2d 1023 (plaintiff's

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interest in family trust expectancy not subject to distribution because " the marital estate divisible pursuant to § **46b-81** refers to interests already acquired, not to expected or unvested interests"); [292 Conn. 624] *Eslami v. Eslami,* 218 Conn. 801, 807-808, 591 A.2d 411 (1991) (interest in contested inheritance not distributable but may be addressed under § 46b-86 when value ascertained and parties' financial circumstances determined); *Rubin v. Rubin, supra*, 204 Conn. at 230-32, 527 A.2d 1184 (contingent award of expected inheritance not distributable under § **46b-81**); *Krause v. Krause,* 174 Conn. 361, 365, 387 A.2d 548 (1978) (interest in future inheritance too speculative to constitute property under predecessor to § **46b-81**).[20]

[292 Conn. 625] Our decision in *Bender v. Bender, supra* 258 Conn. at 733, 785 A.2d 197, updated this traditional, fairly rigid dichotomy by establishing a more nuanced approach to defining property interests under § **46b-81**. In *Bender,* this court " built [on the] foundation" of our prior cases in concluding that the unvested pension of the defendant in that case was property subject to equitable distribution. *Id.*, at 753-54, 785 A.2d 197. Consistent with our time-honored approach, we reiterated that presently enforceable rights, based on either property or contract principles, are *sufficient* to cause property to be divisible. Where *Bender* broke new ground was in its recognition that such rights are not the " sine qua non of ' property' under § **46b-81**." *Id.*, at 753, 785 A.2d 197. In building on our prior cases, we expanded our notion of property under § **46b-81**, recognizing that there is a spectrum of interests that

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do not fit comfortably into our traditional scheme and yet should be available in equity for courts to distribute.

If the acquisition of such an " unconventional" interest is contingent on a future event or circumstance, we now examine the contingency to determine if it is overly speculative. *See id.,* at 748-50, 785 A.2d 197. Thus, *Bender* created a two step framework that preserved the traditional definition of property while carving out a middle ground, encompassing some inchoate property interests that would have been excluded from the definition of distributable property under the older regime. These interests may now be considered on the basis of the likelihood that a contingency eventually would come to pass. Of course, in order to apply this analytical framework properly, it is critical to categorize the type of contingency being addressed. A contingency on which the mere *enjoyment* of a property interest depends differs from a contingency on which acquisition of the property interest *itself* hinges. The former-e.g., a vested but unmatured [292 Conn. 626] pension or an inchoate contractual right-would simply be classified as distributable property under the first step of the *Bender* analysis, whereas the latter

would fail the classic test and therefore have to be addressed under *Bender's* second step.[21] See

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Simmons v. Simmons, supra, 244 Conn. at 167-68, 708 A.2d 949.

In *Bender,* we determined that the defendant's unvested pension benefits, although dependent on certain [292 Conn. 627] contingencies, were sufficiently certain to constitute divisible property because " these contingencies are susceptible to reasonably accurate quantification." *Bender v. Bender, supra*, 258 Conn. at 744, 785 A.2d 197. In so concluding, we recognized that the various contingencies that may determine future property interests come in different degrees. See *id.,* at 754, 785 A.2d 197. Distinguishing the unvested pension benefits at issue in *Bender* from the inheritance interests in *Rubin v. Rubin, supra*, 204 Conn. at 224, 527 A.2d 1184, and *Krause v. Krause, supra*, 174 Conn. at 361, 387 A.2d 548, we declared that " [u]nvested pension benefits ... although dependent on certain future contingencies such as length of service and age [i.e., the mere passage of time], are simply not in [the] same *speculative category* [as a potential inheritance]. Moreover, unlike a potential [292 Conn. 628] inheritance, pension benefits represent a trade-off for potentially higher wages not earned during the marriage; they often represent ... the only or principal material asset; and they are treated by employers and employees as property in the workplace." [22] (Emphasis added.) *Bender v. Bender, supra*, at 754, 785 A.2d 197.

We conclude that *Bender* stands for the proposition that, even in the absence of a presently enforceable right to property based on contractual principles or a statutory entitlement, a party's expectant interest in property still may fall under § **46b-81** if the conditions precedent to the eventual acquisition of such a definitive right are not too speculative or unlikely. The following statement makes this point apparent: " [I]t is, of course, theoretically possible that the defendant's pension will not vest ... [for various reasons]. We conclude, however, that the defendant's *expectation* in his pension plan, as a practical matter, is sufficiently *concrete, reasonable* and *justifiable* as to constitute a presently existing property interest for equitable distribution purposes." (Emphasis added.) *Id.*, at 749, 785 A.2d 197.

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We turn finally to an application of the *Bender* analysis to the facts of the present case. First, it is clear that, whatever interest the defendant had in potential disability payments under § 5-192p, that interest was not, at the time of dissolution, a presently existing, enforceable right to a future benefit. Although the defendant may have had an abstract statutory entitlement, in the event that he became disabled, to certain [292 Conn. 629] defined benefits, he had no concrete, enforceable right to those benefits unless and until an unfortunate accident befell him. Furthermore, the legislature could have modified or terminated the disability retirement program at any time Before the defendant suffered a disability. See *Simmons v. Simmons, supra*, 244 Conn. at 166, 708 A.2d 949. Thus, unlike an interest in a vested pension or a granted but not yet matured stock option, the defendant's interest in his disability benefits was not enforceable prior to the occurrence of the disability.[23] Presumably, the defendant actively was trying to avoid the occurrence of an event triggering an enforceable interest in his disability benefits. We can discern no distinction, for example, between the defendant's interest in his disability benefits and an employee's interest in a potential future workers' compensation claim. To consider these " interests" property in the sense that they could be construed as *presently existing, enforceable* rights to some future asset or income stream is simply to stretch the meaning of these words beyond the breaking point.

Our analysis cannot end here, however, as *Bender* instructs that a presently existing, enforceable right to property, although *sufficient* for purposes of § **46b-81**, is not *necessary.* As we noted previously, in light of *Bender,* analyzing an

interest that does not become a " right," much less actual, possessory property, prior to the occurrence of some future event or events involves a second step. We must look at the nature of the contingency to determine whether it is so speculative as to be deemed a mere expectancy or, conversely, whether it is " sufficiently concrete, reasonable and justifiable as to constitute a presently existing property interest for equitable distribution purposes." *Bender v. Bender, supra*, 258 Conn. at 749, 785 A.2d 197. This approach recognizes the equitable nature of a property distribution made pursuant [292 Conn. 630] to § **46b-81** and allows courts a measure of flexibility to avoid a patently unfair result. For example, as in *Bender,* this approach allows a court to avoid the inequity that would occur if the marriage dissolves shortly Before one of the spouse's pensions vests, especially when the pension is the primary marital asset.[24]

In the present case, the defendant's receipt of disability benefits under § 5-192p was contingent on his becoming sufficiently disabled prior to sixty-five years of age or completing twenty-five years of credited service.[25] A potential disability is, by its

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very nature, an accidental event that every employee and employer strives to avoid. It is difficult to perceive how a property interest tied to such an occurrence is " sufficiently concrete, reasonable and justifiable" ; id.; to treat any benefits that *might* accrue, *if* the accident eventually occurs *and* is serious enough to cause permanent disability, as a presently existing property interest eligible for equitable distribution at the time of dissolution. We are persuaded that this eventuality is more speculative and far less predictable than the income expected to flow from a medical degree; see *Simmons v. Simmons, supra*, 244 Conn. at 166-70, 708 A.2d 949; or the property expected to be acquired through a bequest. See, e.g., *Krause v. Krause, supra* 174 Conn. at 365, 387 A.2d 548. As with a testamentary bequest, however, the disability benefits at issue in the present case were terminable at the state's discretion at any [292 Conn. 631] time Before the defendant suffered a disability.[26] We conclude, therefore, that, consistent with *Bender,* the defendant's interest in future disability benefits is far too speculative to be considered property subject to equitable distribution.

Furthermore, such an interest, even if it was sufficiently concrete to constitute distributable property, could not be classified as distributable under the facts of this case. A benefit derived from an injury occurring years after dissolution, meant solely to compensate for the loss of future wages, simply does not represent the " fruits" of the marital partnership that § **46b-81** is designed to equitably parse. *Krafick v. Krafick, supra*, 234 Conn. at 796, 663 A.2d 365. This view is not foreclosed by, and is indeed consistent with, our decision in *Lopiano v. Lopiano,* 247 Conn. 356, 752 A.2d 1000 (1998). In *Lopiano,* we held that an award of damages from a personal injury action was available, in its entirety, for equitable distribution because the plaintiff's personal injury case was decided, and his damages awarded, prior to the dissolution action. See *id.*, at 367, 752 A.2d 1000. Although, after *Bender,* even a cause of action for personal injury existing *at the time of dissolution* might be considered a property interest subject to equitable distribution under § **46b-81**, we conclude that our law does not require the inequity of treating damages awarded for personal injuries suffered well after dissolution as property subject to distribution.

The difficulty with the present case is that the defendant's " retirement disability" is, in effect, a hybrid of [292 Conn. 632] two conceptually distinct interests. We conclude that, as of the date of the parties' dissolution, the portion of the defendant's retirement benefit attributable to his actual years of service-and, therefore, properly characterized as deferred compensation-is distributable as marital property. See, e.g., *Thompson v. Thompson,* 183 Conn. 96, 100-101, 438 A.2d 839 (1981) (pension benefits not too uncertain or speculative to be considered property subject to distribution). This conclusion is consistent with our reasoning in *Bender,* as the receipt of regular pension benefits represents, at

least in part, deferred compensation earned during the marriage, the value of which is quantifiable at the time of dissolution to a reasonable degree of certainty. On the other hand, we conclude that the portion of the defendant's benefit attributable to the additional amount that he receives

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as a consequence of being disabled was too speculative at the time of dissolution to be considered distributable property under § **46b-81**, and was in no way earned during the course of the marriage. See *Perritt v. Perritt,* 54 Conn.App. 95, 97, 730 A.2d 1234 (1999) ("[a] disability payment is a payment in lieu of wages and a substitute for the income that would have been earned by the recipient").

The defendant's disability benefit is akin to income subject to adjustment under § 46b-82 and, therefore, is not property. The defendant's disability plan is noncontributory and can be amended at any time prior to the disability. It can commence within minutes of hiring and extend a lifetime and thus cannot be characterized as deferred income, which assumes the qualities of an asset. In fact, it would violate the logic of *Krafick* and *Bender* to characterize the defendant's disability benefits as an asset.

In the present case, the record indicates that the defendant was entitled to receive $990 per month in regular retirement benefits at the time of his injury. [292 Conn. 633] Once his application for disability retirement was approved, that amount increased to $2382.30 per month, reflecting the disability enhancement. Our precedents, together with the policy underlying § **46b-81** and simple common sense, require us to treat the $990 as distributable property, and the difference, $1392.30, as nondistributable property. Therefore, pursuant to the judgment of dissolution, the plaintiff is entitled to 40 percent of the defendant's regular retirement benefits but is not entitled to a percentage of the defendant's disability benefits.

The judgment is reversed and the case is remanded with direction to render judgment granting the defendant's motion for clarification and to issue modified financial orders according to law.

In this opinion ROGERS, C.J., and SCHALLER, J., concurred. NORCOTT, J., with whom KATZ, J., joins, concurring and dissenting.

Although I concur with parts I and II A of the majority opinion, as well as the majority's discussion of the relationship between General Statutes § § **46b-81** and 46b-82 in part II B of its opinion, I respectfully dissent from the majority's ultimate conclusion in part II B. In my view, we are not called upon in this appeal to determine which method of distributing marital assets would have been the most appropriate in the circumstances of this case. Rather, we are required to decide the limited question of whether § **46b-81**, as it has been interpreted by this court, authorized the trial court to distribute the disability retirement benefits (disability benefits) of the defendant, Darrell D. Mickey, that were awarded under General Statutes § 5-192p[1] as [292 Conn. 634] part of its financial orders. In determining that the trial court did not have that authority, the majority concludes that the defendant's interest in his disability benefits did not constitute an enforceable property right at the time of dissolution under the first prong of *Bender v. Bender,* 258 Conn. 733, 748-49, 785 A.2d 197 (2001), because: (1) the defendant did not have an enforceable right to the disability benefits unless and until he became disabled; and (2) the legislature

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could have modified or terminated the disability retirement program at any time prior to the defendant becoming disabled. In my view, however, our prior precedents and the language of § 5-192p make the defendant's interest in his disability benefits property under the first prong of *Bender* because the defendant had an enforceable and irrevocable right to those benefits as of the first day of his employment with the state, despite the fact that his receipt and future enjoyment of those benefits was contingent

on him subsequently becoming disabled. Accordingly, I respectfully dissent.

As an initial matter, I note that I agree with the majority that, under the first prong of the *Bender* analysis,[2] our cases generally have classified property interests by characterizing them as either presently existing and enforceable, and thus distributable, or as mere expectancies that are immune from distribution. See *id.,* at 748, 785 A.2d 197. My primary disagreement with the majority relates to the analysis that we employ to make that determination, [292 Conn. 635] as well as the application of that analysis to the benefits in the present case. Specifically, although our focus under the first prong of *Bender* is to determine whether the right to the benefit is presently existing and enforceable at the time of dissolution; see id.; that does not mean that the party must have the right to immediate *receipt* and *enjoyment* of the benefit, or even an unconditional guarantee that the benefit will be received at all. Rather, when the receipt of the benefit associated with a particular interest is contingent on the occurrence of a future event, that interest will nevertheless be considered marital property under our current case law if, at the time of dissolution, the party has an enforceable right to receive the benefit in the event that the condition *does* occur. See *Smith v. Smith,* 249 Conn. 265, 286, 752 A.2d 1023 (1999); *Bornemann v. Bornemann,* 245 Conn. 508, 517-18, 752 A.2d 978 (1998); *Krafick v. Krafick,* 234 Conn. 783, 797, 663 A.2d 365 (1995).

In *Smith v. Smith, supra*, 249 Conn. at 268, 752 A.2d 1023, for example, we addressed the question of whether a potential settlement award arising from the breach of a severance agreement was property subject to distribution as part of the dissolution judgment. We concluded that, even though the award could not have been received unless and until the pending civil action was successfully resolved in the defendant's favor, the interest in that potential award was marital property at the time that the parties agreed to distribute their property [3] because the defendant had an enforceable right to receive the award in the event that the action *was* successful. [292 Conn. 636]

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Id., at 286, 752 A.2d 1023. Similarly, in *Bornemann v. Bornemann, supra*, 245 Conn. at 510, 752 A.2d 978, we addressed the question of whether unvested stock options, granted as part of a termination agreement, were distributable as marital property. We concluded that they were distributable because, " [a]lthough the defendant's failure to abide by the conditions contained in the [termination] agreement would have constituted a breach of the agreement that might have resulted in forfeiture of the stock options," the defendant had a right to receive those options as long as those conditions were satisfied. *Id.*, at 518, 752 A.2d 978. In addition, in *Krafick v. Krafick, supra*, 234 Conn. at 785, 663 A.2d 365, we addressed the question of whether vested, but unmatured pension benefits were distributable property. In concluding that they were, we recognized that " vested pension benefits represent an employee's right to receive payment in the future, *subject ordinarily to his or her living until the age of retirement.* The fact that a contractual right is contingent upon future events does not degrade that right to an expectancy." (Emphasis added; internal quotation marks omitted.) *Id.*, at 797, 663 A.2d 365.

Thus, our decisions in *Smith , Bornemann* and *Krafick* make clear that, although the receipt of a benefit is contingent on a future event, and although the benefit may not be received unless and until that event actually occurs, the interest is not reduced to a mere expectancy as long as the party has an enforceable right to receive the benefit in the event that the condition *does* occur. Moreover, those cases demonstrate that the likelihood that the condition precedent to receipt of the benefit will occur is not relevant to our analysis under the first prong of *Bender.* In *Smith*, for example, we did not in any way address the likelihood that the defendant's cause of action would be successful, and, indeed, it would have been almost impossible for the trial court to have made such a determination without trying the breach of severance action itself in the context of

the [292 Conn. 637] dissolution proceedings. Similarly, in *Bornemann* we did not examine the likelihood that the defendant could or would adhere to the conditions in the termination agreement, and it would have been entirely speculative for the trial court to have engaged in such an examination given the number of future events and contingencies that could have impacted the defendant's adherence to that agreement.

Applying the analysis in these precedents to the present case, therefore, I would conclude that the defendant's interest in his disability benefits was distributable property. The language of § 5-192p (a) expressly provides that " [i]f a member of tier II, while in state service, becomes ... disabled as a result of any injury received while in the performance of his duty as a state employee, he is eligible for disability retirement, *regardless of his period of state service or his age.* " (Emphasis added.) Thus, from the moment the defendant began his employment with the state, he had an enforceable right to receive disability benefits in the event that he subsequently suffered a disabling injury within the scope of his employment. That right was both presently existing and enforceable from that time on, and, had the defendant become disabled on his first day of work, he would have been entitled to receive disability benefits without precondition. As *Smith , Bornemann* and *Krafick* make clear, the mere fact that the receipt and future enjoyment of such benefits was contingent on the defendant becoming disabled in the first place does not mean that his interest was a mere expectancy.[4] Moreover, the fact that the contingency [292 Conn. 638] was unlikely to occur is not relevant

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to our analysis under the first prong of *Bender,* which focuses on whether he had a right to such benefits in the event that the contingency *did* occur. See *Smith v. Smith, supra*, 249 Conn. at 286, 752 A.2d 1023; *Bornemann v. Bornemann, supra*, 245 Conn. at 518, 752 A.2d 978. Accordingly, in light of our prior precedents and the clear language of § 5-192p, I would conclude that the defendant's interest in his disability benefits was marital property under the first prong of *Bender* because, at the time of dissolution, he had an enforceable right to those benefits in the event that he subsequently became disabled, even though he could not actually have received those benefits unless and until that contingency occurred.

The majority also concludes that the defendant's interest was not marital property under the first prong of *Bender* because the disability benefit program could have been revoked by the legislature at any time prior to the defendant becoming disabled, implying that the defendant's interest in those benefits did not, and could not, vest until that time. In my view, however, the language of § 5-192p indicates that the defendant's interest had in fact vested [5] as of the first day of his

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employment [292 Conn. 639] with the state, and could not have been revoked by the legislature at any time thereafter.

Specifically, § 5-192p (a) provides that " [i]f a member of tier II, while in state service, becomes disabled ... prior to age sixty-five, he is eligible for disability retirement if the member has *completed at least ten years of vested service.* If a member of tier II, while in state service, becomes so disabled as a result of any injury received while in the performance of his duty as a state employee, he is eligible for disability retirement, *regardless of his period of state service or his age.* " (Emphasis added.) Thus, the legislature has created two different kinds of disability benefits, each of which has a different prescribed period of " vesting service" Before the interest vests and becomes irrevocable, even though the receipt of such benefits in both instances [292 Conn. 640] remains contingent on the employee subsequently becoming disabled.[6]

Indeed, this conclusion is supported by the similarity between the vesting language of § 5-192p and that of General Statutes § 5-192 *l* ,

which provides for normal retirement benefits that the majority properly considers to have vested in the present case. More specifically, § 5-192l (a) provides that " [e]ach member of tier II *who has attained age sixty-five and has completed ten or more years of vesting service* may retire on his own application on the first day of any future month named in the application." (Emphasis added.) Thus, although neither § 5-192p nor § 5-192 *l* explicitly references the legislature's ability to revoke the respective interest,[7] both statutes specify a required period of vesting service Before the employee becomes eligible to enforce his interest in the particular benefit once all of the prescribed conditions are satisfied, namely, a ten year vesting period for normal retirement benefits and either a ten year vesting period with respect to disability benefits for an injury sustained outside the scope of employment, or, alternatively, immediate vesting for injuries suffered while on the job. Similarly, the receipt of the benefit in both instances is contingent on, and, indeed, the benefit may not be received until, the occurrence of a prescribed future event, namely, the employee becoming disabled for disability benefits and the employee surviving until the age of sixty-five for normal retirement benefits. Based on these similarities, therefore, I am unable to distinguish between the language of the two statutes as far as the vesting or revocability [292 Conn. 641] of the respective interest is concerned. Thus, if the majority considers the " ten or more years of vesting service" language of § 5-192l to render that interest irrevocable after ten years, which I agree that it does, I see no reason to construe the " at least ten years of vested service" or the " regardless of his period of state service or his age" language of § 5-192p as having a different effect. Accordingly, I would conclude that the defendant's interest in disability benefits

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with respect to injuries sustained within the scope of his employment became irrevocable upon his employment with the state.[8]

Finally, I briefly note my disagreement with the majority's conclusion that the defendant's interest in disability benefits did not constitute marital property because the injury occurred postdissolution and represents compensation for future lost wages. We have stated that whether an asset is marital property turns on the time at which an enforceable right to the particular benefit was obtained, and *not* on whether the benefits associated with the interest were received during the marriage. See *Bornemann v. Bornemann, supra*, 245 Conn. at 529, 752 A.2d 978. Moreover, we have recognized that " [e]xamining [292 Conn. 642] what an asset is intended to reflect is significant ... only as it relates to whether [an enforceable right to the] asset was earned prior to or subsequent to the date of dissolution." *Lopiano v. Lopiano,* 247 Conn. 356, 367 n. 5, 752 A.2d 1000 (1998); see also *Bender v. Bender, supra*, 258 Conn. at 752, 785 A.2d 197 ("[t]he fact that a portion of the pension benefits, once vested, will represent the defendant's service to the fire department after the dissolution does not preclude us from classifying the entire unvested pension as marital property"). Because in my view the defendant obtained an enforceable interest in his disability benefits under our current case law from the moment he began working for the state, I do not believe that the fact that those benefits were received after the marriage had been dissolved or that they represent, in part, compensation for future lost wages is relevant to our analysis.

Accordingly, I conclude that the defendant had an enforceable right to disability benefits at the time of dissolution under the first prong of *Bender,* and, therefore, those benefits constituted marital property subject to distribution under § **46b-81**. Because I would affirm the judgment of the trial court, I respectfully dissent.

Notes:

[1] General Statutes § 5-192p provides in relevant part: " (a) If a member of tier II, while in state service, becomes disabled as defined in subsection (b) of this section, prior to age sixty-five, he is eligible for disability retirement if the member has completed at least ten years of vested service. If a member of tier II, while in state service, becomes so disabled as a result of any injury received while in the performance of his duty as a state employee, he is eligible for disability

retirement, regardless of his period of state service or his age...."

[2] General Statutes § **46b-81** provides in relevant part: " (a) At the time of entering a decree annulling or dissolving a marriage ... the Superior Court may assign to either the husband or wife all or any part of the estate of the other....

" (c) In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party ... shall consider the length of the marriage, the causes for the ... dissolution of the marriage ... the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

[3] The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-1.

[4] General Statutes § 5-192n provides in relevant part: " (a) Each ' hazardous duty member' who has completed twenty-five years of credited service while a hazardous duty member may be retired on his own application on the first day of any future month named in the application...."

[5] The record indicates that, in addition to his initial monthly payments, the defendant also received an initial lump sum payment from the state in June, 2005, to compensate him for the retirement benefits to which he was entitled from the date of his retirement, July 1, 2003, until the time that his retirement went into pay status in May, 2005.

[6] Nancy Wilson, a supervisor in the office of the state comptroller, testified that, upon certification of his disability, the defendant was statutorily entitled to receive an enhanced retirement benefit under the state employees retirement system, which was calculated on the basis of a statutorily prescribed formula and included a minimum guaranteed benefit of 60 percent of the defendant's salary at the time of disability.

[7] The defendant again was awarded a onetime lump sum payment to compensate him retroactively for the enhanced benefits to which he was entitled to from his retirement in July, 2003, until the state's approval of his disability in November, 2005, 40 percent of which was sent to the plaintiff in recognition of the financial orders stemming from the parties' dissolution.

[8] Hereinafter, all references to the trial court are to the trial court, *Dyer, J.,* unless otherwise indicated.

[9] We note that the plaintiff has not strictly complied with Practice Book § 63-4(a)(1), which provides in relevant part: " If any appellee wishes to (A) present for review alternate grounds upon which the judgment may be affirmed, [or] (B) present for review adverse rulings or decisions of the court which should be considered on appeal in the event the appellant is awarded a new trial ... that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of the issues.

" Whenever the failure to identify an issue in a preliminary statement of issues prejudices an opposing party, the court may refuse to consider such issue."

The record does not indicate that the plaintiff filed such a statement with this court with respect to these procedural issues, which are framed as alternate grounds for affirmance. We nonetheless proceed to review these claims because we conclude that the defendant has not been prejudiced by this procedural defect. See, e.g., *DiSesa v. Hickey,* 160 Conn. 250, 263, 278 A.2d 785 (1971); cf. Practice Book § 63-4(a)(1) ("[w]henever the failure to identify an issue in a preliminary statement of issues prejudices an opposing party, the court may refuse to consider such issue").

[10] The plaintiff asserts that the fact that the trial court specifically distributed the defendant's potential hazardous duty retirement benefits indicates that the parties were aware that the defendant was engaged in a hazardous occupation and, therefore, that they should have known that the defendant could potentially become disabled in the future. In our view, however, the mere knowledge that the defendant was engaged in employment that entailed a remote chance of disability was insufficient justification to conclude that the parties should have anticipated the specific legal issues in this case.

[11] This task requires that we also interpret General Statutes § § 46b-82, 5-192 *l* and 5-192p in order to determine the nature of the benefits in dispute and how they should be characterized.

[12] General Statutes § 46b-82 provides in relevant part: " (a) At the time of entering the [divorce] decree, the Superior Court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section **46b-81**.... In determining whether alimony shall be awarded, and the duration and amount of the award, the court ... shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section **46b-81**, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability of such parent's securing employment...."

[13] Although § 5-192u declares that tier II plan members need not contribute to the plan to receive their retirement benefits, the record reflects that the defendant had contributed $19,193.53 as of the date of dissolution. It is not

necessary for us to resolve this discrepancy to resolve the issues presented by this case.

[14] We note that, as a hazardous duty member, the defendant also was eligible to apply for hazardous duty retirement under § 5-192n after completing twenty-five years of credited service. Section 5-192n contains its own formula for calculating hazardous duty retirement benefits, which are not relevant in the present case.

[15] Black's Law Dictionary defines " vested" as " [h]aving become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute...." Black's Law Dictionary (8th Ed. 2004); see also *Taylor v. Taylor,* 57 Conn.App. 528, 533, 752 A.2d 1113 (2000) ("The fact that a right is contingent on a future event does not mean that the right is only an expectancy. A vested right can be contingent on a future event, such as continued employment or death."). The most important aspect of vesting in the context of pensions is that it immunizes the employee's interest from being unilaterally altered or abolished by the employer. For instance, in the context of statutory pensions, an employee who has a vested pension would be unaffected by legislative changes to the pension plan occurring *after* he has obtained a vested interest in a particular benefit. See *Pineman v. Oechslin,* 195 Conn. 405, 416, 488 A.2d 803 (1985) (state employees " have statutory rights to retirement benefits once they satisfy the eligibility requirements of the [State Employees Retirement Act] by becoming eligible to receive benefits").

A vested interest " matures" when the holder of that interest obtains a right to *present* possession or payment without further precondition. See *In re Marriage of Brown,* 15 Cal.3d 838, 842, 544 P.2d 561, 126 Cal.Rptr. 633 (1976) ("We shall use the term ‘ vested’ ... as defining a pension right which survives the discharge or voluntary termination of the employee. As so defined, a vested pension right must be distinguished from a ‘ matured’ or unconditional right to immediate payment."); see also *Bender v. Bender, supra*, 258 Conn. at 746, 785 A.2d 197 ("[w]e distinguished the medical degree in *Simmons [v. Simmons, supra*, 244 Conn. at 158, 708 A.2d 949] from the vested, unmatured pension benefits at issue in *Krafick [v. Krafick, supra*, 234 Conn. at 783, 663 A.2d 365], reasoning that the medical degree did not involve a presently existing, enforceable right to receive income in the future").

[16] We note the general impreciseness with which critical terms have been employed in some of our opinions in this area. In *Bornemann*, for instance, we used the terms " matured" and " vested" as if they are synonymous. (Internal quotation marks omitted.) *Bornemann v. Bornemann, supra*, 245 Conn. at 517, 752 A.2d 978. As we noted in footnote 15 of this opinion, however, these terms have very different meanings, and their conflation reveals a fundamental confusion in this court's jurisprudence.

[17] The stock options were granted as part of a termination agreement between the defendant and his former employer. *Bornemann v. Bornemann, supra*, 245 Conn. at 512-13, 752 A.2d 978. In exchange for agreeing not to compete with or assert any claims against his employer, or reveal any of its trade secrets, the defendant was granted several " flights" of stock options with various maturity dates. *Id.*, at 513, 752 A.2d 978.

[18] The fear that we expressed in *Bornemann,* namely, that " fail[ing] to interpret property broadly under § **46b-81** could, and likely would, result in substantial inequity in light of the numerous and varied forms of employment compensation that are in use today" ; *Bornemann v. Bornemann, supra*, 245 Conn. at 520, 752 A.2d 978; is, in our view, misplaced. General Statutes § **46b-81** (c) affords the trial court substantial discretion to consider almost any factor in " fixing the nature and value of the property, if any, to be assigned," including the " occupation, amount and sources of income ... employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income." This language allows courts to account for nontraditional forms of compensation and assets in developing an equitable distribution plan without distorting the meaning of property to achieve the same result. Moreover, as we explain subsequently in this opinion, the expanded view of property that this court established in *Bender v. Bender, supra*, 258 Conn. at 753, 785 A.2d 197, effectively eliminates the potential for the inequity that we described in *Bornemann.*

[19] We believe that the concurring and dissenting justice's understanding of *Bornemann* is deficient and that his reliance on that case is misplaced. Our decision in *Bornemann* was explicitly founded on the fact that the defendant in that case had an enforceable contractual right to the stock options at issue. We specifically described the nature of the interest and its consequences: " [T]he holder of a stock option possesses the right to accept, under certain conditions and within a prescribed time period, the employer's offer to sell its stock at a predetermined price.... Should the employer attempt to withdraw the offer, the employee has a ‘ chose in action’ in contract against the employer.... Conversely, ‘ [t]he defining characteristic of an expectancy is that its holder has no enforceable right to his beneficence.’ " (Citations omitted.) *Bornemann v. Bornemann, supra*, 245 Conn. at 517, 752 A.2d 978. In the present case, we conclude that the defendant's *interest* in his disability benefits at the time of dissolution is readily distinguishable from the enforceable contract right in *Bornemann* because the legislature was under no obligation to maintain the benefits prior to the defendant's injury, and the defendant would have had no cause of action against the state if the legislature had decided to terminate the disability program.

[20] We disagree with the concurring and dissenting justice's characterization of this court's opinion in *Smith v. Smith, supra*, 249 Conn. at 265, 752 A.2d 1023. Discussing *Smith,* the concurring and dissenting opinion declares: " We concluded [in *Smith]* that, even though the [defendant's settlement] award could not have been received unless and until the pending civil action was successfully resolved in the defendant's favor, the interest in that potential award was

marital property at the time that the parties agreed to distribute their property because the defendant had an enforceable right to receive the award in the event that the action *was* successful." (Emphasis in original.) Rather, we stated in *Smith* that " [t]he trial court ... reasonably found that the defendant's *claim* against [her employer] was an *inchoate marital asset* [at the time of dissolution] because, through her work [for her employer], the defendant had already earned an enforceable right to the compensation. Consequently, the trial court properly divided the net settlement proceeds between the parties pursuant to § **46b-81** when it dissolved the parties' marriage." (Emphasis added.) *Smith v. Smith, supra*, at 286, 752 A.2d 1023. Thus, we were merely endorsing the trial court's finding that the defendant had obtained a *chose in action* during the course of the marriage, which is clearly a property interest subject to distribution. See *Dolak v. Sullivan,* 145 Conn. 497, 504, 144 A.2d 312 (1958) ("chose in action" is " intangible personal property"); *Siller v. Siller,* 112 Conn. 145, 150, 151 A. 524 (1930) ("[t]here is no doubt that a right in action, [when] it comes into existence under common-law principles, and is not given by statute as a mere penalty or without equitable basis, is as much property as any tangible possession"); see also *Lopiano v. Lopiano,* 247 Conn. 356, 370, 752 A.2d 1000 (1998) (right of action characterized as property under § **46b-81**). The *value* of the chose in action, on the other hand, determined at least in part by the party's chances of prevailing, may be unknown, and, indeed, the action may turn out to be worthless. Nevertheless, that fact is irrelevant to its classification as a property interest. See, e.g., *Bender v. Bender, supra*, 258 Conn. at 749-50, 785 A.2d 197 (classification stage distinct from valuation stage in analyzing potential interests for equitable distribution). In the present case, the defendant was not injured until well after the marriage was dissolved. Thus, not only did he not have an enforceable contractual or statutory interest in potential disability benefits at the time of dissolution, but he also lacked a cause of action regarding such benefits that could be classified as an intangible property interest subject to distribution under § **46b-81**.

[21] Herein lies the crux of our disagreement with the concurring and dissenting opinion. In our view, the concurring and dissenting justice misunderstands the nature of the contingencies involved in the present case and mistakenly characterizes the defendant's disability benefit as a " vested" interest merely awaiting a qualifying injury to become a matured interest. In this case, the contingency, i.e., the disabling injury, *is* the vesting event. In other words, prior to becoming disabled, the defendant possessed nothing more than an *expectancy* that, should he be injured in the course of his employment, he would receive a disability benefit if the statute remained unchanged. See *Simmons v. Simmons, supra*, 244 Conn. at 166, 708 A.2d 949 ("[U]nlike a property interest, an expectancy may never be realized....The term expectancy describes the interest of a person who merely foresees that he might receive a future beneficence.... [T]he defining characteristic of an expectancy is that its holder has no enforceable right to his beneficence." [Internal quotation marks omitted.]). What the defendant in the present case did not have, however, was a legally enforceable interest in the event that the legislature decided to modify or terminate this benefit prior to the occurrence of such an injury. For instance, unlike the defendant's contractual interest in granted but unmatured stock options that we recognized in *Bornemann v. Bornemann, supra*, 245 Conn. at 518, 752 A.2d 978, the defendant in the present case would have no remedy for what could best be described in contract law parlance as an anticipatory breach by the legislature. Indeed, its analysis of the statutory language notwithstanding, the concurring and dissenting justice appears to recognize, perhaps inadvertently, the unvested nature of the disability benefit at issue when the concurring and dissenting opinion declares that, " although neither § 5-192p nor § 5-192 *l* explicitly references the legislature's ability to revoke the respective interest, both statutes specify a required period of vesting service Before the employee becomes eligible to enforce his interest in the particular benefit once all of the prescribed conditions are satisfied, namely ... either a ten year vesting period with respect to disability benefits for an injury sustained outside the scope of employment ... or, alternatively, *immediate vesting* for injuries suffered while on the job." (Emphasis added.) We agree. Immediately upon incurring an injury on the job, an employee subject to § 5-192p obtains a vested interest in the prescribed disability benefits. Prior to such an occurrence, however, we simply cannot perceive under what principle of law the defendant in this case had an irrevocable, presently existing and enforceable interest in any statutory disability benefit.

We are similarly unpersuaded by the declaration in the concurring and dissenting opinion that " the language of § 5-192p indicates that the defendant's interest had in fact vested as of the first day of his employment with the state, and could not have been revoked by the legislature at any time thereafter." In the absence of statutory language expressly depriving the legislature of its authority to revoke or modify the subject benefits prior to their becoming vested, we are unwilling to import such a limitation by legislative fiat. See, e.g., *Pineman v. Oechslin,* 195 Conn. 405, 415, 488 A.2d 803 (1985) ("When the legislature intends to surrender its power of amendment and revision by creating a contract and thereby binding future legislatures, it must declare that intention in clear and unambiguous terms. A relinquishment of this authority should not occur by legislative inadvertence or judicial implication.") General Statutes § 5-192p (a) provides in relevant part: " If a member of tier II, while in state service, becomes ... disabled as a result of any injury received while in the performance of his duty as a state employee, he is eligible for disability retirement, regardless of his period of state service or his age." In our view, this language is a clear expression of the legislature's desire to provide benefits for particular state employees in the event that they become disabled in the line of duty. There is no indication, explicit or otherwise, that the legislature intended by this language to bestow an irrevocable contractual right to such benefits on every state employee covered under § 5-192p " as of the first day of his employment," as the concurring and dissenting opinion suggests. We decline to bind the legislature to such an onerous obligation under these circumstances.

[22] We note that, in our view, employers and employees generally recognize the difference between vested and unvested pensions, and, although they may treat *vested* pensions as property in the workplace, they realize that unvested pensions are worthless beyond any amount that the employee actually has contributed to the plan. Indeed, common experience would indicate that employees consider the date that their pensions vest as a pivotal point in their careers because they understand that it is not until that moment that they have any valuable, enforceable *right* to future pension benefits.

[23] This is not to say that private disability plans guaranteed by contract or supported by monetary contributions would not qualify as such an interest.

[24] Of course, a court presented with such a scenario also has the option of considering these circumstances in fashioning an alimony award under § 46b-82.

[25] General Statutes § 5-192o (c) provides in relevant part: " A member of tier II who has completed twenty-five years of credited service while a hazardous duty member shall be vested in his retirement benefit under section 5-192n...."

We assume, without deciding, that, if the defendant had become disabled after completing twenty-five years of credited service, he would have been eligible for hazardous duty retirement under § 5-192n rather than disability retirement under § 5-192p.

[26] We note that, the concurring and dissenting justice's view notwithstanding, the *likelihood* that the legislature would decide to modify or terminate the disability benefits conferred by § 5-192p is irrelevant to our analysis. See footnote 8 of the concurring and dissenting opinion. What is relevant is the fact that the legislature is not barred from terminating such benefits, and that the nondisabled employee is without recourse if the legislature chooses to do so.

[1] General Statutes § 5-192p (a) provides: " If a member of tier II, while in state service, becomes disabled as defined in subsection (b) of this section, prior to age sixty-five, he is eligible for disability retirement if the member has completed at least ten years of vested service. If a member of tier II, while in state service, becomes so disabled as a result of any injury received while in the performance of his duty as a state employee, he is eligible for disability retirement, regardless of his period of state service or his age."

[2] As the majority notes, our decision in *Bender* articulated a two step framework for determining whether an interest is property distributable under § **46b-81**. Under the first prong, the analysis of which remains governed by our pre- *Bender* line of cases, we examine whether the party has a presently existing enforceable right to the benefits at the time of dissolution. See *Bender v. Bender, supra*, 258 Conn. at 748, 785 A.2d 197. Only if the interest fails that test do we move to the second prong of the *Bender* analysis, wherein we examine whether the likelihood that the party will obtain an enforceable right to those benefits in the future is sufficiently concrete for the interest to be characterized as marital property. See *id.,* at 749-50, 785 A.2d 197.

[3] I note that the trial court in *Smith* determined, and we agreed, that the defendant's interest in the settlement award was marital property *at the time that the parties agreed to distribute their property* in 1990, at which time it remained unclear whether she was entitled to receive that award, even though the marriage was not actually dissolved until after the award was received in 1995. See *Smith v. Smith, supra*, 249 Conn. at 270-71 and n. 7, 286, 752 A.2d 1023.

[4] The majority implies that the condition that the defendant become disabled is " a contingency on which acquisition of the property interest *itself* hinges," rather than " [a] contingency on which the mere *enjoyment* of a property interest depends...." (Emphasis in original.) I respectfully disagree. Section 5-192p did not require the defendant to satisfy any conditions or wait any period of time Before he became eligible to enforce his interest in disability benefits in the event that he became disabled while on the job. Thus, in my view, the statutory right to such benefits was obtained and became enforceable immediately upon the defendant's employment with the state. By contrast, the defendant's disability merely triggered his receipt and future enjoyment of those benefits, and did not relate to the question of whether he had a right to such benefits in the event that the contingency, namely, his disability, did occur. See *Travelers Ins. Co. v. Pondi-Salik,* 262 Conn. 746, 755, 817 A.2d 663 (2003) ("[d]isability operates only to accelerate the employee's qualification for retirement benefits under § 5-192p").

[5] I note that several jurisdictions have concluded that, if the language of the applicable plan document or statutory provision so provides, interests in disability benefits may vest prior to the date of disability. See, e.g., *Washington v. Murphy Oil USA, Inc.,* 497 F.3d 453, 457 (5th Cir.2007) (employee's interest in disability benefits vested after five years of service based on language of summary plan description, even though employee did not become disabled until almost nine years after beginning employment); *Dickey v. Retirement Board of San Francisco,* 16 Cal.3d 745, 749, 548 P.2d 689, 129 Cal.Rptr. 289 (1976) (relying on distinction between irrevocable *right* to potential disability benefits and possibility that benefits would not be *received* because employee may not become disabled to conclude that disability benefits vested upon acceptance of employment); *Gatewood v. Board of Retirement of the San Diego County Employee's Retirement Assn.,* 175 Cal.App.3d 311, 319, 220 Cal.Rptr. 724 (1985) (public employee's interest in disability pension benefits vested upon employee's acceptance of employment with state); *Welter v. Milwaukee,* 214 Wis.2d 485, 490-91, 571 N.W.2d 459 (1997) (based on statutory language, municipal employee's interest in disability benefits vested upon acceptance of employment), review denied, 217 Wis.2d 519, 580 N.W.2d 689 (1998); see also *Feifer v. Prudential Ins. Co. of America,* 306 F.3d 1202, 1212-13 (2d Cir.2002) (concluding that disability benefits vested *no later* than date of disability with respect to two

plaintiffs, and remanding case to determine if benefits vested *prior* to date of disability with respect to third plaintiff). I also acknowledge, however, that other jurisdictions have concluded that an interest in disability benefits does not vest until the date of disability. See, e.g., *Kestler v. Board of Trustees of North Carolina Retirement System,* 48 F.3d 800, 804 (4th Cir.) (disability retirement benefits do not vest until date of disability), cert. denied, 516 U.S. 868, 116 S.Ct. 186, 133 L.Ed.2d 124 (1995); *Fund Manager, Public Safety Personnel Retirement System v. Phoenix Police Dept. Public Safety Personnel Retirement System Board,* 151 Ariz. 487, 490, 728 P.2d 1237 (App.1986) (right to accidental disability pension does not vest until employee becomes disabled); *Branson v. Public Employees' Retirement Fund,* 538 N.E.2d 11, 12 (Ind.App.1989) (based on statutory language, right to *all* pension benefits, including normal retirement benefits and accidental disability benefits, does not vest until all statutory requirements have been satisfied and employee can demand immediate receipt of benefit).

[6] The majority acknowledges that an interest may be vested, and thus distributable, even though it has not yet matured in the sense that the benefit cannot be received unless and until certain prescribed conditions occur. See *Krafick v. Krafick, supra*, 234 Conn. at 797, 663 A.2d 365.

[7] I presume that the majority would not dispute that an interest in disability benefits under § 5-192p would be considered vested and irrevocable if the language of that statute explicitly so provided.

[8] In addition, even if the defendant's interest was not marital property under the first prong of *Bender* because that interest was subject to revocation by the legislature, we then would analyze that interest under the second prong of *Bender,* wherein our inquiry properly would focus on the likelihood that an enforceable right to such benefits would be obtained, or in this case retained, and not on whether the benefits were likely actually to be *received.* See *Bender v. Bender, supra*, 258 Conn. at 749-50, 785 A.2d 197 (analyzing likelihood that defendant would obtain enforceable right to unvested pension benefits, and not likelihood that such benefits subsequently would be received). Because in my view it is exceedingly unlikely that the legislature would revoke a statutory entitlement, the assurance of which undoubtedly was central to the decision of thousands of state employees who have chosen to pursue careers in state government that entail significant health and safety risks, I would conclude that the likelihood that the defendant would retain his enforceable right to disability benefits was sufficiently concrete to satisfy the second prong of *Bender.*

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Negetive Treatment:

No negative treatment in subsequent cases

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Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, and tried to the court, Hon. Dennis F. Harrigan, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment dissolving the marriage and granting certain other relief; thereafter, the court, Shay, J., denied the plaintiff's motion to open the judgment, and the plaintiff appealed.

Reversed; further proceedings.

SYLLABUS

The plaintiff, whose marriage to the defendant had been dissolved in 2001, sought to open the judgment in 2005 on the basis of fraud. The plaintiff claimed, inter alia, that the property distribution should be revisited by the trial court because the defendant, during the parties' predissolution settlement negotiations, had failed to disclose the existence of an accrued but unvested pension with his employer financial firm worth approximately $2 million. The plaintiff claimed that had she known of the existence of the pension, she would not have entered into the parties' separation agreement as written because it made no provision for her to receive a portion of the pension or some other compensation for waiving any right to such an interest. The dissolution judgment incorporated orders of alimony, child support, and an equitable distribution of the martial property consistent with the written separation agreement. The plaintiff contended that at the time of the parties' marital dissolution, interests in unvested pensions constituted property or assets required to be disclosed on financial affidavits and subject to distribution pursuant to statute ([Rev. to 2001] § **46b-81**). During bifurcated proceedings on the motion to open, the trial court heard evidence, including expert testimony, about the nature of the pension generally, and the defendant's specific interest therein, and determined that although benefits accrued during an individual's term of employment, they did not immediately vest. Although the defendant had been informed of the pension when he became a partner in the firm approximately ten years before his marriage was dissolved, his pension was unvested at the time of the dissolution. The trial court concluded that at the time of the decree dissolving the parties' marriage, the defendant's pension was not property subject to distribution pursuant to § **46b-81**. That court reasoned that this court's decision in *Bender* v. *Bender* (258 Conn. 733, 785 A.2d 197), which held that unvested pension benefits were distributable marital property pursuant to § **46b-81**, was inapplicable to the present case because that decision postdated the parties' marital dissolution here, and that the pension was unquestionably not property under the law in effect prior to *Bender* . The trial court also determined, however, that the defendant should have disclosed the pension on his financial affidavits because nondisclosure prevented the trial judge who rendered the judgment of dissolution from performing his

statutory (§ 46b-66) duty to find the parties' settlement agreement fair and equitable under the circumstances, or from considering the pension when fashioning the alimony award. Because the trial court determined that the pension was not property, that court concluded that any evidence as to the value of the pension was not relevant or material, and, accordingly, refused to admit any such evidence offered by the plaintiff. During the hearing on the plaintiff's motion to open, the trial court heard conflicting testimony as to whether the plaintiff was aware of the pension, whether the defendant had disclosed the pension during negotiations, and whether the parties' had discussed the pension personally or through counsel. That court found that it was implausible that the pension had not been discussed during the parties' marriage and concluded that the plaintiff knew of the pension at the time of the dissolution. The court further concluded that the defendant had disclosed the existence of the pension during the settlement negotiations, and, accordingly, determined that the plaintiff had not proven her claim of fraud. Notwithstanding its conclusion that the defendant should have disclosed the pension on his affidavit, the trial court concluded that the nondisclosure was not fraudulent and would not likely have changed the outcome of the dissolution court's finding of fairness or produced a different result. The trial court thereafter denied the plaintiff's motion to open the judgment, and the plaintiff appealed.

Held :

1. The trial court abused its discretion in denying the plaintiff's motion to open the judgment, this court having determined that, although the trial court properly concluded that *Bender* did not apply to this case, that court committed reversible error by determining that the law preexisting *Bender* established definitively that the defendant's pension was not distributable marital property at the time of the parties' dissolution, and by concluding that the question of whether the pension was definitively established to be distributable property in 2001 was a necessary preliminary issue to be decided in the plaintiff's action alleging fraudulent nondisclosure, as the defendant was legally obligated to disclose the existence and characteristics of the pension to the plaintiff and to the dissolution court regardless of whether it was distributable property, and the plaintiff could have relied on that nondisclosure to her detriment: the plaintiff's ability to prove that she had been defrauded was not dependent on her establishing that had she known about the pension in 2001, she necessarily would have been awarded some portion of it, and, in light of the law at the time of the dissolution here, it was possible that she would have been awarded a share of the pension or other property in lieu of a share; furthermore, pursuant to the disclosure policies and principles previously articulated by this court, any retirement or employment benefit potentially receivable by a party to a dissolution action should be disclosed on that party's financial affidavit along with all known details as to its value, vesting requirements and current status, and in cases where it is unclear or debatable whether the item qualifies for distribution under § **46b-81**, it is for the trial court to make that determination after a full and frank disclosure of the item, its relevant attributes and any contingencies to which it is subject.

2. The trial court's evidentiary rulings, whereby it refused to admit the most probative evidence of the pension's value or to consider and determine that value at all, were improper: the plaintiff, in order to prevail on her motion to open, needed to prove that the defendant misrepresented the amount of property he owned by failing to disclose the existence of the pension and all of its salient features, and that she relied on that misrepresentation to her detriment by agreeing to a settlement to which she would not have agreed had she known all the details about the pension, and if the trial court had determined, on the basis of a complete evidentiary record, that the pension had a considerable worth, that determination could have undermined its finding that the plaintiff had full knowledge of the pension and chose not to pursue any interest in it or any other compensation for relinquishing any such interest, or that determination could have

changed the trial court's assessment of the defendant's full and frank disclosure to the plaintiff of the pension's existence and its value; moreover, even if the plaintiff could not show that the dissolution court would have treated the pension as distributable property, the value of the pension was relevant to the question of whether that court, had it known of the pension, still would have found the parties' separation agreement to be fair and equitable and would have approved it, and this court could not conclude that the outcome of a new trial probably would not differ.

3. The trial court did not commit plain error by placing the burden of proving fraud on the plaintiff under the circumstances of this case, the plaintiff having conceded on appeal that, under existing law, she bore the burden of proving the elements of fraud by clear and convincing evidence; furthermore, the plaintiff's request that this court create and adopt a new exception to that established law as a new legal standard was not subject to plain error review.

Steven D. Ecker, with whom was M. Caitlin S. Anderson, for the appellant (plaintiff).

Samuel V. Schoonmaker IV, with whom were Allen Gary Palmer and, on the brief, Wendy Dunne DiChristina and Anthony L. Cenatiempo, for the appellee (defendant).

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh and McDonald, Js.[*] ROGERS, C. J. In this opinion NORCOTT, PALMER, EVELEIGH and McDONALD, Js., concurred. ZARELLA, J., concurring in part and dissenting in part.

OPINION

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[312 Conn. 431] ROGERS, C. J.

This case concerns a spouse's duty to disclose an accrued but unvested pension during dissolution proceedings. The plaintiff, Catherine Reville, appeals[1] from the judgment of the trial court denying her motion to open a 2001 judgment dissolving her marriage to the defendant, John Reville, on the basis of fraud. The plaintiff alleged that the defendant committed fraud during predissolution settlement negotiations by failing to disclose an accrued but unvested pension benefit, either on his financial affidavits or otherwise. After finding, inter alia, that the defendant had disclosed the existence of the pension to the plaintiff orally, both during the parties' marriage and during settlement negotiations, the trial court denied the plaintiff's motion to open. The plaintiff claims on appeal that [312 Conn. 432] the trial court improperly: (1) held that the pension, at the time the parties' marriage was dissolved, definitively was not " property" subject to equitable distribution pursuant to General Statutes (Rev. to 2001) § **46b-81**;[2] (2) refused to consider evidence of the pension's value, which undercut the court's findings regarding disclosure; and (3) required the plaintiff to bear the burden of proving fraud under the circumstances. We agree with the plaintiff's first two claims and, accordingly, reverse the judgment of the trial court.

The following facts, which either are undisputed or were found by the trial court, and procedural history are relevant to the appeal. On May 25, 2001, the trial court, *Hon. Dennis F. Harrigan*, judge trial referee, rendered judgment dissolving the parties' fourteen year marriage, and it incorporated into the judgment orders of alimony, child support and an equitable distribution of the marital property consistent with the parties' written separation agreement. Pursuant to that agreement, the parties had endeavored to split their assets equally. The plaintiff filed an amended postjudgment motion to open and set aside the dissolution judgment, dated September 15, 2005, claiming that the court should revisit the issue of property distribution because the defendant, a partner with PricewaterhouseCoopers LLP, had failed to disclose on all four of his financial [312 Conn. 433] affidavits the existence of an

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accrued but unvested pension (pension).[3] The plaintiff claimed further that she had relied on those affidavits and the representations contained

therein as to the extent and scope of the defendant's assets, and that the pension that he had failed to disclose had a substantial value, likely in excess of $2 million. According to the plaintiff, had she known of the existence of the pension, she would not have entered into the separation agreement as it was written because it made no provision for her to receive an interest in the pension or some other compensation for waiving her right to such an interest. The plaintiff contended that interests in unvested pensions were, around the time of the parties' divorce, " property or assets" required to be disclosed on financial affidavits in dissolution actions and subject to distribution pursuant to § **46b-81**. By her motion to open, the plaintiff also sought to enforce a penalty provision in the parties' separation agreement, which provided for a forfeiture of intentionally concealed property interests.

The trial court, *Shay, J* .,[4] decided, sua sponte, to bifurcate the proceedings on the plaintiff's motion to open the judgment into two phases. In the first phase, the court endeavored to determine whether, pursuant to § **46b-81**, the pension was marital property at the time of the dissolution. In the event that the pension [312 Conn. 434] was determined to be property, a second phase would be held to determine whether the defendant had failed to disclose it, whether any such nondisclosure was fraudulent and whether nondisclosure would have altered the underlying judgment.[5]

During the first phase of the proceedings on the plaintiff's motion to open, the trial court heard testimony about the pension from the defendant and William Miller, an actuarial and pension expert retained by the plaintiff. The deposition of Roger Hindman, a partner in PricewaterhouseCoopers LLP, who oversaw benefit programs nationally for staff and partners of that firm, was read into the record. The evidence presented established the existence and nature of the pension generally, and the defendant's specific interest therein.

At the time of the dissolution judgment, the defendant was forty-five years old and had been employed by PricewaterhouseCoopers LLP, or one if its predecessors, for approximately twenty years, and he had been a partner in the firm for nearly one decade.[6] When the defendant became

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a partner, he was informed of the benefits associated with that position, which included the pension at issue among several other retirement savings vehicles.

The trial court found that the pension is unqualified, in the sense that it is not covered by the Employment [312 Conn. 435] Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. It is not funded on an ongoing basis by contributions to a trust fund, but rather, is paid out of the firm's current profits at the time it is due to eligible retirees. Moreover, although benefits accrue during an individual's term of employment, they do not immediately vest. Normal retirement age at PricewaterhouseCoopers LLP, is age sixty but, under the terms of the pension, a partner is eligible for a reduced benefit at age fifty with twenty years of service or a full benefit at age fifty-five. At the time of the dissolution judgment, the defendant's pension was unvested, but it became partially vested five years later in 2006, and fully vested by 2010. The terms of the pension are subject to change and were modified somewhat during the 1998 merger; see footnote 6 of this opinion; but pursuant to the postmerger partnership agreement, preexisting partners' benefits, including the defendant's pension, were protected. The pension benefit is calculated using a formula that takes into account a partner's years of service and a figure representing 30 percent of the average pay in his or her five highest earning years, but it is subject to a cap pursuant to which total pension payments to retired partners cannot exceed 15 percent of the firm's current profits. In addition, the pension is subject to forfeiture if a retired partner violates certain conditions such as a noncompete requirement. The defendant testified that he was unaware of any retired partner not receiving the pension benefit, provided he or she complied with those conditions.

Although all partners were aware of the pension and its basic terms, there was no written document memorializing those terms until April, 2003. In April, 2000, however, a personalized, electronic projection report was made available to each partner, including the defendant, through his or her work computer. That report estimated the present and future values of the available benefit plans, including the pension, by employing certain [312 Conn. 436] assumptions as to the rate of return, life expectancy and earnings growth. If a partner chose, he or she could enter alternative assumptions and change the projections. Employing the default assumptions, which included a retirement age of sixty, the projection report, as of December 31, 1999, estimated the present value of the defendant's projected retirement income stream to be $3,839,117.

After the first phase of the proceedings, the trial court made findings that included the foregoing facts and concluded that, in May, 2001, at the time of the decree dissolving the parties' marriage, the defendant's pension was not property subject to distribution pursuant to § **46b-81**. In so concluding, the court reasoned that this court's decision in *Bender* v. *Bender*, 258 Conn. 733, 785 A.2d 197 (2001), which held that a party's unvested pension benefits were distributable marital property pursuant to § **46b-81**, was inapplicable to the analysis here because that decision postdated the dissolution judgment in this case by several months. Moreover, according to the trial court, the pension unquestionably was not property under the law in effect prior to *Bender* . The trial

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court held, nevertheless, that the defendant should have disclosed the pension on his financial affidavits because nondisclosure prevented Judge Harrigan from performing his duty, mandated by General Statutes § 46b-66,[7] to find the parties' settlement agreement [312 Conn. 437] fair and equitable under the circumstances, and/or from giving consideration to the pension when fashioning his award of alimony. See General Statutes (Rev. to 2001) § 46b-82.[8]

The trial court then proceeded to the second phase of the proceedings on the motion to open the judgment. During that phase, the trial court ruled that, in light of its earlier determination that the pension was not property, any evidence as to its value was not relevant or material. Accordingly, the trial court refused to admit such evidence when it was offered by the plaintiff.

During the second phase, there was substantial testimony from both parties as well as individuals who had represented or assisted them during the dissolution proceedings. The plaintiff testified that she was unaware of the pension during the parties' marriage, and further, that it was not disclosed to her during the extensive settlement negotiations attendant to the dissolution proceedings. The plaintiff's counsel during the dissolution proceedings, Anthony Piazza, confirmed the plaintiff's account of nondisclosure. The plaintiff's expert witness, Mark Harrison, an attorney and a certified public accountant, was familiar with the pension, but could not recall whether he had heard about it during the [312 Conn. 438] parties' case or when he was engaged in a different, later dissolution action involving another PricewaterhouseCoopers LLP partner.

The defendant testified that he and the plaintiff had discussed the pension during their marriage, and that he and his counsel disclosed the pension to the plaintiff and her representatives several times during settlement negotiations. According to the defendant, prior to the dissolution judgment, he had not accessed the April, 2000 electronic projection report made available

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to him at work that predicted the value of the pension based on certain assumptions. The defendant testified further that he was aware of the pension, but made an affirmative decision not to list it on his financial affidavit after discussing the matter with his counsel, because he did not believe it was an asset. The defendant's counsel at the dissolution proceedings, Christopher Burdett, confirmed the defendant's account in

regard to disclosure of the pension during negotiations and the decision to omit it from the affidavit. Anthony Artabane, a colleague of the defendant's who was present at the settlement negotiations,[9] also testified that the pension had been discussed with the plaintiff.

Although the settlement negotiations preceding the dissolution of the parties' marriage had lasted sixteen months and produced more than twenty drafts of their settlement agreement, the defendant did not produce any written or documentary evidence demonstrating disclosure of the pension to the plaintiff. Additionally, Burdett did not have any notes or records indicating that the pension had been discussed orally with the plaintiff or her representatives.

After considering the conflicting testimony, the trial court found that the defendant's version of events was [312 Conn. 439] more credible than the plaintiff's version. The court found it implausible that the pension had not been discussed during the parties' marriage, and concluded that the plaintiff " knew about the [pension] at the time of the dissolution of [the] marriage in 2001, and that she now wishes to change the bargain she reached with the advice of counsel and her expert." According to the court, although the defendant did not disclose the pension on his financial affidavits, he did so during settlement negotiations, and the plaintiff and her counsel knew about it. The court held, therefore, that the plaintiff had not proven her claim of fraud.

The trial court reiterated its view that, although the pension did not qualify as distributable property, the defendant still should have disclosed it on his affidavit to enable Judge Harrigan, the dissolution court, to determine whether the settlement was fair and equitable. It concluded, however, that the defendant's nondisclosure to the court " was not fraudulent, and in any event, would not likely have changed the outcome of the court's finding of fairness or produced a different result." Consequently, the trial court denied the plaintiff's amended motion to open the judgment.[10] This appeal followed.

The plaintiff claims that the trial court improperly concluded that, in May, 2001, the defendant's pension was not property within the meaning of § **46b-81** that he was required to disclose on his financial affidavit. She contends further that the court improperly excluded, or failed to consider, evidence of the pension's value during the second phase of the proceedings on the motion on the basis that such evidence was irrelevant because the pension was not property, and that these improper rulings tainted the court's findings [312 Conn. 440] as to disclosure. Finally, the plaintiff claims that the trial court should not have placed the burden of proving fraud on her under the particular circumstances of the case, namely, when the defendant has failed to disclose a substantial asset on his

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financial affidavits during a dissolution proceeding.

The defendant contends in response that the trial court correctly concluded that the pension was not distributable property. He argues additionally that the court properly denied the plaintiff's motion to open the judgment because the plaintiff failed to prove fraud. According to the defendant, the court's finding that the pension was disclosed orally to the plaintiff is supported by the testimonial evidence and was fatal to the plaintiff's motion. The defendant claims further that, although the pension's value was irrelevant, there nevertheless was evidence in this regard before the court. Finally, the defendant contends, the court's allocation of the burden of proof was not in error.

We begin with the general standard of review and an overview of the legal framework that governed the trial court proceedings. " Our review of a court's denial of a motion to open [based on fraud] is well settled. We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse

of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Weinstein* v. *Weinstein*, 275 Conn. 671, 685, 882 A.2d 53 (2005).

[312 Conn. 441] Pursuant to General Statutes § 52-212a, " a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. . . ." An exception to the four month limitation applies, however, if a party can show, inter alia, that the judgment was obtained by fraud. See *Weiss* v. *Weiss*, 297 Conn. 446, 455, 998 A.2d 766 (2010).

" Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment. . . . A marital judgment based upon a stipulation may be opened if the stipulation, and thus the judgment, was obtained by fraud." (Internal quotation marks omitted.) *Weinstein* v. *Weinstein*, supra, 275 Conn. 685.

" Fraud by nondisclosure, which expands on the first three of [the] four elements [of fraud], involves the failure to make a full and fair disclosure of known facts connected with a matter about which a party has assumed to speak, under circumstances in which there is a duty to speak. . . . A lack of full and fair disclosure of such facts must be accompanied by an intent or expectation that the other party will make or will continue in a mistake, in order to induce that other party to act to her detriment. . . . In a marital dissolution case, the requirement of a duty to speak is imposed by Practice Book § [25-30], requiring the exchange and filing of financial affidavits . . . and by the nature of the marital relationship." (Citations omitted.) *Gelinas* v. *Gelinas*, 10 Conn.App. 167, 173, 522 A.2d 295, cert. denied,

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204 Conn. 802, 525 A.2d 965 (1987), overruled [312 Conn. 442] on other grounds by *Billington* v. *Billington*, 220 Conn. 212, 595 A.2d 1377 (1991).

" There are three limitations on a court's ability to grant relief from a dissolution judgment secured by fraud: (1) there must have been no laches or unreasonable delay by the injured party after the fraud was discovered; (2) there must be clear proof of the fraud; and (3) there is a [reasonable probability][11] that the result of the new trial will be different." (Footnote added; internal quotation marks omitted.) *Weinstein* v. *Weinstein*, supra, 275 Conn. 685.

" To determine whether there [is] proof of fraud, [a court should] consider the evidence through the lens of our well settled policy regarding full and frank disclosure in marital dissolution actions. Our [rules of practice have] long required that at the time a dissolution of marriage, legal separation or annulment action is claimed for a hearing, the moving party shall file a sworn statement . . . of current income, expenses, assets and liabilities, and pertinent records of employment, gross earnings, gross wages and all other income. . . . The opposing party is required to file a similar affidavit at least three days before the date of the hearing . . . .

" Our cases have uniformly emphasized the need for full and frank disclosure in that affidavit. A court is entitled to rely upon the truth and accuracy of sworn statements required by . . . the [rules of practice], and a misrepresentation of assets and income is a serious and intolerable dereliction on the part of the affiant [312 Conn. 443] which goes to the very heart of the judicial proceeding. . . . These sworn statements have great significance in domestic disputes in that they serve to facilitate the process and avoid the necessity of testimony in public by persons still married to each other regarding the

circumstances of their formerly private existence. . . .

" Moreover, in *Monroe* v. *Monroe*, [177 Conn. 173, 182, 413 A.2d 819, appeal dismissed, 444 U.S. 801, 100 S.Ct. 20, 62 L.Ed.2d 14 (1979)], we referred to the requirement of full and frank disclosure between attorney and marital client. [L]awyers who represent clients in matrimonial dissolutions have a special responsibility for full and fair disclosure, for a searching dialogue, about all of the facts that materially affect the client's rights and interests. *Id.,* 183. In *Baker* v. *Baker*, 187 Conn. 315, 322, 445 A.2d 912 (1982), we imposed this requirement of honest disclosure between the litigating parties and the court. It is a logical extension of those precedents to require such full and frank disclosure as well between the marital litigants themselves. . . .

" We have recognized, furthermore, in the context of an action based on fraud, that the special relationship between fiduciary and beneficiary compels full disclosure by the fiduciary. . . . Although marital parties are not necessarily in the relationship of fiduciary to beneficiary, we believe that no less disclosure is required of such parties when they come

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to court seeking to terminate their marriage.

" Finally, the principle of full and frank disclosure . . . is essential to our strong policy that the private settlement of the financial affairs of estranged marital partners is a goal that courts should support rather than undermine. . . . That goal requires, in turn, that reasonable settlements have been knowingly agreed upon. . . . Our support of that goal will be effective only if we instill confidence in marital litigants that we require, as a concomitant of the settlement process, such full and frank disclosure from both sides, for then [312 Conn. 444] they will be more willing to [forgo] their combat and to settle their dispute privately, secure in the knowledge that they have all the essential information. . . . This principle will, in turn, decrease the need for extensive discovery, and will thereby help to preserve a greater measure of the often sorely tried marital assets for the support of all of the family members." (Internal quotation marks omitted.) *Weinstein* v. *Weinstein*, supra, 275 Conn. 686-87.

We now turn to the plaintiff's claims. Additional facts and procedural history will be provided when necessary.

I

The plaintiff claims first that the trial court improperly held that the defendant's pension, at the time of the May, 2001 dissolution judgment, was not property subject to distribution under § **46b-81**. She contends that the trial court should have held to the contrary by applying this court's decision in *Bender* v. *Bender*, supra, 258 Conn. 736, which established that unvested pension benefits were distributable property, but improperly chose instead to provide an unwarranted critique of the majority opinion in that case and to follow the dissenting opinion. According to the plaintiff, the trial court should have applied this court's holding in *Bender* retroactively because in May, 2001, it was a foreseeable decision that affirmed an already existing, consistent opinion of the Appellate Court and predictably built upon prior case law. In any event, the plaintiff claims, the real question before the trial court was not whether *Bender* ought to apply retroactively, but whether the defendant violated his fundamental obligation of full and frank disclosure, and the court's inordinate focus on *Bender* " established a deeply flawed framework for the ultimate resolution of this case." She contends that, because the trial court analyzed her fraud claim using a flawed legal framework, its factual findings also are faulty.

[312 Conn. 445] The defendant contends in response that the trial court correctly held that an unvested pension was not distributable property prior to this court's decision in *Bender* . According to the defendant, the Appellate Court's decision in that case, *Bender* v. *Bender*, 60 Conn.App. 252, 758 A.2d 890 (2000), aff'd, 258 Conn. 733, 785 A.2d 197 (2001), which predated the dissolution

of the parties' marriage, did not address the issue, and this court's subsequent decision represented a substantial and unexpected change in our equitable distribution jurisprudence that should not apply retroactively to May, 2001.

Although we disagree that our decision in *Bender* effected a substantial and surprising change to the law of marital property distribution, we nevertheless agree with the defendant that the decision does not apply retroactively to cases that were not pending at the time the decision was rendered. We disagree, however, with the trial court's determination that the law preexisting *Bender* established definitively that the defendant's pension was *not* distributable marital property in May, 2001,

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and that *Bender* represented a sharp departure from, rather than a progressive outgrowth of, our preexisting jurisprudence. In short, at the time of the parties' divorce, the proper treatment of unvested pensions in dissolution actions was an unsettled issue in Connecticut. More fundamentally, however, we disagree with the trial court's view that the question of whether the defendant's pension definitively was established to be distributable property in May, 2001, was a necessary preliminary issue to be decided in this action alleging fraudulent nondisclosure. Specifically, as the plaintiff contends, and as the trial court belatedly acknowledged, the defendant was legally obligated to disclose the existence and characteristics of the pension to the plaintiff and the dissolution court *regardless* of whether it clearly was distributable property. Moreover, the plaintiff's ability to prove that she had been defrauded [312 Conn. 446] was not dependent on her establishing that, had she known about the pension in May, 2001, she necessarily would have been awarded some portion of it. At the same time, in light of the state of the law at the time, it is entirely possible that the plaintiff would have been awarded a share of the pension or other property in lieu of a share. As explained more fully hereinafter, we agree with the plaintiff that the trial court's inordinate focus on *Bender*, and the nonissue of whether the pension definitively was or was not marital property in May, 2001, distorted the remainder of the trial and led the court to commit reversible evidentiary error.

We first note the applicable standard of review. As a general matter, the question of whether a particular retirement benefit constitutes distributable property pursuant to § **46b-81** is a question of statutory interpretation. Accordingly, our review of the trial court's decision is plenary. See *Mickey* v. *Mickey*, 292 Conn. 597, 613, 974 A.2d 641 (2009); *Bender* v. *Bender*, supra, 258 Conn. 741; *Krafick* v. *Krafick*, 234 Conn. 783, 793-94, 663 A.2d 365 (1995).

The following additional procedural history is relevant. On December 11, 2007, during prehearing proceedings, the trial court, sua sponte, directed the parties to prepare for a bifurcated hearing on the plaintiff's claim of fraud. The court explained that " first and foremost . . . we have to determine whether or not the [defendant's pension] is in fact a marital asset. Second, we have to make a determination if it is a marital asset, was it in fact disclosed. If it was not disclosed then we have to determine whether or not that nondisclosure was fraudulent. . . . [T]hat's my . . . analysis of this."

The trial court then mentioned this court's decision in *Bender*, noted that it was issued months after the dissolution judgment,[12] and opined that it represented [312 Conn. 447] a change in the law. The trial court stated, therefore, that with the parties' input, it would have to decide whether the pension was distributable property by applying *Bender*, or " apply[ing] pre- *Bender* law because this is a 2001 dissolution . . . ." According to the trial court, " the fundamental question is was this particular asset a marital asset in May of 2001 . . . because if it's not marital property . . . you just don't go any further. There's no fraud. If it's not marital property and [if] it wasn't disclosed, it doesn't matter." [13]

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In response to the court's directive, the

plaintiff's counsel noted that the Appellate Court's decision in *Bender* was released in the year prior to the dissolution judgment,[14] and that decision similarly indicated that unvested pensions were distributable property. Moreover, in counsel's view, even prior to *Bender*, there was an obligation to disclose unvested pension benefits during a dissolution action, such that a failure to disclose them would amount to a fraudulent misrepresentation. The defendant's counsel, for his part, argued that the asset in question was not truly a pension and, in any event, it had been disclosed orally.

[312 Conn. 448] The trial court then reiterated its view that the " seminal question" in this case was whether the defendant's pension was " marital property in May of 2001." The court thus directed the parties to begin the hearing on the plaintiff's motion to open by limiting the evidence to that particular question, and it explained again that it would address the issue of disclosure only if the question were answered in the affirmative. Thereafter, a four day hearing was held. Consistent with the trial court's directive, the hearing was devoted to establishing the features of the defendant's pension, the contingencies to which it was subject and the way it was treated during, and affected by, the PricewaterhouseCoopers LLP merger. See footnote 6 of this opinion.

The plaintiff, in her post hearing brief to the court, claimed, inter alia, that the Appellate Court's decision in *Bender*, which had affirmed the distribution of an unvested pension plan, predated the dissolution judgment in this action and, therefore, required the defendant to disclose his pension on his financial affidavit. The plaintiff contended further that earlier jurisprudence also established such an obligation. The defendant treated this court's decision in *Bender* as applicable, but argued that his unvested pension was factually distinguishable from the one at issue in that case.

In its memorandum of decision addressing whether the defendant's pension was property, the trial court, after making extensive findings as to the particulars of the pension, provided a detailed history of Connecticut's equitable distribution jurisprudence. It then concluded that the Appellate Court's decision in *Bender* v. *Bender*, supra, 60 Conn.App. 252, was not pertinent. According to the trial court, because the focus of the Appellate Court's decision was on whether the unvested pension at issue had been properly valued and distributed, and the parties to that case did not dispute that the pension was distributable property, the Appellate [312 Conn. 449] Court did not decide whether

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the pension was property under § **46b-81**, but simply assumed that it was. Finally, the trial court concluded that this court's decision in *Bender* v. *Bender*, supra, 258 Conn. 733, was not applicable to the analysis because the release of the decision postdated the dissolution judgment by several months. Moreover, the trial court reasoned, that decision amounted to a " sea change" [15] in our equitable distribution jurisprudence that was misguided and inconsistent with earlier cases. In explaining its reasoning, the trial court provided a lengthy critique of the majority opinion in *Bender*, and it relied heavily upon a characterization of our prior equitable distribution jurisprudence that was articulated in a dissenting opinion. See *Bender* v. *Bender*, supra, 258 Conn. 767-69 (*Zarella, J.*, dissenting). The trial court then applied the law as the dissenting opinion described it to exist prior to this court's decision in *Bender* and concluded that the defendant's pension, in May, 2001, was not " property" that would have been subject to distribution as part of the dissolution judgment.[16]

In the final paragraph of its twenty-four page memorandum of decision, the trial court concluded further, in direct contradiction to its previous explanations of the reasons for a bifurcated hearing, that the pension, although not property, nevertheless needed to be disclosed. Specifically, the court now recognized, the dissolution court should have known about the pension when determining whether the parties' settlement was [312 Conn. 450] fair and when crafting its award of alimony. Accordingly, the trial

court ordered that the hearing on the plaintiff's motion to open should continue. After the second part of the hearing concluded, the trial court held that no fraud had been proven.

Although several aspects of the trial court's reasoning are sound, we nevertheless disagree with both its overall approach to analyzing the issues in this case and its conclusion that the defendant's pension definitively was not distributable marital property in May, 2001. First, we agree with the plaintiff that the real issue in this case was whether the defendant was required to disclose, and did in fact disclose, the pension during the dissolution proceedings, and not whether the pension was definitively established to be distributable property in May, 2001. Second, regardless of whether the pension was established to be distributable property at that time, its existence was a highly relevant consideration both for the plaintiff in deciding whether to agree to the proposed settlement agreement, and for the dissolution court in deciding whether to approve that agreement. Accordingly, nondisclosure, if proven, could have caused the plaintiff to act to her detriment, and full disclosure could have led to a different result in the dissolution action. Third, because the proper treatment of unvested pension benefits in dissolution actions simply was an unsettled matter in May, 2001, the trial court improperly treated it as definitively established instead of acknowledging

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that, in light of the state of the law at that time and the developments that were soon to follow, the plaintiff might have been awarded a share of the pension or other property in lieu of a share. As we will explain hereinafter, the trial court's unconventional analysis and its improper conclusion as to the classification of the pension distorted the remainder of the hearing on the plaintiff's motion to open and led the court to commit reversible evidentiary error. Because of that error, the court's denial of the plaintiff's motion to open was an abuse of discretion.

[312 Conn. 451] To begin, as the trial court eventually realized after conducting a lengthy hearing on the details of the defendant's unvested pension, the defendant unquestionably was obligated to disclose that pension to the plaintiff and the dissolution court, regardless of whether this state's appellate jurisprudence definitively had confirmed that it was distributable property by May, 2001. Pursuant to the long-standing full and frank disclosure policies and principles we have articulated; see *Weinstein* v. *Weinstein*, supra, 275 Conn. 686-87; *Billington* v. *Billington*, supra, 220 Conn. 219-22; *any* retirement or employment benefit potentially receivable by a party to a dissolution action should be disclosed on that party's financial affidavit along with all known details as to its value, vesting requirements and current status. In cases in which it is unclear or debatable whether the item at issue qualifies for distribution under § **46b-81**, it is for the *trial court* to make that determination after a full and frank disclosure of the item, its relevant attributes and any contingencies to which it is subject.[17] Conversely, it is patently improper for a party to interpret the statute and case law and decide for himself or herself whether the item qualifies for distribution, and then to insulate that decision from any judicial review by failing to disclose it. When the trial court decides whether an item is distributable property, if either party is dissatisfied, he or she has the option of appealing the matter to a higher tribunal. In this regard, we agree with the plaintiff that " [f]inancial affidavits in dissolution matters are not intended as a place for gamesmanship or even advocacy," and that affidavits require " unadulterated honesty because, in [312 Conn. 452] the absence of full and frank disclosure, the entire system breaks down." [18]

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Next, even if a benefit such as an unvested pension is too speculative to be distributable as marital property pursuant to § **46b-81**, its existence still may play into the decision-making process of the benefit holder's spouse when he or she is determining whether to accept or decline a proposed settlement offer. For instance, the

plaintiff in this case, if aware that the defendant was approaching the vesting period for a pension offered by his longtime employer[19] that would provide, throughout his entire retirement, an annual payment based on 30 percent of his income in his highest earning years, might reasonably have demanded that she receive a significantly greater percentage of the couple's remaining assets than she would have had she not known about the pension. Although there were contingencies that, had they come to pass, might have disqualified the defendant from receiving the pension, the plaintiff, having familiarity with her spouse, his work history and the characteristics of his employer, might have considered those contingencies to be negligible [312 Conn. 453] and bargained accordingly. In short, the plaintiff could have relied on nondisclosure of the pension to her detriment, regardless of whether it ultimately was classified as distributable marital property.

Relatedly, as the trial court correctly recognized after conducting a mini-trial on whether the defendant's pension was marital property in May, 2001, even when an item is determined to be nondistributable, its existence nevertheless is a relevant consideration for a court adjudicating a dissolution action when it assesses the fairness of a settlement, distributes other property or fashions other financial orders. See, e.g., General Statutes § 46b-66 (a) (when reviewing settlement agreements for fairness and equity, court must consider, inter alia, " the financial resources . . . of the spouses"); General Statutes § **46b-81** (c) (when distributing property, court must consider, inter alia, " the opportunity of each [party] for future acquisition of capital assets and income"); General Statutes § 46b-82 (a) (when fixing alimony, court must consider, inter alia, " sources of income"); see also *Thompson* v. *Thompson*, 183 Conn. 96, 100, 438 A.2d 839 (1981) (trial court properly considered plaintiff's unaccrued pension benefits as source of future income when fixing property assignment and alimony orders).[20] Consequently, we reiterate, *all* retirement and employment benefits potentially receivable by a party to a dissolution action must be fully and frankly disclosed on that party's financial [312 Conn. 454] affidavits, regardless of whether they are definitively established to be distributable marital property.

Finally, although we further agree with the trial court that this court's decision in *Bender* v. *Bender*, supra, 258 Conn. 733, would not

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apply retroactively to May, 2001, to a case that, at that time, already had reached final judgment,[21] and that the earlier Appellate Court decision in that case did not directly address the issue of how unvested pensions should be classified, we disagree that a determination of whether the defendant's pension definitively was established to be distributable property at that discrete point in time was the pertinent inquiry, or was in any way dispositive of the issues in this case. Rather, the trial court simply should have acknowledged that, in early to mid-2001, around the time the parties were engaged in settlement negotiations, the proper treatment of unvested pension benefits in dissolution actions was *an open question* in Connecticut.[22] That question was to be settled soon, however, and there were significant indications that it would be decided as it was. Instead of drawing an artificial line on the calendar after which unvested pensions suddenly [312 Conn. 455] became distributable property, the trial court should have considered whether, in light of that legal climate, there was a substantial likelihood that, had both the plaintiff and the dissolution court knew of the pension, the plaintiff would have refused to accept the settlement agreement and the outcome of the dissolution proceedings would have differed.

The parties' dissolution action was commenced in 2000, and disposed of in May, 2001. As early as 1981, this court held that a dissolution court properly could consider a party's unvested pension benefits when crafting property and alimony orders. *Thompson* v. *Thompson*, supra, 183 Conn. 100. In 1995, in *Krafick* v. *Krafick*, supra, 234 Conn. 798-99 n.23, after concluding that *vested* pension benefits were distributable property, this court noted that, although the issue of *unvested* pension benefits

was outside the scope of the decision, " the same reasoning has been applied to find that such benefits also . . . constitute property," and we cited several decisions from other jurisdictions to that effect. In that case and thereafter, in the years immediately preceding the institution of the parties' dissolution action, this court began to cite a very broad definition of property in marital cases,[23] and we expanded

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our interpretation of the scope of § **46b-81** to include such things as personal injury awards; *Lopiano* v. *Lopiano*, 247 Conn. 356, 367, 752 A.2d 1000 (1998); and nonexercisable stock options. *Bornemann* v. *Bornemann*, 245 Conn. 508, 518, 752 A.2d 978 (1998).[24] In a 2000 appeal to [312 Conn. 456] this court, a party raised the issue of whether unvested pension benefits were distributable property, but we did not resolve the issue then because of a confusing and inadequate record. See generally *Rosato* v. *Rosato*, 255 Conn. 412, 766 A.2d 429 (2001). We reiterated, however, that the issue remained an open one, and we retained jurisdiction over the appeal with an assurance that we would decide the issue expeditiously in the event the trial court, on remand, concluded that the benefits at issue were in fact unvested. *Id.,* 422 n.16, 425 n.19.[25]

Also around that time, at least one trial court had ordered equitable distribution of a party's unvested pension benefits. See *Bender* v. *Bender*, Superior Court, judicial district of New Haven, Docket No. FA97-0258814-S (October 8, 1998). In late 2000, the trial court's order was upheld by the Appellate Court. *Bender* v. *Bender*, supra, 60 Conn.App. 252-53. The focus of the Appellate Court's decision was on the valuation and distribution of the pension rather than its classification as marital property,[26] because the parties to that case did not dispute that the pension was distributable. *Id.,* 254. The Appellate Court's overt acceptance of this underlying premise without, for example, ordering supplemental briefing on the matter,[27] suggested, however, [312 Conn. 457] that it did not view classification of the pension as property to be especially controversial.[28]

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Finally, around the time the parties' marriage was dissolved, there existed a growing national consensus in favor of treating unvested pension benefits as distributable property in dissolution actions. See *Bender* v. *Bender*, supra, 258 Conn. 751 n.8 (citing decisions from thirty-one jurisdictions, as well as statutes of four states defining distributable property to include unvested pension benefits). Representatives of the national and state family law bars, when asked in early 2001 to weigh in on the matter, agreed that this was the proper approach. *See id.,* 741 n.4 (noting that American Academy of Matrimonial Lawyers and Connecticut Bar Association Family Law Section, whom this court invited to appear as amici curiae, both contended that unvested pension was distributable property).

Consequently, in the present matter, had the defendant's pension been listed on his financial affidavit, Judge Harrigan might have followed this growing trend and awarded a portion of the pension to the plaintiff. [312 Conn. 458] Moreover, had the disposition of the case been delayed for several months because of the plaintiff's unwillingness to settle without receiving a share of the defendant's pension or other property in lieu of a share, that judge would have had the benefit of this court's decision in *Bender* v. *Bender*, supra, 258 Conn. 733, and would have been required to treat the pension as distributable property. Alternatively, had the case been tried and gone to final judgment with the plaintiff having sought, but not received, an interest in the pension, she might have pursued an appeal to challenge that disposition, in which case, in light of our impending decision in *Bender*, she would have prevailed. Instead of holding a straightforward hearing on the elements of fraud, acknowledging that the law regarding distribution of unvested pensions was unsettled, considering the foregoing possibilities and determining whether the plaintiff was misled by nondisclosure to her ultimate detriment, the trial court embarked on a lengthy excursion to determine the undeterminable, namely, whether the defendant's pension definitively was or was not distributable

property in May, 2001.[29] [312 Conn. 459] This was improper.[30]

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[312 Conn. 460] The defendant contends that any error the trial court made in determining whether the pension was marital property is harmless in light of the fact that the court also found that the defendant orally disclosed the pension to the plaintiff and her representatives, and the court's finding, which has evidentiary support and, therefore, is not clearly erroneous, necessarily is fatal to the plaintiff's claim of

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fraud. For the reasons explained in part II of this opinion, the trial court's finding of disclosure must be revisited because of the court's failure to consider and/or admit important, relevant evidence. Moreover, the court's disregard of that evidence stemmed from its flawed analysis regarding whether the pension was distributable property. Accordingly, we disagree that any impropriety in the trial court's classification of the pension could not have affected its ultimate conclusion that fraud was unproven.

II

The plaintiff's next claim concerns the trial court's ruling as to the relevance of evidence concerning the value of the defendant's pension. The plaintiff contends that the court improperly excluded important evidence in that regard, and refused to consider other relevant [312 Conn. 461] evidence. The defendant contends in response that, although there was some evidence of the pension's value before the trial court, that evidence was " unnecessary" in the first phase of the proceedings on the motion to open the judgment and " irrelevant" in the second phase. We agree with the plaintiff.

A trial court's ruling as to whether evidence is relevant and probative is subject to review for an abuse of discretion. *State* v. *Jackson*, 304 Conn. 383, 424, 40 A.3d 290 (2012). " Evidence is relevant if it has any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. Conn. Code Evid. § 4-1. Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, [as] long as it is not prejudicial or merely cumulative." (Internal quotation marks omitted.) *State* v. *Bonner*, 290 Conn. 468, 496-97, 964 A.2d 73 (2009).

The following additional procedural history is relevant. During the first phase of the proceedings, the trial court directed the parties to focus on the specific, narrow issue of whether the defendant's pension qualified as marital property pursuant to § **46b-81** at the time of the dissolution judgment.[31] Accordingly, the parties addressed that issue alone, and any evidence presented as to the pension's value was peripheral and incomplete. [312 Conn. 462] Miller, an actuarial and pension expert who testified on the plaintiff's behalf, did not offer a firm opinion as to the pension's value. Rather, he testified only as to whether, as a general or conceptual matter, the pension was susceptible of being valued,[32] and

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he offered a " guesstimate" that at the end of 1999, it was worth approximately $500,000.

At the conclusion of the first phase of the motion proceedings, the trial court held that the pension was not marital property subject to distribution. Thereafter, during the second phase, conducted approximately nine months later, the court ruled, sua sponte, that at that stage of the trial, any evidence of the value of the pension, whether proffered by either party, was irrelevant and immaterial and would not be admitted. In light of that ruling, the plaintiff made an offer of proof for the record, which included her disclosure of

Miller as an expert witness and a report that Miller had prepared[33] to value the pension, in which he opined that it had a substantial value, in excess of $1 million.[34] The court [312 Conn. 463] precluded the proffered evidence, again holding that it was irrelevant and immaterial to the second phase of the proceedings.

After the second phase, the trial court concluded that the plaintiff had not proven fraud, essentially adopting the defendant's account of disclosure and discrediting the plaintiff's account of nondisclosure. The plaintiff subsequently filed a motion for articulation wherein she requested, inter alia, that the trial court articulate whether it had made any determination as to the value of the defendant's pension at the time of the dissolution judgment and, if so, what that value was. Following the trial court's denial of the plaintiff's motion, this court, upon review, ordered the trial court to provide the requested articulation. In the articulation that followed, the trial court explained that it considered the plaintiff's request to be a " red herring" because the court unequivocally had found that the pension was not property at the time of the dissolution judgment. According to the court, " [t]he clearly articulated purpose of the first phase of the trial was *not* to determine the value of the [pension], rather it was to determine if the [pension] should be construed as a marital asset at the time of the decree dissolving the marriage. This question was answered in the negative." (Emphasis in original.) Furthermore, the court explained, " [a]ssuming arguendo that [it] was looking to determine the value of the [pension] (*which it was not*)," there was " no credible evidence as to [the] value of the [pension] as of May 25, 2001, the date of the dissolution of the [parties'] marriage." (Emphasis in original.) In this regard, the court noted that the valuation provided by Miller in the first phase of the motion proceedings was only a " 'guesstimate'" that the court did not find to be credible.

We agree with the plaintiff that the court's evidentiary rulings, whereby it refused to admit the most probative evidence of the pension's value or to consider and determine [312 Conn. 464] that value at all, were improper.[35] First, to prevail on her motion to

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open the judgment, the plaintiff needed to prove that the defendant misrepresented the amount of property he owned by failing to disclose the existence of the pension and all of its salient features; see footnote 18 of this opinion; and that she relied on that misrepresentation to her detriment by agreeing to a settlement to which she would not have agreed had she known all the details about the pension. See *Weinstein* v. *Weinstein*, supra, 275 Conn. 685; *Gelinas* v. *Gelinas*, supra, 10 Conn.App. 173. Because of the absence of *any* documentary proof directly evidencing disclosure of the pension by the defendant and knowledge of it by the plaintiff, the trial court decided these issues largely on the basis of its assessment of the parties' credibility. In short, the court credited the defendant's version of events and discredited the plaintiff's version. If, however, the trial court were to have determined, on the basis of a complete evidentiary record, that the pension had considerable worth; see footnote 34 of this opinion; that determination could have severely undermined the court's finding that the plaintiff had [312 Conn. 465] full knowledge of the pension, yet simply chose not to pursue any interest in it or some alternative compensation for relinquishing any such interest. Similarly, a finding of substantial value may well have changed the trial court's assessment of the defendant's account of full and frank disclosure to the plaintiff, namely, disclosure not only of the pension's existence, but of *all* its salient features, including its value.[36]

In connection with her motion to open, the plaintiff also needed to show that the outcome of a new trial probably would differ. *Weinstein* v. *Weinstein*, supra, 275 Conn. 685. Because of the court imposed bifurcated hearing and the trial court's improper conclusion, after the first phase, that the pension definitively was not property in May, 2001, the plaintiff was foreclosed from arguing that, in light of the uncertain state of the law at that time, the pension, if fully disclosed to

the dissolution court, may well have been treated as distributable property. In this event, the value of the pension was relevant to the question of whether the plaintiff would have been awarded a substantially different portion of the parties' total assets. Conversely, even if the plaintiff could not show that the dissolution court would have treated the pension as distributable property, the value of the pension was relevant to the question of whether that court, had it known of the pension,

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still would have found the parties' separation agreement to be fair and equitable and approved it. The trial court, without considering any evidence of value, concluded that Judge Harrigan's finding in this regard would not have differed. We do not agree. Particularly, if the pension had a present value in excess of $1 million, as Miller, the [312 Conn. 466] plaintiff's expert, intended to testify; see footnote 34 of this opinion; it is questionable whether Judge Harrigan would have approved the parties' agreement, which basically endeavored to give each party approximately one half of the remaining marital property.[37]

For the foregoing reasons, we conclude that the trial court's evidentiary rulings, which flowed from its improper analysis regarding whether the pension was [312 Conn. 467] distributable property, were improper. Additionally, the court's finding that there was no fraud, which flowed from those evidentiary rulings, also is fatally flawed.[38] Consequently, the trial court's denial of the plaintiff's motion to open was an abuse of discretion.

III

The plaintiff's last claim is that the trial court improperly required her to bear the burden of proving fraud under the circumstances of this case. According to the plaintiff, once it is established that a party to a dissolution action has failed to list a substantial asset either on his or her financial affidavit or in open court, the burden should shift to that party to prove, by clear and convincing evidence, either the absence of fraud or that the nondisclosure was harmless. The plaintiff concedes

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that she did not raise this claim at trial, but asks that this court find plain error in the trial court's failure to allocate the burden of proof as she suggests. The defendant responds that there is no plain error for this court to rectify because the trial court correctly applied existing law that required the plaintiff to bear the burden of proving the elements of fraud. We agree with the defendant.

" [The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a [312 Conn. 468] trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . .

" An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record.

" Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . In *State* v. *Fagan*, [280 Conn. 69, 87, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S.Ct. 1491, 167 L.Ed.2d 236 (2007)], we described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest [312 Conn. 469] injustice." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Sanchez*, 308 Conn. 64, 76-78, 60 A.3d 271 (2013).

We agree with the defendant that the trial court correctly allocated and applied the burden of proof that, for decades, has been part of our jurisprudence governing motions to open dissolution judgments on the basis of fraud, and furthermore, these cases have not distinguished between fraud based on misrepresentation and that based on nondisclosure. See, e.g., *Weinstein* v. *Weinstein*, supra, 275 Conn. 684-85; *Billington* v. *Billington*, supra, 220 Conn. 215, 217-18; *Jucker* v. *Jucker*, 190 Conn. 674, 675, 677, 461 A.2d 1384 (1983); see also *Terry* v. *Terry*, 102 Conn.App. 215, 223, 925 A.2d 375, cert. denied, 284 Conn. 911, 931 A.2d 934 (2007). The plaintiff did

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not object to the imposition of these standards at trial, nor did she suggest that another framework should apply. Indeed, she concedes on appeal that, under existing law, she bore the burden of proving the elements of fraud by clear and convincing evidence. In sum, the plaintiff does not contend that the court improperly applied existing law, but rather, she requests that we create and adopt a new exception to that law, and then conclude that the trial court improperly failed to apply that exception.

As the preceding explanation of the plain error doctrine makes clear, however, a prerequisite to its invocation is the trial court's commission of an obvious and serious error. We cannot find plain error under the circumstances of this case because there is no true error to correct. " [T]he plain error doctrine should not be applied in order to review a ruling that is not arguably incorrect in the first place." *State* v. *Pierce*, 269 Conn. 442, 453, 849 A.2d 375 (2004); *id.* (holding that Appellate Court improperly invoked plain error to raise supplementary issues when " trial court acted pursuant to a presumptively valid statute in accordance with its [312 Conn. 470] express provisions"). As we previously have explained, when a trial court has " follow[ed] [an] established rule of law . . . [it] can hardly be said to have committed plain error" ; (internal quotation marks omitted) *Williamson* v. *Commissioner of Transportation*, 209 Conn. 310, 319, 551 A.2d 704 (1988); *id.* (no plain error when trial court instructed jury, in accordance with long line of cases applying General Statutes § 13a-144, that it was plaintiff's burden to prove defective highway was sole proximate cause of her injuries); and " [i]t is not plain error for a trial court to follow Connecticut law." *Sorrentino* v. *All Seasons Services*, 245 Conn. 756, 768, 717 A.2d 150 (1998); *id.,* 766-68 (rejecting defendant's unpreserved claim that it was plain error for court to instruct jury on plaintiff's burden of proof in wrongful discharge case in accordance with standard articulated in state cases). When a party's claim is dependent on the recognition of a new legal standard, plain error cannot apply. *Feen* v. *New England Benefit Cos*., 81 Conn.App. 772, 778, 841 A.2d 1193 (no plain error where appellant's claim was contingent on unsettled legal principles), cert. denied, 269 Conn. 910, 852 A.2d 739 (2004). We conclude, therefore, that the trial court did not commit plain error by placing the burden of proving fraud on the plaintiff in accordance with established Connecticut case law.

To summarize, the trial court improperly concluded that the defendant's unvested pension, in May, 2001, definitively was not distributable marital property pursuant to § **46b-81**. Because the court employed an incorrect legal analysis to conclude that the pension was not property, it improperly refused to admit and/or consider evidence of the pension's value, evidence which was relevant to the issues of whether it had been disclosed and whether it would have affected the outcome of the dissolution action. Consequently, the trial court's denial of the plaintiff's motion to open was an abuse of discretion. [312 Conn. 471] The trial court applied the correct burden of proof to the plaintiff's claim, and accordingly, did not commit plain error in that regard.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion NORCOTT, PALMER, EVELEIGH and McDONALD, Js., concurred.

CONCUR BY: ZARELLA (In Part)

DISSENT

ZARELLA, J., concurring in part and dissenting in part.

The majority concludes that the trial court improperly denied the motion of the

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plaintiff, Catherine Reville, to open and set aside the judgment dissolving her marriage to the defendant, John Reville, on the basis of allegations that the defendant committed fraud by failing to disclose an unvested pension benefit on his financial affidavits during predissolution settlement nego-tiations. The majority specifically disagrees with the trial court's determination that (1) it was necessary to resolve the question of whether the benefit constituted distributable marital property under General Statutes (Rev. to 2001) § **46b-81** in order to determine whether the defendant committed fraud, (2) the law at the time of the dissolution proceedings definitively established that the benefit did not constitute distributable marital property, and (3) in light of the foregoing, there was no need to consider evidence of the value of the benefit in deciding whether the defendant committed fraud. Rather, the majority concludes that the defendant was " legally obligated" to disclose the existence and characteristics of the unvested pension benefit during the predissolution settlement negotiations, regardless of whether the benefit constituted distributable marital property. The majority also concludes that the trial court's decision not to allow expert testimony on the value of the benefit undermined its factual finding that the defendant disclosed the benefit to the plaintiff, thus [312 Conn. 472] causing the court to commit reversible evidentiary error when it determined that the defendant did not commit fraud. I disagree with these conclusions because the majority disregards the legal grounds on which the plaintiff's motion to open was based, namely, that the unvested pension benefit constituted distributable marital property and that the defendant's failure to disclose it not only caused her to rely to her detriment on a false representation of his assets, but was a clear violation of the parties' separation agreement. The majority also misconstrues this court's precedent on the disclosure of property interests in dissolution proceedings and takes an untenable position with respect to the trial court's factual finding that the defendant disclosed the benefit to the plaintiff. Accordingly, although I join in part III of the majority's opinion regarding the plaintiff's burden of proof, I respectfully dissent from parts I and II.

I

The majority first concludes that the trial court was not required to determine whether the defendant's unvested pension benefit constituted distributable marital property in May, 2001, because " any retirement or employment benefit potentially receivable by a party to a dissolution action should be disclosed [in] that party's financial affidavit along with all known details as to its value, vesting requirements and current status . . . regardless of whether it . . . [is]

classified as distributable marital property." (Emphasis omitted; footnotes omitted.) I disagree.

The majority loses sight of the legal grounds on which the plaintiff's motion was based. The plaintiff's original motion alleged that the defendant committed fraud when he failed to disclose in his financial affidavit " *a significant asset which would have been property subject to division under § **46b-81*** ," specifically, an [312 Conn. 473] unvested pension benefit of substantial value.[1] (Emphasis added.) Approximately four months later, the plaintiff requested permission to amend her motion in order to allege, as a second ground on which to open the judgment, that the defendant's failure to disclose the benefit was a violation of the parties' separation agreement.

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Paragraph 13.11 of the separation agreement provided in relevant part: " If it is established by a preponderance of the evidence that a party misrepresented or intentionally concealed *a property interest*, the effect thereof or an important characteristic thereof, the interest of the concealing party will be transferred *in full* to the nonconcealing party and the concealing party will pay all costs, fees, expenses, attorney's fees, and damages of the nonconcealing party caused by said concealment." (Emphasis added.) The plaintiff noted that the proposed amendment would allow her to seek enforcement of the remedies established by paragraph 13.11, which she claimed were " appropriate and commensurate" with the allegations of nondisclosure and fraud in her original motion.[2] In other words, a determination that the benefit constituted distributable marital property on the date of dissolution would allow the plaintiff to seek 100 percent of the benefit's value without subjecting all of the parties' other assets to further review and distribution by the court. Consequently, there can be no doubt that the principal issue raised in the plaintiff's motion required the trial court to make an initial determination as to whether the defendant's unvested pension benefit constituted distributable marital property.

[312 Conn. 474] The language in § **46b-81** also indicates that any resource[3] subject to assignment must be identified as property. As previously stated, the clearly articulated purpose of the plaintiff's motion was to obtain the full value[4] of the defendant's unvested pension benefit under § **46b-81**, which provides in relevant part: " (c) *In fixing the nature and value of the property, if any, to be assigned*, the court . . . shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. . . ." There is nothing in this language suggesting that a resource that is subject to assignment can be considered anything other than property. Accordingly, in addressing the plaintiff's claim that the unvested pension benefit was a resource subject to assignment that should have been disclosed, the trial court was required under § **46b-81** to determine initially whether the benefit constituted property.

This threshold determination also was required under the law that existed when the parties' divorce was finalized in May, 2001, which is the law that must be applied

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in resolving the issues in this case. Prior to that time, this court consistently took the position that, when it [312 Conn. 475] was unclear whether a particular resource was subject to division under § **46b-81**, a determination first must be made as to whether it constituted property. For example, only six years earlier, the court had stated in *Krafick* v. *Krafick*, 234 Conn. 783, 663 A.2d 365 (1995), that the " first" step in considering the equitable distribution of resources in a dissolution proceeding is to determine " whether the resource is property within [the meaning of] § **46b-81** . . . ." *Id.,* 792. Moreover, this was not a newly created principle but had been articulated and applied before *Krafick*, and continued to be applied thereafter. See, e.g., *Lopiano* v. *Lopiano*, 247 Conn. 356, 367, 752 A.2d 1000 (1998)

(personal injury award deemed subject to equitable distribution following determination that award constituted property under § **46b-81**); *Bornemann* v. *Bornemann*, 245 Conn. 508, 518, 752 A.2d 978 (1998) (unvested stock options in which employee had enforceable right deemed subject to equitable distribution following determination that options constituted property under § **46b-81**); *Simmons* v. *Simmons*, 244 Conn. 158, 168, 708 A.2d 949 (1998) (medical degree not subject to equitable distribution because degree did not constitute property under § **46b-81**); *Rubin* v. *Rubin*, 204 Conn. 224, 225, 232, 527 A.2d 1184 (1987) (interest in revocable inter vivos trust not subject to equitable distribution because trust did not constitute property under § **46b-81**); *Krause* v. *Krause*, 174 Conn. 361, 364-65, 387 A.2d 548 (1978) (potential inheritance not subject to equitable distribution because it did not constitute property under predecessor to § **46b-81**). Consequently, the trial court properly began its analysis of the plaintiff's claim by considering whether the defendant's unvested pension benefit constituted distributable marital property.[5]

[312 Conn. 476] **II**

The trial court ultimately determined that the defendant " did not have an 'existing enforceable right' in the [unvested pension benefit], which was, therefore, not marital property subject to division pursuant to . . . § **46b-81**." I agree with this conclusion and believe the plaintiff's motion should have been denied on that ground. The trial court nonetheless conducted another hearing to consider the question of fraud because the defendant's failure to bring the benefit to the attention of the plaintiff and the court during the litigation or to include it, " if only as a footnote, on his financial affidavit, prevented the court from fully performing its statutory duty under General Statutes [Rev. to 2001] § 46b-66 to find the agreement of the parties to be fair and equitable under all the circumstances, and/or to otherwise give due consideration to this factor in its award of alimony." [6] The majority likewise concludes that the unvested pension benefit should have been disclosed in May, 2001, regardless of its status as property.

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In reaching that conclusion, the majority relies on (1) the principle of full and frank disclosure articulated in *Billington* v. *Billington*, 220 Conn. 212, 219-22, 595 A.2d 1377 (1991), (2) the discussion of unaccrued pension rights in *Thompson* v. *Thompson*, 183 Conn. 96, 100, 438 A.2d 839 (1981), (3) the holding in *Bender* v. *Bender*, 258 Conn. 733, 749, 785 A.2d 197 (2001), that unvested pension benefits constitute distributable marital property, which the majority claims the defendant should have anticipated when preparing his financial affidavits, and (4) several statutory provisions pertaining to financial orders in dissolution proceedings. See General Statutes (Rev. to 2001) § 46b-66[7] [312 Conn. 477] (court shall consider " financial resources . . . of the spouses" in reviewing separation agreements for fairness and equity); General Statutes (Rev. to 2001) § **46b-81** (c)[8] (court shall consider, inter alia, " the opportunity of each [party] for future acquisition of capital assets and income" in distributing marital property); General Statutes (Rev. to 2001) 46b-82[9] (court shall consider, inter alia, " [each party's] amount and sources of income" in ordering alimony). In my view, none of these authorities supports the majority's conclusion.

[312 Conn. 478] **A**

The majority first determines that the defendant should have disclosed the unvested pension benefit in his financial affidavits under the principle of full and fair disclosure set forth by this court in *Billington* . To the extent the court in *Billington* articulated a principle of general applicability that might have guided the trial court in May, 2001, however, it was limited to the accuracy of the information provided by the parties regarding assets or interests that they *knew* were subject to disclosure under the relevant rules of practice,

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statutory provisions, and existing judicial

precedent at that time. It is therefore improper for the majority to rely on *Billington* in concluding that the defendant should have disclosed his unvested pension benefit, *regardless* of its status as distributable marital property. As the court in *Billington* explained: " Our [rules of practice have] long required that at the time a dissolution of marriage . . . is claimed for a hearing, the moving party shall file a sworn statement . . . of current income, expenses, assets and liabilities, and pertinent records of employment, gross earnings, gross wages and all other income. . . . The opposing party is required to file a similar affidavit at least three days before the date of the hearing . . . .

" Our cases have uniformly emphasized the need for full and frank disclosure in that affidavit. A court is entitled to rely upon the *truth and accuracy* of sworn statements required by [the rules of practice], and a misrepresentation of assets and income is a serious and intolerable dereliction on the part of the affiant which goes to the very heart of the judicial proceeding. . . . These sworn statements have great significance in domestic disputes in that they serve to facilitate the process and avoid the necessity of testimony in public by persons still married to each other regarding the circumstances of their formerly private existence." [312 Conn. 479] (Citations omitted; emphasis added; internal quotation marks omitted.) *Billington* v. *Billington*, supra, 220 Conn. 219-20.

The majority takes this language out of context and applies it in a manner unintended by the *Billington* court. The quoted passage in *Billington* had nothing to do with whether a particular resource was subject to disclosure but with the parties' obligation to disclose the true value of a resource previously disclosed as property in their financial affidavits.[10] *See id.* Consequently, it was the quality, amount and accuracy of the information provided by the defendant regarding the value of the resource, not whether the resource should have been disclosed in the first place, to which the court was referring in the quoted passage. *See id*. In fact, to my knowledge, this court *never* has relied on the principle of full and fair disclosure, either before or after *Billington*, in determining whether a resource was subject to disclosure when the law was unclear as to whether it should have been disclosed by the parties or considered by the trial court in entering its financial orders. See, e.g., *Bender* v. *Bender*, supra, 258 Conn. 749; *Lopiano* v. *Lopiano*, supra, 247 Conn. 367; *Bornemann* v. *Bornemann*, supra, 245 Conn. 518; *Simmons* v. *Simmons*, supra, 244 Conn. 164; *Krafick* v. *Krafick*, supra, 234 Conn. 798; *Rubin* v. *Rubin*, supra, [312 Conn. 480] 204 Conn. 232; *Thompson* v. *Thompson*, supra, 183 Conn. 100;

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Krause v. *Krause, supra,* 174 Conn. 364-65. Even in *Weinstein* v. *Weinstein*, 275 Conn. 671, 882 A.2d 53 (2005), which the majority cites but was decided four years following dissolution of the parties' marriage in the present case, the court invoked the principle of full and fair disclosure in discussing the allegedly fraudulent valuation of a resource the defendant previously had disclosed in his financial affidavit, not in determining whether an undisclosed resource *should have been* disclosed by the defendant. *Id.,* 686-88; *see also Friezo* v. *Friezo*, 281 Conn. 166, 181-83, 191-93, 914 A.2d 533 (2007).

The majority does not put the cart before the horse but, rather, forgets the horse entirely. Only if it had been undisputed, which was not the case here, or the trial court had concluded, that the benefit was distributable marital property would it be appropriate for this court to apply the principle of full and fair disclosure in determining whether the defendant had committed fraud. Indeed, that is why, as previously discussed, the principle never has been applied to settle the question of whether a disputed resource should be disclosed in a dissolution proceeding. It is also why the trial court in the present case properly began its analysis, as other courts had done numerous times before, by considering whether the unvested pension benefit constituted distributable marital property.

The standard of full and fair disclosure, when applied to every resource, including a

resource that has never been identified as property, is too broad to provide the parties and the courts with adequate guidance as to when disclosure is required because it provides no basis for distinguishing between resources that require disclosure and those that do not. In other words, without more specific guidance, parties would be required to disclose on their financial affidavits every conceivable [312 Conn. 481] resource, both present and future, to which they might be entitled, including a medical degree, a potential inheritance, or an interest in a revocable inter vivos trust, all of which this court had determined prior to May, 2001, were *not* interests subject to equitable distribution. See *Simmons* v. *Simmons*, supra, 244 Conn. 168 (medical degree); *Rubin* v. *Rubin*, supra, 204 Conn. 232 (revocable inter vivos trust); *Krause* v. *Krause*, supra, 174 Conn. 364-65 (potential inheritance). In contrast, when applied to a resource that the parties agree must be disclosed, such as income, real estate or a vested pension benefit, " full and fair disclosure" is easily understood and properly construed as referring to all of the available information regarding the nature and value of the resource. Consequently, the majority improperly relies on the principle of full and fair disclosure in concluding that the defendant should have disclosed his unvested pension benefit to the plaintiff in May, 2001.

B

The majority also relies on *Thompson* v. *Thompson*, supra, 183 Conn. 96, for the proposition that disclosure was required because a trial court may consider a party's " unaccrued pension benefits as [a] source of future income when fixing [the] property assignment and alimony orders . . . ." Text accompanying footnote 20 of the majority opinion. A close examination of the record and language in *Thompson*, however, reveals that the pension benefits at issue in that case were vested, unlike in the present case, and, accordingly, the reasoning in *Thompson* is inapposite.

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In *Thompson*, one of the issues before the court was " the extent to which a trial court may take into account unaccrued pension rights . . . ." *Thompson* v. *Thompson*, supra, 183 Conn. 97. The plaintiff in *Thompson* argued that the trial court improperly had relied on [312 Conn. 482] " evidence of pension benefits [that she] would receive if she continued to work at her present job until [the] age [of] sixty-five" ; *id.,* 98; because the pension was " too speculative in nature to be considered by a court fashioning alimony and property assignment orders." *Id.,* 100. This court disagreed, reasoning that " [p]ension benefits represent a form of deferred compensation for services rendered. . . . As such, they are conceptually similar to wages . . . [under § § **46b-81** and 46b-82] . . . . Just as current and future wages are properly taken into account under these statutes, so may unaccrued pension benefits, a source of future income, be considered. . . .

" The . . . assertion that pension benefits are as uncertain and speculative as an expected inheritance is unsound. It is true that the exact amount of the benefits to be received often will depend upon whether the employee survives his retirement age, how long he lives after retirement and what his compensation level is during his remaining years of service. But these contingencies are susceptible to reasonably accurate quantification. . . . The present value of a pension benefit may be arrived at by using generally accepted actuarial principles . . . ." (Citations omitted; footnote omitted.) *Id.,* 100-101.

Since *Thompson*, this court, as well as the majority in the present case, has misunderstood the decision as referring to unvested pension benefits. See *Krafick* v. *Krafick*, supra, 234 Conn. 794-95 n.20; *Bender* v. *Bender*, supra, 258 Conn. 743-44. When the court in *Thompson* referred to the pension benefits at issue as " unaccrued" benefits, however; *Thompson* v. *Thompson*, supra, 183 Conn. 97, 100, 101; it was not referring to unvested pension benefits but to pension benefits that would accrue in the future should the plaintiff continue to work for her employer until the age of sixty-five under a pension plan in which she *already had a* [312

Conn. 483] *vested interest* . *See id.,* 100 n.3 (distinguishing between " unaccrued" pension benefits that would accrue in future under vested pension and " [v]ested" pension benefits that already have accrued). This conclusion is supported by the record in *Thompson* and the arguments in the parties' appellate briefs, all of which expressly referred to the plaintiff's admission that her pension had " vested" and that the question before the court was whether the increase in her retirement benefits from her continued employment until the age of sixty-five should be considered by the court in its property division and alimony orders. *See id.,* 99-100. *Thompson* thus spoke only of future, unaccrued benefits under a *vested* pension plan, and, as a result, its reasoning has no bearing on whether the defendant in the present case was legally obligated in May, 2001, to disclose his unvested pension benefit in his financial affidavits.[11]

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C

The majority further claims that, although this court's holding in *Bender* that an unvested pension benefit is distributable marital property was not retroactive to May, 2001, the trial court in the present case " should have acknowledged that, in early to mid-2001, around the time the parties were engaged in settlement negotiations, the proper treatment of unvested pension benefits in dissolution actions was an open question in Connecticut" ; (emphasis omitted); and that " there were significant indications that it would be decided as it was" in *Bender* . I disagree.

[312 Conn. 484] There are several problems with this reasoning. First, the possibility in May, 2001, that this court might soon determine in *Bender* that unvested pension benefits constituted distributable marital property is irrelevant because the parties were required to act on the basis of the law that existed on the date of dissolution, which, as the majority concedes, did not yet recognize that unvested pension benefits constituted property.

Second, to the extent the majority views " significant indications" as consisting of judicial decisions that broadened the interpretation of the relevant statutes and required the disclosure of other types of benefits, including vested pension benefits; *Krafick* v. *Krafick*, supra, 234 Conn. 798; personal injury awards; *Lopiano* v. *Lopiano*, supra, 247 Conn. 371; and unvested stock options; *Bornemann* v. *Bornemann*, supra, 245 Conn. 518; the fact that this court had been asked repeatedly to decide whether the parties to a dissolution proceeding had a legal obligation to disclose such benefits attests to the ambiguity of the applicable law at that time and the necessity for its continued interpretation to determine the scope of the disclosure requirement. Moreover, this court had concluded in several previous cases that the disputed resource or benefit did not constitute distributable marital property. See *Simmons* v. *Simmons*, supra, 244 Conn. 178 (medical degree); *Rubin* v. *Rubin*, supra, 204 Conn. 232 (interest in revocable inter vivos trust); *Krause* v. *Krause*, supra, 174 Conn. 364-65 (potential inheritance). Indeed, of the six cases decided by this court prior to May, 2001, in which the parties disagreed as to whether a benefit or resource was distributable marital property, the court determined in only three cases that the benefit or resource constituted property. *Lopiano* v. *Lopiano*, supra, 247 Conn. 371 (personal injury awards); *Bornemann* v. *Bornemann*, supra, 518 (unvested stock options); *Krafick* v. *Krafick*, supra, 798 (vested pension benefits). [312 Conn. 485] Thus, the " growing trend" to which the majority refers did not necessarily point to a future decision by this court that a party's unvested pension benefit constituted property. Finally, insofar as the majority views the decisions of other jurisdictions that required the disclosure of unvested pension benefits in 2001 as providing a significant indication regarding this court's future decision in *Bender*, it only highlights the majority's recognition that unvested pension benefits were not considered property subject to disclosure in this jurisdiction during the parties' predissolution negotiations.

In sum, neither the defendant nor the trial court could have anticipated this court's decision

in *Bender* because there was no Connecticut case law in May, 2001, suggesting that an unvested pension benefit constituted distributable marital property. No decision of this court or the Appellate Court, including *Thompson*,

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stated even in dictum that a trial court should consider an unvested pension benefit as a property interest in crafting its financial orders. The only references to unvested pension benefits in cases decided before May, 2001, appeared in two footnotes in *Krafick*, one of which incorrectly construed *Thompson* ; see *Krafick* v. *Krafick*, supra, 234 Conn. 794-95 n.20, 798-99 n.23; a footnote in *Rosato* v. *Rosato*, 255 Conn. 412, 422 n.16, 766 A.2d 429 (2001); and a passing comment in *Smith* v. *Smith*, 249 Conn. 265, 274, 752 A.2d 1023 (1999), with *Rosato* recognizing only months before the separation agreement in the present case was drafted that the status of unvested pension benefits remained unresolved in Connecticut.[12]

[312 Conn. 486] Insofar as the majority suggests that the defendant and the trial court should have anticipated the result in *Bender* because of the Appellate Court's earlier decision in *Bender* v. *Bender*, 60 Conn.App. 252, 758 A.2d 890 (2000), aff'd, 258 Conn. 733, 785 A.2d 197 (2001), the Appellate Court did not address whether unvested pension benefits constitute property, the issue was not certified to this court on appeal, and this court, which ultimately decided to address the issue, had not yet published its decision in May, 2001. Moreover, *Bender* involved a different factual situation than that in the present case because the vesting requirement in *Bender* was twenty-five years of service and the defendant had been employed for approximately nineteen years at the time of the parties' divorce. *Id.,* 253. Finally, this court never has characterized its decision in *Bender* as a mere " incremental [step]" in Connecticut's jurisprudential development that might have been anticipated. Footnote 29 of the majority opinion. Rather, this court stated in *Bender* that " the issue of whether unvested pension benefits are property subject to equitable distribution [312 Conn. 487] under § **46b-81** [was] one of *first impression* for this court . . . ." (Emphasis added.) *Bender* v. *Bender*, supra, 258 Conn. 743. Although there is language in *Bender* referring to a " common theme" running

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through our prior case law; *id.,* 748; the theme to which *Bender* referred consisted of the type of analysis employed, not to a series of similar holdings that would have predicted the outcome of this court's decision in *Bender* .[13] Thus, although the court in prior cases had considered certain common factors in determining whether the interest in question constituted marital property, it was not possible to predict how the court would apply those factors in a future case to the unresolved question of whether unvested pension benefits constitute distributable marital property.

The court in *Bender* also recognized that, despite the existence of a common theme, our prior case law could be interpreted in different ways, depending on the type of potential property interests at issue. *See id.,* 753. The court stated: " Where [the majority] and the dissent [in *Bender*] part company is over the appropriate reading of our prior jurisprudence. We acknowledge . . . that *in some cases* we have determined that certain interests constituted property where there were enforceable contract rights therein, *while in others* we have determined that certain interests were too speculative to constitute property where there were no such rights. We do not read those cases, however, as the dissent does, to mark out a hard and fast line requiring such rights as the sine qua non of 'property' under § **46b-81**." (Emphasis added.) *Id*. The court ultimately concluded: " *We believe that any uncertainty regarding vesting is more appropriately* [312 Conn. 488] *handled in the valuation and distribution stages, rather than in the classification stage* ." (Emphasis added.) *Id.,* 749-50. Moreover, this was not a conclusion that necessarily could have been anticipated because, although it did not entirely eliminate consideration of whether an interest constitutes distributable property, it deemphasized the court's prior focus on that question and allowed

consideration of the problem of uncertainty in the context of valuation and distribution.[14]

The court similarly acknowledged in a subsequent decision that, although its holding in *Bender* concerning unvested pension benefits represented a natural progression and expansion of the law, it also broke new ground. See *Mickey* v. *Mickey*, 292 Conn. 597, 625, 974 A.2d 641 (2009). In *Mickey*, we explained: " Our decision in *Bender* . . . *updated* [*the*] *traditional, fairly rigid dichotomy by establishing a more nuanced approach* to defining property interests under § **46b-81**. In *Bender*, this court built [on the] foundation of our prior cases in concluding that the unvested pension of the defendant in that case was property subject to equitable distribution. . . . Consistent with our time-honored approach, we reiterated that presently enforceable rights, based on either property or contract principles, are sufficient to cause property to be divisible.

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Where Bender broke new ground was in its recognition that such rights are not the sine qua non of property under § **46b-81**. . . . In building on our prior cases, we expanded our notion of property under § **46b-81**, recognizing that there is a spectrum of interests that do [312 Conn. 489] not fit comfortably into our traditional scheme and yet should be available in equity for courts to distribute ." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Id*. The majority quotes selectively from this passage to emphasize the portion that refers to the evolution and general continuity of Connecticut law in the area of marital property rights rather than the portion referring to the fact that *Bender* had recognized a new category of property interests that " do not fit comfortably into our traditional scheme . . . ." *Id*.; see also *Czarzasty* v. *Czarzasty*, 101 Conn.App. 583, 594, 922 A.2d 272 (" [T]he court [in *Bender*] seems to have *recast* the analysis used to determine whether an interest or benefit is property under § **46b-81** to a more probabilistic assessment untethered to the existence of a presently existing enforceable right. Consequently, since *Bender*, whether a party has a presently existing enforceable right to the present or future receipt of the asset appears no longer to be determinative. Instead, the determination of whether a claimed asset is subject to distribution pursuant to § **46b-81** appears to depend on the degree of certainty revealed by the evidence that the litigant will eventually receive the asset. In sum, in accordance with the dictates of *Bender*, in confronting property claims under § **46b-81**, trial courts must make an assessment on a case-by-case basis of the likelihood of the person's receiving the asset claimed by his or her spouse. If the likelihood is not too speculative, then it is property subject to valuation and distribution." [Emphasis added.]), cert. denied, 284 Conn. 902, 931 A.2d 262 (2007). Thus, when the majority opines that the court's decision in *Bender* was predictable, or was an incremental step that should have been anticipated and reflected in the trial court's decision in the present case, it goes too far, and its conclusion is inconsistent with the conclusion in *Mickey* that *Bender* " expanded our notion of property under § **46b-81**" in a way that [312 Conn. 490] could not have been foreseen by creating an entirely new category of inchoate interests available for consideration and possible distribution by Connecticut's trial courts. *Mickey* v. *Mickey*, supra, 625. More importantly, the majority simply does not explain why the parties were required to predict what the future law would be and how this court would apply it in their particular case.

D

The majority finally relies on § § 46b-66, **46b-81**, and 46b-82 in concluding that, " even when an item is determined to be nondistributable, its existence nevertheless is a relevant consideration for a court adjudicating a dissolution action when it assesses the fairness of a settlement, distributes other property or fashions other financial orders." I agree with the majority that a party's disclosure of the opportunity to acquire future capital assets and income under § **46b-81**, which would have included the defendant's unvested pension benefit in 2001, generally is required so that the

trial court can perform its statutory duty under § 46b-66 of determining whether a separation agreement is " fair and equitable under all the circumstances." General Statutes (Rev. to 2001) § 46b-66. There are several difficulties, however, with applying this principle to the facts of the pres-ent case.

First, the trial court's statutory duty under § 46b-66 was not the legal theory on which the plaintiff's motion to open was

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based. The two grounds on which her motion was based were, first, that the defendant committed fraud by failing to disclose a benefit that was distributable marital property, thus causing her to rely to her detriment on a false representation of his assets and, second, that the defendant's alleged nondisclosure of the benefit was in violation of paragraph 13.11 of the parties' separation agreement. As previously discussed, [312 Conn. 491] the reason why the plaintiff relied on these grounds was because they enabled her to ask for relief in the form of the full value of the benefit, a lessened burden of proof, and attorney's fees and costs without reopening the entire judgment, which would not have been possible if she had based her motion on the ground that the trial court was unable to perform its statutory duty. The plaintiff thus vehemently objected to the trial court's determination in its first memorandum of decision that the defendant's unvested pension benefit was not a marital asset subject to distribution.

As evidence of her frustration, the plaintiff filed the very next day a motion for reargument, reconsideration and/or rehearing (motion for reconsideration) of the trial court's preliminary decision on the property issue. In her motion, she argued in relevant part that the trial court, in concluding that the unvested pension benefit was not marital property, had " developed a *new rule* that there was an obligation to disclose on financial affidavits and/or during discovery, even 'putative assets' such as the [unvested pension benefit] . . . and that the defendant's failure to disclose that 'putative asset' . . . prevented the court from performing its judicial function under § 46b-66 . . . thus exposing the judgment to being reopened if the nondisclosure was intentional and it would have affected the outcome of the case." (Emphasis added.) The plaintiff added that the court was in effect stating that the nondisclosure of a putative asset such as the defendant's unvested pension benefit " constituted a fraud upon the court, and the opposing party," and that the court's decision was improper because it represented " a departure from prior judicial precedent of the Connecticut Supreme Court interpreting § **46b-81** . . . ." These arguments were clearly motivated by the plaintiff's belief that the only way she could obtain 100 percent of the defendant's unvested pension benefit was to claim that the [312 Conn. 492] benefit constituted property and that the defendant's alleged nondisclosure constituted both fraud and a violation of paragraph 13.11 of the parties' separation agreement, which, as previously noted, provides that the *full value* of a property interest that has been intentionally misrepresented or concealed would be transferred to the nonconcealing party. In addition, because the plaintiff strongly disagreed, during the hearing on the motion for reconsideration, that the trial court should consider the issue of its statutory duty under § 46b-66, the court's ultimate conclusion that a decision on the fairness of the separation agreement would not have been affected by nondisclosure of the defendant's unvested pension benefit left her with no basis for an appeal on statutory grounds. In other words, the trial court's conclusion that disclosure of the benefit would not have affected its statutory duty was consistent with the plaintiff's claim in her motion for reconsideration that this was an inappropriate ground on which to justify the hearing on that motion. The plaintiff was therefore not aggrieved by the trial court's decision on the issue of its statutory duty and cannot use it as a basis for an appeal. See, e.g., *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 95 n.2, 84 A.3d 828 (2014) (aggrieve-ment is essential prerequisite to appellate jurisdiction).

In addition to the fact that the trial court

raised the issue of its statutory duty

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under § 46b-66 sua sponte and that the plaintiff is not aggrieved by the court's decision on that issue, the majority's conclusion that the judgment should be opened is undermined by the court's factual finding that the defendant disclosed the benefit to the plaintiff. See part III of this opinion. Accordingly, in light of the trial court's finding and the apparent lack of any contrary authority, the defendant had no greater obligation than the plaintiff to disclose the benefit to the court.

[312 Conn. 493] I finally note the well established principle that a reviewing court may reframe a question raised on appeal to more accurately reflect the issue presented. See, e.g., *State* v. *Thompson*, 307 Conn. 567, 570 n.3, 57 A.3d 323 (2012). In the present case, however, the trial court and the majority have *changed* the issue presented in the plaintiff's motion to open and have disregarded the plaintiff's theory of the case. Furthermore, the fraud claim cannot remain in the case on the ground that the defendant's financial affidavit defrauded the court because " the concept of fraud on the court [in the marital litigation context] is properly limited to cases [in which] *both* parties join to conceal material information from the trial court." (Emphasis added.) *Billington* v. *Billington*, supra, 220 Conn. 222. I therefore disagree with the majority that the trial court should have granted the plaintiff's motion to open the judgment under the principles set forth in *Billington*, *Thompson*, *Bender*, or the relevant statutes pertaining to the trial court's financial orders.

III

I next address the majority's conclusions regarding the fraud issue.[15] In addition to the fact that the second hearing on the motion to open was unnecessary following the trial court's determination in the first hearing that the defendant's unvested pension benefit did not constitute property, a continued hearing was improper because all of the testimony and evidence offered at the second hearing pertained to whether the defendant had disclosed the benefit to the plaintiff, rather than to whether he had disclosed the benefit to the court so that it could perform its statutory duties under § 46b-66. The majority nonetheless fails to acknowledge this [312 Conn. 494] disconnect between the trial court's conclusion in the first hearing and the testimony and evidence in the second hearing, which would have been relevant only if the court had determined that the benefit constituted property. The majority instead concludes that the trial court abused its discretion during the second hearing because it precluded relevant evidence regarding the value of the benefit. The majority further concludes that the trial court, in determining that the defendant disclosed the benefit to the plaintiff, relied largely on its assessment of the parties' credibility, which could have been affected by evidence of the benefit's value. The majority thus speculates that, " [i]f . . . the trial court [had] determined, on the basis of a complete evidentiary record, that the pension had considerable worth . . . that determination could have severely undermined the court's finding that the plaintiff had full knowledge of the pension, yet simply chose not to pursue any interest in it or some alternative compensation for relinquishing any such interest. Similarly, a finding of substantial value may well have changed the trial court's assessment of the defendant's account of

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full and frank disclosure to the plaintiff . . . ." (Citation omitted.) Text accompanying footnote 36 of the majority opinion. The majority further claims that, if the proffered testimony of the plaintiff's expert on the value of the unvested pension benefit had been admitted and credited by the court, it might have treated the benefit as distributable marital property, thus affecting the financial orders and the outcome of the case. I disagree.

" Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact;

(2) the statement was untrue and known to be so by its maker; [312 Conn. 495] (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment. . . . A marital judgment based upon a stipulation may be opened if the stipulation, and thus the judgment, was obtained by fraud. . . . A court's determinations as to the elements of fraud are findings of fact that we will not disturb unless they are clearly erroneous. . . .

" There are three limitations on a court's ability to grant relief from a dissolution judgment secured by fraud: (1) there must have been no laches or unreasonable delay by the injured party after the fraud was discovered; (2) there must be clear proof of the fraud; and (3) there [must be] a substantial likelihood that the result of the new trial will be different." (Internal quotation marks omitted.) *Weinstein* v. *Weinstein*, supra, 275 Conn. 685.

The following additional facts are relevant to a resolution of this claim. At the conclusion of its memorandum of decision on the property issue, the trial court ordered the parties to attend a status conference so that the remaining issues could be explored and a new date could be set for a hearing to determine whether the defendant's alleged failure to disclose the unvested pension benefit " was fraudulent, wilful and without just cause and, if so, whether or not the outcome of the original judgment would have been materially changed had the disclosures been made."

In preparation for the hearing, the defendant notified the court in a disclosure statement dated October 15, 2008, that he would call Mark S. Campbell to testify as an expert witness regarding the present value of the unvested pension benefit on the date of dissolution. On November 21, 2008, the plaintiff notified the court in two disclosure statements that she also would call Campbell, in addition to her own expert witness, William [312 Conn. 496] Miller, to testify regarding the present value of the benefit. The plaintiff's disclosure statement pertaining to Campbell indicated that she agreed with his conclusion that the defendant had an interest in an unvested pension benefit for which a present value could be determined but that she rejected and disputed the discount rate Campbell had applied to calculate this value, which he had determined was at least $17,000 on the date of dissolution. More specifically, Campbell's present value calculations assumed a discount rate equal to the twenty year treasury bond rate as of the valuation date, which was 6.04 percent per annum, plus a " [s]pecific qualitative risk" discount factor of 15 percent per annum, for a total discount rate of 21.04 percent. The 15 percent discount rate was based on several factors Campbell determined could have a potentially negative effect on the present value calculation, including (1) the unfunded nature of the pension plan,[16] (2) the

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defendant's unvested interest in the plan at the time of dissolution,[17] (3) the contingent nature of the plan, which depended on the defendant's company continuing as a going concern and maintaining its ability to fund the plan from its current earnings, and (4) the ability of the company to discontinue or otherwise alter the plan at any time. In her disclosure statement pertaining to Miller, the plaintiff indicated he would testify that the present value of the benefit on the date of the dissolution was $1,079,451 under the " proper" discount rate, assuming the defendant retired at the age of fifty-five. Although Miller was expected to testify that Campbell's use of the 15 percent discount rate was " not appropriate," and that he did not consider the risks and uncertainties [312 Conn. 497] on which this discount rate was based in his own present value calculation, Miller acknowledged many of the same uncertainties identified by Campbell, as well as several others. For example, Miller noted in his report, which was attached as an exhibit to the disclosure statement, that the pension plan was unfunded and would be directly affected by the ongoing financial health of the company, the defendant was not eligible for any benefit payment on the date of dissolution, the defendant would forfeit the benefit if he terminated his employment with the company before the early

retirement age of fifty, and the present value of the benefit could vary significantly depending on the age at which the defendant retired. Miller nonetheless indicated that, in calculating the present value of the benefit, he did not take these uncertainties into account but " based [his calculation on] the terms and conditions of the plan . . . as set forth in the expanded retirement benefit projection reports available to [the company] . . . and the defendant's dates of service, years of service as a partner and his earnings." Miller also assumed that the defendant would retire at the age of fifty-five, thus allowing him to conclude that the present value of the benefit was $1,079,451, which was 56 percent higher than the benefit's present value of $693,663 if the defendant retired at the age of sixty, the normal retirement age for company employees and the age used in the company's own formula for calculating the value of employee benefits under its pension plan.[18]

[312 Conn. 498] On November 25, 2008, the trial court considered whether to admit the proposed testimony and concluded that any evidence regarding value was " just not relevant." The court reiterated, upon further reflection, that " the proffer of any evidence with regard to valuation, at this stage, would . . . not be material, [would not] be relevant . . . ." The following day, when the parties raised the matter again, the trial

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court repeated that it did not believe the valuation testimony was relevant or material to the issue of fraud in the second hearing. See footnote 21 of this opinion (further explaining procedural history of proceedings on admission of expert testimony).

After the hearing, the trial court issued its second memorandum of decision on the plaintiff's motion to reopen. The court concluded that the plaintiff had not clearly proven fraud because either she or her attorney had been apprised of the unvested pension benefit both before and during the dissolution proceedings. In referring to the factual predicate for its conclusion, the trial court explained as follows: " During [the second hearing], the court heard from the [defendant] regarding his knowledge of the salient aspects of his [company], including income and retirement. He testified that he and [the plaintiff], a [certified public accountant] and former [company] employee from 1984 through 1991, frequently discussed these subjects. In particular, he told the court that, although the general terms of the [unvested pension benefit] were known to the [company] partners, they were not committed to writing until 2002. In response to partner inquiries, a template allowing the employee to input data, including salary and longevity, was made available to the employees on their work computers on or about April, 2000, which allowed them to project an estimate of the future benefit. The [defendant] said that he did not access his computer at that time for that purpose.

[312 Conn. 499] " Later, during the [dissolution] proceedings, he discussed this potential benefit with his attorney, and they made an affirmative decision not to list the [unvested pension benefit] on the financial affidavit, as it was not funded, vested, or accrued at that time. Still later, he testified that the [unvested pension benefit], along with other topics, including the potential future sale of [the consulting arm of the company], came up during a settlement conference at the office of the [plaintiff's] attorney, Anthony Piazza, at which was also present the [plaintiff's] expert, Mark Harrison, who had been hired to value the [defendant's] benefits. The [defendant] has consistently maintained this position throughout the proceedings, and the court concluded that this position was accepted by the [plaintiff] and those representing her. The [defendant's] counsel, Christopher Burdett, confirmed his client's account. The [plaintiff's] attorney did not deny that the meeting took place but denied that the subject of the [unvested pension benefit] came up at that time. . . . Harrison did not deny that he was present at the meeting; however, [he] told the court that, at that time, he was aware that [the company] had [an unvested pension benefit], but he could not say for sure . . . now eight years later . . . what the source of his knowledge was, since he had also been hired as an expert by another [company employee's] spouse at the same time. . . . [T]he

[plaintiff] testified consistently that she had no knowledge of the [unvested pension benefit] up to that point. The [defendant] and his counsel continued to take the position that the [unvested pension benefit] was not an asset, and, therefore, they elected not to . . . note it [in] the [defendant's] financial affidavit. . . .

" The next disputed incident took place during final negotiations at the courthouse on May 25, 2001, the day set for trial. Present were the [plaintiff], Attorney Piazza, his associate, Laura Simmons, and . . . Harrison. The [312 Conn. 500] [defendant] was there along with Attorney Burdett, as well as a coworker, [Anthony] Artabane. The parties and witnesses all agree that the negotiations took place all day at the courthouse, culminating in an agreement and a

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hearing before [the court] late in the afternoon, at which time the court approved the agreement and dissolved the marriage. It is also undisputed that some clauses were reworked and typed at Attorney Piazza's office that same day, and that some changes were simply inserted by hand and initialed. From that point on, the stories diverge. The [defendant] testified that the subject of the [unvested pension benefit] came up during the day, in the absence of his attorney, during a discussion between himself, [the plaintiff], and her counsel, Attorneys Burdett and Simmons being at [Attorney] Piazza's office to have some changes to the agreement typed. Again, the [plaintiff] and her attorney dispute this claim. However, it is supported by . . . Artabane, who was present in court that day and was within earshot of that discussion. [Artabane] testified that he joined that discussion to corroborate the position taken by the [defendant] regarding the [unvested pension benefit]. One specific change to the agreement, which the court found significant, was the insertion of the word 'vested' in . . . paragraph 13.11 [of the separation agreement], which . . . called for penalties in the event of a party's failure to disclose a vested asset.

" On balance, the court believes that the [defendant's] version of events is more credible. The court found both parties to be intelligent and articulate, and the fact that both are [certified public accountants] and familiar with numbers and complex financial matters lends further credence to the [defendant's] argument. Furthermore, the court does not believe that the subject of the [unvested pension benefit] did not come up between [the defendant] and [the plaintiff] at any time during their marriage, in particular, within the context of the [312 Conn. 501] salient aspects of the [defendant's] partnership, including retirement benefits, or in the lengthy merger negotiations with [another company], and, in particular, regarding the preservation of existing and potential partner benefits, like the [unvested pension benefit]. Certainly, the aspirational expectations of both spouses were shared from time to time during the marriage, if only in the form of pillow talk. In point of fact, the [plaintiff] herself told the court that, during their marriage, she and [the defendant] discussed four broad, work-related subjects, to wit: (1) office politics; (2) benefits; (3) finances and compensation; and (4) partnership. The court believes that the testimony and evidence supports a finding that the [plaintiff] knew about the [unvested pension benefit] at the time of the dissolution of marriage in 2001 and that she now wishes to change the bargain she reached with the advice of counsel and her expert." (Emphasis omitted; internal quotation marks omitted.)

Thereafter, the trial court determined that the unvested pension benefit did not constitute property because of the reasons set forth in its earlier memorandum of decision. The court also explained that, in considering whether the separation agreement was fair and equitable within the meaning of § 46b-66, " a court bases its consideration of fairness upon the financial affidavits of the parties; that the better practice would be to call the court's attention to an item of potential financial significance by way of a footnote on said affidavit; that, under all the facts and circumstances, the [defendant's] failure to list [the] same on his financial affidavit was not fraudulent, and, in any event, would not likely have changed the outcome of the court's finding

of fairness." The court further concluded " [t]hat the testimony and evidence supports a finding that, while the [defendant] did not disclose the existence of the [unvested pension benefit] on his financial affidavit, at least as late as the [312 Conn. 502] final negotiations that took place at the courthouse on May 25, 2001,

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the [plaintiff] and her counsel knew about the [unvested pension benefit], that the [defendant] did disclose [the] same in the context of negotiations leading up to the execution of a written [separation] agree-ment, as evidenced in part by the written amendments to said agreement, and that fact is amply supported by the testimony of the [defendant] and his witnesses."

On the basis of these factual findings, the trial court concluded that " [t]he [plaintiff] has failed to meet her burden in that there was no clear proof of fraud; to the contrary, the court found sufficient evidence to support a finding that the existence of the [unvested pension benefit] was disclosed to the [plaintiff] and her counsel during the settlement negotiations and prior to the entry of the decree." The court further concluded that, although " [i]n a matrimonial action, financial affidavits play an important role, and there is a need for full and fair disclosure . . . [u]nder all the facts and circumstances, there was insufficient evidence presented to the court to demonstrate that, in the event of a new trial, there was a likelihood of a different result." (Citation omitted.) I agree with the trial court's conclusions because they are based on factual findings, supported by documentary and testimonial evidence from the defendant and several other witnesses, that the defendant disclosed the unvested pension benefit to the plaintiff during the settlement negotiations.

Nevertheless, instead of addressing the trial court's findings and conclusions directly to determine whether they were clearly erroneous; [19] see, e.g., *Nyenhuis* v. [312 Conn. 503] *Metropolitan District Commission*, 300 Conn. 708, 729, 22 A.3d 1181 (2011) (trial court's findings of fact subject to clearly erroneous standard of review); the majority attempts to avoid this requirement by taking a more circuitous path, claiming that the trial court abused its discretion by improperly precluding the evidence proffered by the plaintiff through her expert witness concerning the value of the defendant's unvested pension benefit. It is

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therefore necessary to consider the law on evidence.

" It is well settled that the trial court's evidentiary rulings are entitled to great deference. . . . The trial court is given broad latitude in ruling on the admissibility of evidence, and [the reviewing court] will not disturb such a ruling unless it is shown that the ruling amounted to an abuse of discretion. . . . [Thus, the court's] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did. . . .

[312 Conn. 504] " The law defining the relevance of evidence is also well settled. Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . [E]vidence need not exclude all other possibilities [to be relevant]; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree. . . . [T]he fact that evidence is susceptible of different explanations or would support various inferences does not affect its admissibility, although it obviously bears upon its weight. So long as the evidence may reasonably be construed in such a manner that it would be relevant, it is admissible. . . . Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative." (Citations omitted; internal quotation marks omitted.) *Jewett* v. *Jewett*, 265 Conn. 669, 679-80, 830 A.2d 193 (2003).

The majority claims that the trial court decided the issue of fraud " largely on the basis

of its assessment of the parties' credibility," and that the expert testimony concerning the value of the unvested pension benefit was relevant to the trial court's assessments of the defendant's credibility and to show that the outcome of a new trial probably would have been different if the testimony had been allowed.[20] I disagree.

The majority considers and decides this issue because it was raised by the plaintiff as a minor argument [312 Conn. 505] in her brief to this court. The record makes clear, however, that the plaintiff did not offer the expert testimony of Campbell or Miller for the purpose of impeaching the defendant's testimony regarding his disclosure of the benefit to the plaintiff but, rather, to provide substantive evidence of the benefit's value in support of her motion for reconsideration of the trial court's prior ruling that the benefit constituted property. The issue of the defendant's credibility was never raised in the disclosure statements, which were filed several days before the trial court's hearing on the matter, nor was it raised during the hearing itself. After the trial court expressly concluded on two successive days that expert testimony on the value of the pension benefit was " not relevant" or material to the issue of fraud because the benefit did not constitute property, neither party made any further argument as to why the testimony should

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be heard. If the plaintiff had intended to offer the testimony for the purpose of impeaching the defendant's credibility, she could have made that argument to the court. Because she failed to do so, the court was unable to consider it.[21] It is well

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[Entire Page Contains Footnote]

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established that [312 Conn. 506] this court will not consider a claim not raised at trial. [312 Conn. 507] See, e.g., *River Bend Associates, Inc* . v. *Conservation &* [312 Conn. 508] *Inland Wetlands Commission*, 269 Conn. 57, 82, 848 [312 Conn. 509] A.2d 395 (2004). " [T]he standard for the preservation of a claim alleging an improper evidentiary ruling . . . is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . .

" These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Internal quotation marks omitted.) *State* v. *Johnson*, 289 Conn. 437, 460-61, 958 A.2d 713 (2008); see also *Council* v. *Commissioner of Correction*, 286 Conn. 477, 498, 944 A.2d 340 (2008) (" [A] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party." [Internal quotation marks omitted.]). " Thus, because the sina qua non of preservation is fair notice to the trial court; see, e.g., *State* v. *Ross*, 269 Conn. 213, 335-36, 849 A.2d 648 (2004) (the essence of the preservation requirement is that *fair notice* be given to the trial court of the party's view of the governing law . . .); the determination of whether a claim has [312 Conn. 510] been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Emphasis in original; internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753-54, 66 A.3d 869 (2013). Accordingly, the plaintiff improperly raised this

unpreserved claim on

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appeal, and the majority has improperly decided it.[22]

[312 Conn. 511] Nevertheless, even if the expert testimony was relevant to the issue of the defendant's credibility, the trial court's decision to exclude it was not harmful error. " The harmless error standard in a civil case is whether the improper ruling would likely affect the result. . . . In the absence of a showing that the [excluded] evidence would have affected the final result, its exclusion is harmless." (Internal quotation marks omitted.) *Desrosiers* v. *Henne*, 283 Conn. 361, 366, 926 A.2d 1024 (2007).

There is no support for the majority's conclusion that the expert testimony might have affected the outcome of the hearing because the trial court did not decide whether the defendant committed fraud " largely on the basis of its assessment of the parties' credibility," and, more particularly, the defendant's credibility.

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The defendant's testimony that he had disclosed information to the plaintiff regarding the unvested pension benefit was only one of many factors, including the *plaintiff's* testimony, that the trial court considered in concluding that the plaintiff or her attorney had knowledge of the benefit. Among these other factors were (1) testimony by the defendant's attorney that the benefit was mentioned during a predissolution settlement conference at the office of the plaintiff's attorney, (2) [312 Conn. 512] testimony by one of the defendant's coworkers that he overheard a conversation between the defendant, the plaintiff, and the plaintiff's attorney during the final settlement negotiations at the courthouse on the date of dissolution, at which time the unvested pension benefit was mentioned and that he joined in the discussion to confirm the defendant's position with respect to the benefit, (3) insertion of the word " vested" by way of a handwritten amendment to paragraph 13.11 of the parties' separation agreement, which pertained to the penalties that would be imposed in the event that a party failed to disclose a property interest, thus indicating an explicit understanding by both the parties and their attorneys that unvested pension benefits were not covered by the provision, (4) the formidable penalties set forth in paragraph 13.11 of the separation agreement for a party's failure to disclose a vested benefit, (5) the plaintiff's testimony that she was a certified public accountant and therefore familiar with numbers and complex financial matters, and (6) the plaintiff's testimony that, during their marriage, she discussed, inter alia, benefits, finances, compensation and partnership matters with the defendant. Moreover, given that the defendant would have lost the entire value of the benefit if he intentionally failed to disclose it to the plaintiff, he had no incentive to hide it and every reason to disclose it, a fact that was not likely to have eluded the trial court. Accordingly, because a finding of fraud requires " clear proof" of fraud, the defendant's testimony was not dispositive but only one of many factors that the court considered in reaching its conclusion that the plaintiff had failed to meet her burden of proving that the defendant committed fraud.

For the foregoing reasons, I respectfully dissent from parts I and II of the majority opinion.

Notes:

[*]The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1]The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2]General Statutes (Rev. to 2001) § **46b-81** provides in relevant part: " (a) At the time of entering a decree . . . dissolving a marriage . . . the Superior Court may assign to either the husband or wife all or any part of the estate of the other. . . .

" (c) In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party . . . shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station,

occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

[3]Subsequently, the plaintiff amended her September 15, 2005 motion to allege that the defendant had failed to disclose the existence of a second retirement plan. The defendant ultimately conceded that he inadvertently had failed to disclose this second plan, which had comparatively little value, and its disposition is not a subject of this appeal.

On October 11, 2005, the plaintiff filed another motion to open and modify the dissolution judgment as it pertained to child support. On February 19, 2008, she filed a motion for contempt relating to the defendant's alleged violation of a term of the property distribution portion of the parties' separation agreement. The trial court's disposition of these two motions also is not at issue in this appeal.

[4]Hereinafter, references to the trial court are to *Shay, J.*, unless otherwise noted.

[5]It is not clear why the trial court employed this approach to trying a fraud claim. As explained more fully hereinafter, at the conclusion of the first phase, the court concluded that the pension was not distributable property, but that the defendant should have disclosed it anyway. The court then held the second phase of the trial which, it previously had informed the parties, would be unnecessary in the event the pension was not found to be property.

[6]Price Waterhouse and Coopers & Lybrand, LLP, merged in 1998 to form PricewaterhouseCoopers LLP. The defendant worked for Price Waterhouse for all but one year between 1980 and the time of the merger, and he was named a partner of that firm on July 1, 1991. Postmerger, he remained a partner in the newly formed entity, PricewaterhouseCoopers LLP.

[7]General Statutes § 46b-66 (a) provides in relevant part: " In any case . . . where the parties have submitted to the court an agreement concerning the custody, care, education, visitation, maintenance or support of any of their children or concerning alimony or the disposition of property, the court shall inquire into the financial resources and actual needs of the spouses and their respective fitness to have physical custody of or rights of visitation with any minor child, in order to determine whether the agreement of the spouses is fair and equitable under all the circumstances. If the court finds the agreement fair and equitable, it shall become part of the court file, and if the agreement is in writing, it shall be incorporated by reference into the order or decree of the court. If the court finds the agreement is not fair and equitable, it shall make such orders as to finances and custody as the circumstances require. . . ."

While changes have been made to § 46b-66 since the time of the proceedings here; see, e.g., Public Acts 2001, No. 01-135, § 1; Public Acts 2005, No. 05-258, § 1; subsection (a) has remained unchanged. For purposes of convenience, we refer to the current revision of the statute.

[8]General Statutes (Rev. to 2001) § 46b-82 provides in relevant part: " At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section **46b-81**. . . . In determining whether alimony shall be awarded, and the duration and amount of the award, the court . . . shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section **46b-81**, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability of such parent's securing employment."

[9]Apparently, Artabane intended to testify in the dissolution proceedings as a character witness for the defendant, in the event such testimony was necessary.

[10]The plaintiff filed a motion to reargue, which the court denied without substantive discussion.

[11]We recently altered the standard for a party to obtain a new trial on the basis of fraud to require that party to show only a " reasonable probability" that the result of a new trial will be different, rather than a " substantial likelihood," as our previous case law had held. See *Duart* v. *Dep't of Corr.*, 303 Conn. 479, 491, 34 A.3d 343 (2012). A reasonable probability means " a probability sufficient to undermine confidence in the outcome," or that the nondisclosed information " could reasonably be taken to put the whole case in such a different light as to undermine confidence in the [judgment]." (Internal quotation marks omitted.) *Id.,* 492.

[12]This court's decision in *Bender* v. *Bender*, supra, 258 Conn. 733, was released on December 18, 2001, approximately seven months after the judgment of dissolution was rendered in the present case.

[13]In a subsequent memorandum of decision, the trial court explained why " it was appropriate to divide the hearing into two distinct phases." According to the court, " a determination as to whether or not the [pension] was marital property *at the time of the decree dissolving the marriage* was a distinct, potentially definitive issue . . . . Accordingly, phase I would deal solely with the issue of whether or not the [pension] in question was marital property at the time of the decree. In the event that the court were to conclude that,

based upon the evidence, the [pension] was not marital property, the inquiry as to that issue would for all intents and purposes end. On the other hand, if there was an affirmative finding, the inquiry would move to phase II. In that event, the court would be called upon to decide whether or not the [defendant] failed to disclose the property in question . . . whether or not the nondisclosure was fraudulent, and if so, would that fact likely have altered the underlying judgment." (Emphasis in original.)

[14]The Appellate Court's decision in *Bender* v. *Bender*, supra, 60 Conn.App. 252, was released on October 3, 2000, approximately eight months prior to the dissolution judgment in the present case.

[15]A " sea change" is defined as " a striking change" or " any major transformation or alteration." Random House Unabridged Dictionary (2d Ed. 1993).

[16]The trial court described Justice Zarella's dissenting opinion in *Bender* as " well reasoned," and stated that it " agree[d]" with the analysis therein. When subsequently discussing its opinion with the parties, the trial court explained that, although it had " great respect" for this court, it " also [had] great respect for some individual members of the court . . . ." The trial court indicated that it accepted Justice Zarella's view of pre- *Bender* jurisprudence; see *Bender* v. *Bender*, supra, 258 Conn. 767-69; and it concluded, therefore, that " what this case turned on was the calendar."

[17]Both parties' counsel from the dissolution action appear to have understood this requirement. Attorney Piazza testified that, in 2000, when he had clients with unvested assets, he always listed those assets on the clients' financial affidavits. Attorney Burdett testified that he counseled clients to include on their affidavits assets with doubtful status and that he had so advised the defendant, but also that the defendant was a proactive client with clear opinions who made the ultimate decision not to list the pension.

[18]We take this opportunity to emphasize that full and frank disclosure of a pension should include not only the facts of its existence and vesting status (i.e., the total time of employment needed to vest and the time the employee spouse already has completed), but also any readily available information pertaining to the calculation of benefits and/or the present value of those benefits. Cf. *Weinstein* v. *Weinstein*, supra, 275 Conn. 690 n.12 (to comply with requirement of full and frank disclosure, defendant should have disclosed both fact of ownership of asset and accurate assessment of asset's worth). Moreover, disclosure of all relevant information that is available should be clear and overt, and not merely discoverable or inferable through careful analysis of a mass of documentation. *Id.,* 690 n.12, 693 n.14. In this regard, we reject the defendant's contention that vague, general references in the PricewaterhouseCoopers LLP partnership agreement to retired partners' receipt of " payments" or " participat[ion] in [n]et [p]rofits," or the single word " pension," in a schedule appended to some of the many drafts of the parties' separation agreement, constitute full and frank disclosure of the pension and all of its relevant attributes. Notably, the trial court's memorandum of decision does not cite these documents as evidence of disclosure.

[19]See footnote 6 of this opinion.

[20]The dissenting justice questions whether *Thompson* supports the proposition that unvested pension benefits must be disclosed because his examination of the record and briefs in that case reveals that it actually involved the unaccrued portion of a vested pension, rather than an unvested pension. He contends that subsequent decisions of this court describing *Thompson* differently have misinterpreted its holding. Regardless of whether this is the case, *Thompson* still stands for the proposition that benefits that are not distributable property, for whatever reason, may be taken into account by a court fashioning financial orders in a dissolution proceeding. Such benefits, therefore, need to be disclosed. Accordingly, *Thompson* is not, as the dissent states' " inapposite."

[21] Although the general rule is that judicial decisions may apply retroactively to govern disputes whose operative facts predate those decisions; see *Ostrowski* v. *Avery*, 243 Conn. 355, 377 n.18, 703 A.2d 117 (1997); retroactive application nevertheless is limited to cases that are pending and, therefore, have not resulted in final judgments. *Marone* v. *Waterbury*, 244 Conn. 1, 11 n.10, 707 A.2d 725 (1998). In May, 2001, the parties' dissolution action had gone to final judgment.

We agree, therefore, with the trial court that *Bender* did not apply retroactively to the parties' dissolution action. We disagree, however, with the trial court's reasoning. In concluding that *Bender* did not apply retroactively, the trial court improperly applied the law applicable to statutory amendments rather than judicial decisions.

[22] We disagree with the defendant's suggestion that, prior to 2001, the Appellate Court had held that employment benefits were not property due to their unvested status. In *Wendt* v. *Wendt*, 59 Conn.App. 656, 674-76, 757 A.2d 1225, cert. denied, 255 Conn. 918, 763 A.2d 1044 (2000), the Appellate Court upheld the trial court's ruling that certain pension benefits were not distributable marital property because they represented, in their entirety, compensation for postdissolution employment services, and not because they were unvested per se. See also *Hopfer* v. *Hopfer*, 59 Conn.App. 452, 458, 757 A.2d 673 (2000) (same reasoning, as to unvested stock options).

[23] *See Lopiano* v. *Lopiano*, 247 Conn. 356, 365, 752 A.2d 1000 (1998) (The court defined " property as the term commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments . . . ." [Internal quotation marks omitted.]), quoting Black's Law Dictionary (6th Ed. 1990) p. 1216; see also *Simmons* v. *Simmons*, 244 Conn. 158, 165, 708 A.2d 949 (1998) (same); *Krafick* v. *Krafick*, supra, 234 Conn. 794 (same).

[24] But see *Simmons* v. *Simmons*, 244 Conn. 158, 164, 708 A.2d 949 (1998) (medical degree not property subject to equitable distribution).

To dispute our assertion that, around the time of the parties' divorce, our case law was trending toward a broader conception of what constituted distributable property, the dissent cites *Krause* v. *Krause*, 174 Conn. 361, 387 A.2d 548 (1978), and *Rubin* v. *Rubin*, 204 Conn. 224, 527 A.2d 1184 (1987). At the time of the judgment in the parties' dissolution action, the decisions in *Krause* and *Rubin* were twenty-three and fourteen years old, respectively, and, as such, do not speak as strongly to the direction of our case law in 2001 as the cases we cite herein, which were decided in 1998.

[25] The decision in *Rosato* v. *Rosato*, supra, 255 Conn. 412, was released on March 6, 2001.

[26] When dividing resources in a dissolution action, " [t]here are three stages of analysis regarding the equitable distribution of each resource: first, whether the resource is property within § **46b-81** to be equitably distributed (classification); second, what is the appropriate method for determining the value of the property (valuation); and third, what is the most equitable distribution of the property between the parties (distribution)." *Krafick* v. *Krafick*, supra, 234 Conn. 792-93.

[27] In its opinion, the Appellate Court expressly stated that classification of the pension was not at issue because " [n]either party challenges the authority of the court to award nonvested pension rights." *Bender* v. *Bender*, supra, 60 Conn.App. 254.

[28] Arguably, the Appellate Court's acceptance of the premise that the unvested pension at issue was property pursuant to § **46b-81**, a determination that was an essential prerequisite to the valuation and distribution of the pension; see footnote 26 of this opinion; was a controlling precedent to be followed by the dissolution court.

Bender was not a case in which an appellate tribunal assumed, without deciding, that a subsidiary legal prerequisite was established because the claim whose success depended on that prerequisite would fail in any event. See, e.g., *Schumann* v. *Dianon Systems, Inc*., 304 Conn. 585, 621, 43 A.3d 111 (2012) (assuming, without deciding, that balancing test for determining whether public employee speech was constitutionally protected was applicable before concluding that plaintiff could not prevail under that test). In such instances, the assumed point is not essential to the court's ultimate holding and, therefore, it creates no binding precedent. We recognize, however, that the precedential effect of a case is substantially diminished when the legal point involved was decided with little or no argument. See 20 Am. Jur. 2d 519, Courts § 137 (2005).

[29]The trial court's decision to paint this court's decision in *Bender* v. *Bender*, supra, 258 Conn. 733, as marking a bright line on the calendar, prior to which an unvested pension definitively was not property and after which it was, stemmed from the trial court's characterization of *Bender* as a surprising reinterpretation of § **46b-81** that upended earlier jurisprudence. As we have explained herein, we disagree with that characterization. Additionally, in *Bender* itself, we stated that our decision to treat unvested pension benefits as property rested on a theme running throughout our prior case law; *id.,* 748, 751; and made clear that we had not " overruled our prior cases defining property for purposes of our equitable distribution statute . . . [but rather, had] built upon their foundation." *Id.,* 753. Although *Bender* did break new ground and adopt a more nuanced approach toward classification of assets as marital property; see *Mickey* v. *Mickey*, supra, 292 Conn. 625-28; such incremental steps in jurisprudential development are a hallmark of the common law and, for the reasons we have explained, we do not consider this court's holding in *Bender* to have been a particularly surprising one.

Instead of accepting this court's view of its own § **46b-81** jurisprudence, as stated in *Bender*, the trial court enthusiastically embraced an alternative description of that jurisprudence that was set forth in the dissenting opinion in that case. See *Bender* v. *Bender*, supra, 258 Conn. 764-79 (*Zarella, J*., dissenting). The trial court also devoted several pages of its memorandum of decision to critiquing the majority opinion in *Bender*, posing rhetorical questions about the implications of the holding and making clear that it much preferred, and even " agree[d]" with, the reasoning of the dissenting opinion. In the trial court's view, when faced with a majority and dissenting opinion on a matter, " the best course for the court is to attempt to reconcile both positions, if possible, and then to apply that reasoning to the particular facts at . . . hand."

Our disapproval of this aspect of the trial court's decision cannot be overstated. It is axiomatic that a dissenting opinion, by its very nature, represents a minority of the court's *disagreement* with the law as established by the majority opinion and, therefore, is not an authoritative ruling to be applied by a lower court. *See Arar* v. *Ashcroft*, 585 F.3d 559, 581 n.14 (2d Cir. 2009) (" [d]issents by their nature express views that are not the law"), cert. denied, 560 U.S. 978, 130 S.Ct. 3409, 177 L.Ed.2d 349 (2010); *Kennedy* v. *Walker*, 135 Conn. 262, 274, 63 A.2d 589 (1948) (dissenting and concurring opinions " [do] not represent authoritative law"), aff'd, 337 U.S. 901, 69 S.Ct. 1046, 93 L.Ed. 1715 (1949), superseded by statute on other grounds as stated in *State* v. *Sanabria*, 192 Conn. 671, 474 A.2d 760 (1984); *State* v. *Hernaiz*, 140 Conn.App. 848, 855, 60 A.3d 331 (refusing defendant's request to rely on dissenting opinions contrary to established law), cert. denied, 308 Conn. 928, 64 A.3d 121 (2013). Additionally, once this court has finally determined an issue, for a lower court to reanalyze and revisit that issue is an " improper and fruitless" endeavor. *State* v. *Shipman*, 142 Conn.App. 161, 166, 64 A.3d 338, cert. denied, 309 Conn. 918, 70 A.3d 41 (2013); see also *Cannizzaro* v. *Marinyak*, 139 Conn.App. 722, 734, 57 A.3d 830 (2012) (explaining that it is not lower court's province to reevaluate Supreme Court precedent), cert. granted on other grounds, 308 Conn. 902, 60 A.3d 286 (2013). The trial

court's reliance on a dissenting opinion as a source of law was improper. Unfortunately, the trial court's gratuitous editorializing regarding the majority opinion in *Bender* v. *Bender*, supra, 258 Conn. 733, strongly suggests a fundamental misconception of its role in a hierarchical system of justice.

[30]The dissent contends that the trial court's preliminary focus on determining whether the defendant's pension, *in May, 2001*, was definitively established to be distributable property pursuant to § **46b-81**, was demanded by the plaintiff's theory of her case, as evidenced by her motion to open which, in part, sought relief pursuant to the parties' settlement agreement. We do not agree. Although, for the reasons we explain in this opinion, the legal status of unvested pensions in and around 2001 was generally relevant, focusing the inquiry on the precise date of the parties' settlement agreement and the dissolution of their marriage was inappropriate and, further, was not mandated by the plaintiff's motion to open. In fact, the plaintiff argued in her motion that: (1) had she known about the pension, she never would have entered the settlement agreement; and (2) unvested pensions were " 'property or assets'" subject to disclosure and distribution pursuant to § **46b-81** " at the time of the events outlined" in the motion, which events spanned from 2000 through 2004. Finally, it is not clear that the parties, when addressing nondisclosure of " a property interest, the effect thereof or an important characteristic thereof" in the penalty clause of their settlement agreement, intended that phrase to be defined strictly as any property definitively established by Connecticut appellate jurisprudence to be distributable pursuant to § **46b-81**.

[31]According to the trial court, the first phase of the hearing was focused on the classification stage of " the [three stage] *Krafick* model." Valuation and distribution are the other two stages of that model. See footnote 26 of this opinion.

[32]While testifying, Miller referenced the personalized projection report that PricewaterhouseCoopers LLP, had made available to the defendant in April, 2000, and that report was admitted into evidence. Miller explained that the report, employing certain assumptions as to the vesting date, discount rate, earnings growth and life expectancy, stated that the defendant's future pension benefits, at the end of 1999, had a present value of $3,839,117. The projection report did not take into account the contingencies to which the defendant's ultimate receipt of the pension was subject, however, nor did it specify which portion of the present value was attributable to services that were yet to be rendered, postdissolution.

[33]Miller completed his report subsequent to the first phase of the motion proceedings.

[34]The plaintiff's expert witness disclosure indicated that Miller would testify about, inter alia, the present value of the defendant's pension as of the date of the dissolution judgment. Specifically, Miller would have testified consistently with his report that, as of that date, the defendant had earned an annual benefit of $105,988, and that the present value of that income stream was in excess of $1 million. Miller's report details his methodology, the information on which he relied and the assumptions he employed.

[35]The dissent contends that the following analysis is inappropriate because the plaintiff, at trial, did not proffer her evidence of the pension's value along with a detailed explanation of its relevance to the issues before the court, specifically arguing that the evidence would discredit the defendant's testimony regarding those issues. According to the dissent, therefore, we improperly hold that the evidence was admissible on an unpreserved basis. The trial court, however, did not even wait for the plaintiff to offer the evidence, or for the defendant to object to it, before ruling, sua sponte, that no evidence of value would be admitted, although *both* parties had prepared such evidence and intended to present it. In the highly unusual circumstances of this case, wherein the trial court imposed its own theoretical framework on the litigation, unexpectedly altered that framework midstream and, then, proactively ruled on

evidentiary objections that had not been made, we decline to penalize the plaintiff for not making a textbook objection to the trial court's sua sponte ruling. Because, as we explain hereinafter, valuation evidence clearly was relevant to both the elements of fraud and the factors governing a motion to open on the basis of fraud, the trial court's ruling likely invoked confusion.

[36]Pursuant to their separation agreement, the parties had endeavored to divide their assets equally. At the time of the dissolution, they stipulated that their former marital home was worth $550,000, and their final financial affidavits reflect other divisible assets of approximately $1.5 million. Accordingly, an additional asset valued in excess of $1 million was extremely significant.

[37]In the dissent's view, Miller's report and testimony properly were excluded because, due to the report's analytical deficiencies, it was entirely irrelevant and hence inadmissible. The dissent contends that the trial court, even had it considered the evidence, necessarily would not have found it credible. According to the dissent, even though Miller explicitly listed a number of uncertainties regarding the pension, he did not actually take them into account.

The trial court did not reject the cited evidence on the rationale set forth by the dissent, and even the defendant does not suggest such a sweeping argument. In any event, we disagree with the dissent's assessment of the report, which was prepared by a highly qualified expert, with degrees in mathematics and actuarial science, who specialized in evaluating employee pensions and their present values. The dissent speculates that, although Miller articulated several contingencies to which the defendant's receipt of his pension was subject, he did not actually take them into account. A more plausible reading, however, is that he did take them into account, but did not believe they warranted the excessively high discount rate chosen by Mark S. Campbell, the defendant's expert. For example, the report quotes PricewaterhouseCoopers LLP documents and reports evidencing the firm's commitment to the pension and the firm's financial health, and it discusses the defendant's lengthy employment history with the firm, including almost one decade as a partner, in support of the conclusion that he was unlikely to be terminated prematurely. Additionally, because the trial court did not permit Miller to testify, he never had the opportunity to explain the reasoning behind his report, nor to explain why he disagreed with the opposing report, which the dissent simply accepts unquestioningly. Miller identifies several problems with Campbell's estimate of the pension's present value, not least among them that it was in " direct contrast" to the projection report prepared by PricewaterhouseCoopers LLP, and made available to the defendant, in April, 2000. In crediting Campbell's report over Miller's, the dissent essentially is finding facts, a task which clearly is not the function of an appellate tribunal. *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 106, 84 A.3d 828 (2014).

[38]The dissent criticizes us for failing to analyze directly whether the trial court's factual finding that the pension was disclosed is clearly erroneous. Our response to that criticism is that the plaintiff has not made that argument, but rather, has claimed evidentiary error.

[1]The asset was known as the " PricewaterhouseCoopers Partners Retirement Plan."

[2]The plaintiff filed her original motion to open on May 11, 2005. She subsequently filed her request for permission to amend the motion and the proposed amended motion on September 15, 2005. On November 14, 2008, she filed a third and final amended motion in which she added allegations relating to a small, but also allegedly undisclosed, retirement plan that had not been referenced in her previous motions.

[3]The term " resource" is used throughout this opinion to describe all financial interests potentially subject to equitable distribution because that is the term this court used in *Krafick* v. *Krafick*, 234 Conn. 783, 792, 663 A.2d 365 (1995), in discussing whether a vested benefit should be deemed property subject to distribution under § **46b-81**. A resource may or may not be

an asset or property, but only an asset or property is subject to equitable distribution under § **46b-81**.

[4]In her final amended motion to open, the plaintiff modified the language she used in her prior amended motion from claiming a right to " 100 percent of the asset" to claiming a right to " one half or 100 percent of the concealed asset" because another provision in paragraph 13.11 of the parties' separation agreement provided for an equal division of the concealed asset if the nondisclosure was not fraudulent.

[5]The trial court acknowledged nine months later during a subsequent hearing on the plaintiff's amended motion to open that it was aware of, and had followed, the " *Krafick* model" in its analysis of the property issue. The court specifically noted that, because this court had not yet decided *Bender* v. *Bender*, 258 Conn. 733, 785 A.2d 197 (2001), at the time of dissolution, it had followed " the *Krafick* model . . . the three part model" in ruling on the motion, which required an initial determination of whether the unvested pension constituted distributable marital property.

[6]The issue of the trial court's ability to perform its statutory duty was not raised by the plaintiff but, rather, was raised by the court sua sponte.

[7]General Statutes (Rev. to 2001) § 46b-66 provides in relevant part: " In any case under this chapter where the parties have submitted to the court an agreement . . . concerning alimony or the disposition of property, the court shall inquire into the financial resources and actual needs of the spouses . . . in order to determine whether the agreement of the spouses is fair and equitable under all the circumstances. . . ."

Hereinafter, all references to § 46b-66 are to the 2001 revision.

[8]General Statutes (Rev. to 2001) § **46b-81** provides in relevant part: " (a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint . . . the Superior Court may assign to either the husband or wife all or any part of the estate of the other. . . .

* * *

" (c) In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party . . . shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

Hereinafter, all references to § **46b-81** are to the 2001 revision.

[9]General Statutes (Rev. to 2001) § 46b-82 provides in relevant part: " At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other . . . . In determining whether alimony shall be awarded, and the duration and amount of the award, the court . . . shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section **46b-81** . . . ."

Hereinafter, all references to § 46b-82 are to the 2001 revision.

[10]The underlying issue in *Billington* was " whether a party to a marital dissolution judgment must establish, in order [to] subsequently . . . open the judgment based upon a claim of fraud, that she was diligent during the original action in attempting to discover the fraud." *Billington* v. *Billington*, supra, 220 Conn. 214. The alleged

fraud in *Billington* was the defendant's failure to disclose information that would have resulted in a significantly higher valuation of a piece of real property that he had listed on his financial affidavit. *Id.,* 214-15. The quoted passage was thus intended to emphasize the parties' obligation to provide *accurate* information in their financial affidavits as a context for its subsequent discussion of the diligence issue. *See id.,* 219-20. At the time *Billington* was decided, this court had not yet determined whether unvested property interests were too speculative to be considered assets subject to distribution.

[11]The majority's conclusion that " *Thompson* still stands for the proposition that benefits that are not distributable property, for whatever reason, may be taken into account by a court fashioning financial orders in a dissolution proceeding" ; footnote 20 of the majority opinion; is incorrect, and, therefore, *Thompson* provides no support for the majority's assertion that there were unmistakable signs before the dissolution judgment in the present case that this court would determine in *Bender* that unvested pension benefits constituted property.

[12]In the first *Krafick* footnote, the court evaluated the effect of *Thompson* on the issue of whether vested pension benefits constituted distributable marital property and incorrectly observed that *Thompson* had " addressed nonvested pension benefits and concluded only that such interests were not too speculative to be taken into account in some fashion by the trial court in crafting its financial orders in a dissolution action." *Krafick* v. *Krafick*, supra, 234 Conn. 794-95 n.20. In a second footnote, the court further noted that its conclusion that vested pension benefits constituted property was consistent with the conclusions of courts in other jurisdictions that nonvested pensions constitute property. *Id.,* 798-99 n.23. Only two months before dissolution of the parties' marriage, however, this court expressly recognized that the court in *Krafick* had " left open the question of whether nonvested pensions are distributable [marital assets]" ; (emphasis omitted) *Rosato* v. *Rosato*, supra, 255 Conn. 422 n.16; which was consistent with an even more explicit recognition by this court only one year earlier that " the marital estate divisible pursuant to § **46b-81** refers to interests already acquired, not to expected or unvested interests . . . ." *Smith* v. *Smith*, supra, 249 Conn. 274. Thus, insofar as the majority suggests that the case law existing around the time of the parties' divorce was " trending toward a broader conception of what constituted distributable [marital] property" ; footnote 24 of the majority opinion; see *Lopiano* v. *Lopiano*, supra, 247 Conn. 371; *Bornemann* v. *Bornemann*, supra, 245 Conn. 518; *Krafick* v. *Krafick*, supra, 798; this court's dicta in *Rosato* and *Smith*, which were published only months before the dissolution judgment in the present case, indicated the court's intent to place limits on the concept of distributable marital property and its recognition that the question of whether unvested pension benefits constituted property had not been decided.

[13]After discussing several recent decisions of this court, the court in *Bender* stated: " These cases reflect a common theme, namely, that in determining whether a certain interest is property subject to equitable distribution under § **46b-81**, we look to whether a party's expectation of a benefit attached to that interest was too speculative to constitute divisible marital property." *Bender* v. *Bender*, supra, 258 Conn. 748.

[14]I agree with the majority that the trial court in the present case improperly relied in part on my dissent in *Bender* ; see *Bender* v. *Bender*, supra, 258 Conn. 764 (*Zarella*, *J*., dissenting); as a basis for its decision. The majority correctly observes that my dissent was " not an authoritative ruling to be applied by a lower court." Footnote 29 of the majority opinion. Consequently, to the extent that the trial court relied on my dissent in *Bender*, I reject that portion of its analysis.

[15]I readily agree that disclosure of an unvested pension benefit on a financial affidavit is required after *Bender* because we determined in that case that unvested pension benefits constitute property subject to equitable distribution.

[16]Thus, the payment of pension benefits was subject to the general revenues of the defendant's company.

[17]As of the date of dissolution, the defendant was not eligible for the pension benefit because he was only forty-five years old, and an early retirement benefit was not available until a partner was at least fifty years old. If the defendant had terminated his employment prior to the early retirement age of fifty, he would have forfeited the benefit.

[18]To the extent the majority refers to a present value of $3,839,117 in its statement of facts and elsewhere in its opinion; see, e.g., footnote 32 of the majority opinion; it is not relevant to the current analysis, and neither the plaintiff nor the defendant suggests that this was the present value of the pension. The $3.8 million valuation was contained in the company's standard projection report, was derived from certain default assumptions that were not necessarily appropriate in the defendant's case, and, as the majority acknowledges, " [t]he projection report did not take into account the contingencies to which the defendant's ultimate receipt of the pension was subject . . . nor did it specify which portion of the present value was attributable to services that were yet to be rendered, postdissolution." *Id.*

[19]The majority states that it does not consider whether the trial court's factual finding that the pension was disclosed was clearly erroneous because " the plaintiff has not made that argument . . . ." Footnote 38 of the majority opinion. The majority, however, fails to understand the rules of practice that legitimize such claims. Practice Book § 67-4 (d) provides that each argument in the appellant's brief " shall include a separate, brief statement of the standard of review the appellant believes should be applied." Practice Book § 67-5 (d) similarly provides that each argument in the appellee's brief " shall include a separate, brief statement of the standard of review the appellee believes should be applied." Thus, by requiring the parties to articulate the applicable standard of review, our rules of practice open the door for disagreement and mandate a decision by the reviewing court explaining its reasons for selecting the standard of review that it ultimately applies to resolve the issue. Moreover, this has been the practice of Connecticut's reviewing courts for a very long time. See, e.g., *State* v. *Coccomo*, 302 Conn. 664, 671, 31 A.3d 1012 and n.2, 302 Conn. 664, 31 A.3d 1012 (2011) (rejecting defendant's argument that standard of review should be de novo); *Perez* v. *Minore*, 147 Conn.App. 704, 709, 84 A.3d 460 (2014) (acknowledging plaintiffs' argument that standard of review should be plenary but agreeing with defendant that proper standard of review was abuse of discretion); *Brye* v. *State*, 147 Conn.App. 173, 177, 81 A.3d 1198 (2013) (acknowledging state's argument that standard of review should be abuse of discretion but agreeing with plaintiff that proper standard of review was plenary). Accordingly, given that the defendant in the present case devoted four pages of his appellate brief to disputing the plaintiff's assertion that all of her claims of error were subject to plenary review and contending that this court should review the trial court's factual findings to determine whether they were clearly erroneous, the majority must address the defendant's argument and explain why it is unpersuasive.

[20]The majority specifically claims that, " [i]f . . . the trial court [had] determined, on the basis of a complete evidentiary record, that the pension had considerable worth . . . that determination could have severely undermined the court's finding that the plaintiff had full knowledge of the pension, yet simply chose not to pursue any interest in it or some alternative compensation for relinquishing any such interest. Similarly, a finding of substantial value may well have changed the trial court's assessment of the defendant's account of full and frank disclosure to the plaintiff, namely, disclosure not only of the pension's existence, but of *all* its salient features, including its value." (Citation omitted; emphasis in original.) Text accompanying footnote 36 of the majority opinion.

[21]The majority defends its conclusion that the expert testimony should have been admitted on the ground that it was relevant to the trial court's

determination of the defendant's credibility, even though neither party raised that claim, because " [t]he trial court . . . did not even wait for the plaintiff to offer the evidence, or for the defendant to object to it, before ruling, sua sponte, that no evidence of value would be admitted, although *both* parties had prepared such evidence and intended to present it. In the highly unusual circumstances of this case, [in which] the trial court imposed its own theoretical framework on the litigation, unexpectedly altered that framework midstream and, then, proactively ruled on evidentiary objections that had not been made, we decline to penalize the plaintiff for not making a textbook objection to the trial court's sua sponte ruling. Because . . . valuation evidence clearly was relevant to both the elements of fraud and the factors governing a motion to open on the basis of fraud, the trial court's ruling likely invoked confusion." (Emphasis in original.) Footnote 35 of the majority opinion. In other words, the majority concludes that it may decide whether the expert testimony was relevant on a ground that the parties never raised because the trial court allegedly prevented them from fully explaining their arguments or objections prior to its sua sponte ruling to exclude the testimony. The majority thus suggests that the plaintiff would have argued that the testimony might have affected the trial court's credibility determination if she had been given the opportunity to present it. I strongly disagree with this conclusion because it is based on mere speculation and a complete misunderstanding of the record.

The trial court's sua sponte ruling was not made before the parties explained why they wanted to offer the expert testimony, the ruling did not proactively cut off potential evidentiary objections by either party, and it did not invoke confusion. Rather, the ruling came near the end of a series of filings and discussions over the course of several weeks, during which both parties had ample time to explain their views to the court regarding why they believed the expert testimony was necessary. Accordingly, the court's sua sponte ruling, and its three other rulings relating to the proffered testimony, were well understood and accepted by the parties.

The subject of expert testimony initially arose following the trial court's issuance of its memorandum of decision on June 10, 2008, in which it concluded that the defendant's unvested pension benefit did not constitute property subject to distribution. At a July 3, 2008 hearing intended to clarify the issues to be considered during the phase two hearing, on the issue of fraud, the court stated that it did not know if expert witnesses would be required but that, if the parties believed they were, the court would need to hear why.

The subject next was raised on October 15, 2008, when the defendant filed a notice disclosing his intention to call Campbell as an expert witness. The defendant provided the plaintiff with a copy of Campbell's report, which contained information regarding the professional accounting standards in effect at that time and an estimate of the present value of the defendant's unvested pension benefit as of the date of dissolution. On October 17, 2008, the plaintiff filed a motion to preclude Campbell's testimony on the ground that she was prejudiced because the disclosure was late, and, therefore, she would not have sufficient time to depose Campbell or retain her own expert to evaluate Campbell's report before the start of the phase two hearing. She also argued that the defendant appeared to be trying to relitigate the effect of the professional accounting standards on his obligation to disclose the pension benefit to the plaintiff, an issue the court already had decided during the phase one hearing, and that the defendant was attempting to offer evidence on another subject the court also previously had decided, namely, his legal obligation to disclose the benefit in his financial affidavits.

At a hearing on October 29, 2008, the trial court denied the motion. After counsel explained the plaintiff's reasons for seeking to preclude Campbell's testimony, the court determined that the testimony would be germane to the financial orders and that the defendant should be allowed to present it. The court also determined that Campbell should be allowed to testify regarding the applicability of the professional accounting standards to the defendant's personal life, thus

potentially shedding light on his state of mind and his reasons for preparing the financial affidavits as he did.

On November 21, 2008, the plaintiff filed two notices with the court disclosing her intention to call Campbell and Miller as expert witnesses in her case. On November 24, 2008, she also filed a motion for reconsideration of the trial court's phase one ruling that the defendant's unvested pension benefit constituted property. The plaintiff argued that the fact that the defendant, through Campbell, had ascribed a present value to his accrued benefit at the time of dissolution was a significant new consideration that the court should weigh along with a reexamination of its decision that the benefit constituted property. The plaintiff's counsel reiterated in a hearing on the motion for reconsideration that, if the court had known that the benefit had value, it might have decided the property issue differently. The defendant's counsel objected, arguing that it was too late to reconsider the court's phase one decision. The defendant's counsel also noted that the court had been apprised, before its phase one ruling, of the fact that the pension benefit may have had value when the plaintiff's expert, Miller, had been allowed to testify that the benefit had an undiscounted present value of $3.8 million and a discounted present value of $400,000. The defendant's counsel further challenged the plaintiff's theory that ascribing a value to the benefit meant that the benefit constituted property subject to distribution.

The hearing on the motion for reconsideration continued the following day, at which time the defendant's counsel again argued that the plaintiff's request for reconsideration of the trial court's phase one ruling was improper and that, contrary to the plaintiff's claim, the fact that the benefit had value did not mean that it constituted property. The defendant's counsel thus contended that, to reconsider and open the judgment under the second prong of *Krafick*, which required the court to consider the value of the benefit following a first prong determination that the benefit constituted property, would not comply with the *Krafick* model. The plaintiff's counsel responded that there would have been no reason for the defendant to offer evidence through Campbell of the benefit's present value if it did not constitute property.

The trial court then reflected that, from its perspective, the defendant's counsel had been arguing that Campbell's testimony went to the defendant's mental state, apparently meaning Campbell's expected testimony regarding the applicability of the professional accounting standards to the defendant's personal life. Thus, to the extent the testimony was about the benefit's present value, such testimony was irrelevant. The trial court explained that, after the decision in *Bender*, this court seemed to have no problem skipping step one and going directly to step two of the *Krafick* analysis, on valuation, thus " boot-strapping" the concept of property onto the concept of valuation by concluding that " if there's value, then it must be property." The court reminded the parties, however, that it was required to apply pre- *Bender* law, and that, to be consistent with the line of pre- *Bender* authority, the valuation of a benefit was not relevant to a determination of whether it constituted property. The plaintiff's counsel responded that he still had to proffer the testimony of Miller, his expert witness, for the purpose of establishing a proper record, and the trial court stated that it understood the need to do so. After additional pondering regarding the effect of valuation on the concept of property, the court stated: " So, from your standpoint, [defense counsel], I would sua sponte rule that the proffer of any evidence with regard to valuation, at this stage, would . . . not be material, [would not] be relevant . . . ." The court added a few minutes later that it was denying the plaintiff's motion for reconsideration because it did not believe that valuation played a role with respect to the unvested pension benefit. The plaintiff's attorney made no further comments regarding that ruling.

The next day's hearing began with a statement by the plaintiff's attorney, who acknowledged the trial court's ruling the previous day but sought to make an offer of proof as to the testimony of Campbell and Miller to " protect the record . . . ." He stated

that the two expert witnesses, who were present in the courtroom that day, were prepared to testify in accordance with the disclosure statements he previously had filed with the court. The defendant's counsel moved to preclude the testimony based on the offer of proof because the trial court's ruling on the motion for reconsideration the preceding day had made very clear that the court " would not consider evidence of value at this stage of the phase two hearing, and, in accordance with [the court's] previous ruling, [the defendant's counsel] would ask for a motion to preclude both witnesses, and . . . that satisfies [the plaintiff's counsel's] need to protect the record based on his offer." The trial court responded that its sua sponte ruling was intended to reverse its earlier ruling denying the plaintiff's motion to preclude Campbell's testimony on behalf of the defendant. The court explained: " I have since had time to reflect upon this and, in considering the evidence I have to date, and considering the case law as I understand it, I don't believe that valuation testimony is relevant or material to the issue we have in this particular phase. So, for that reason, I am precluding [Campbell, the defendant's] witness. I indicated that I took it upon my shoulders on [that] one. I indicated that was . . . sua sponte . . . ." The defendant's attorney then renewed his motion to preclude the testimony of the plaintiff's expert witness, Miller, based on the trial court's decision regarding the testimony of the defendant's own expert witness, Campbell. Although the trial court made no further ruling, the plaintiff's attorney indicated his acceptance of the court's decision to preclude the testimony, apparently by virtue of the court's ruling on the motion for reconsideration and its ruling on the defendant's expert witness, and asked that the disclosure offer function as the plaintiff's proffer for purposes of clarifying the record.

At no time during the six weeks that the parties and the trial court discussed the issue of expert testimony did either party argue, or even remotely suggest, that the testimony was proffered for the purpose of assisting the court in making credibility determinations. Furthermore, none of the trial court's rulings precluded the plaintiff's attorney from making that argument. Accordingly, the majority's conclusions with respect to this matter are unsupported by the record.

[22]Even if this claim had been properly preserved for impeachment purposes, Miller's proffered testimony regarding the present value of the defendant's unvested pension benefit on the date of dissolution was inadmissible. Miller failed to consider the risk factors that Campbell had used to justify a 15 percent discount rate in calculating the present value and that Miller *himself* had identified in his report as risks but did not include in his calculation. For example, Miller noted that the plan was unfunded, the benefit was unvested on the date of dissolution, the benefit would be affected by the defendant's company's financial health, and the defendant would forfeit the benefit if he terminated his employment with the company before the age of fifty. Despite acknowledging these uncertainties, however, Miller treated the defendant's unvested pension benefit for all intents and purposes as vested, accrued, payable from a pension account with sufficient funding, and without any cap, when in fact the benefit was wholly unfunded, only partially accrued, to be paid out of future company earnings, and limited by a cap based on those earnings. Accordingly, because Miller omitted from his calculation any consideration whatsoever of the risks and uncertainties that both he and Campbell had identified, his determination regarding the benefit's present value was grossly deficient and thus inadmissible, *especially* under *Bender* . *See Bender* v. *Bender*, *supra*, 258 Conn. 749-50 (uncertainties and contingencies to be considered in valuation of property interests). Indeed, I find it highly ironic that Campbell conducted what amounted to a *Bender* valuation of the defendant's unvested pension plan, whereas Miller conducted a valuation analysis completely inconsistent with *Bender* because his calculation did not take into account the contingencies that he had identified. I thus disagree with the majority's claim that the trial court would have accepted Miller's calculation, would not have found the separation agreement to be fair and equitable, and would not have found the defendant's testimony to be

credible if Miller had been allowed to testify that the unvested pension benefit had a present value of $1,079,451.

I add that, to the extent the majority claims that my critique of Miller's proposed testimony is unwarranted and that I am " essentially . . . finding facts" ; footnote 37 of the majority opinion; it is the majority that raises the issue of the validity and relevance of Miller's testimony by declaring that, " [i]f . . . the trial court [had] determined, on the basis of a complete evidentiary record, that the pension had considerable worth . . . that determination could have severely undermined the court's finding that the plaintiff had full knowledge of the pension, yet simply chose not to pursue any interest in it or some alternative compensation for relinquishing any such interest. Similarly, a finding of substantial value may well have changed the trial court's assessment of the defendant's account of full and frank disclosure to the plaintiff, namely, disclosure not only of the pension's existence, but of *all* its salient features, including its value." (Citation omitted; emphasis in original.) Text accompanying footnote 36 of the majority opinion. Not only does this passage clearly presume the validity of Miller's calculations, but it includes a citation to a prior footnote explaining that Miller would have testified that the present value of the defendant's unvested pension benefit as of the date of dissolution was " in excess of $1 million." Footnote 34 of the majority opinion. It is therefore the majority that makes an issue of the validity and relevance of Miller's testimony, to which I merely respond.

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Negetive Treatment:

No negative treatment in subsequent cases

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137. Cannizzaro v. Marinyak, 308 Conn. 902, 60 A.3d 286, (Conn. 2013)

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139. Trotter v. Commissioner of Correction, 308 Conn. 901, 60 A.3d 286, (Conn. 2013)

140. State v. Coccomo, 302 Conn. 664, 31 A.3d 1012, (Conn. 2011)

141. Perez v. Minore, 147 Conn.App. 704, 84 A.3d 460, (Conn.App. 2014)

142. Brye v. State, 147 Conn.App. 173, 81 A.3d 1198, (Conn.App. 2013)

810 A.2d 818 (Conn.App. 2002)
74 Conn.App. 120
Barbara RICCIUTI
v.
Michael RICCIUTI.
No. 21816.
Appellate Court of Connecticut.
December 17, 2002.

Argued Sept. 19, 2002.

[74 Conn.App. 121] James W. Shea, North Branford, for the appellant (defendant).

Lee Marlow, Greenwich, with whom was Bernard Christianson, New Haven, for the appellee (plaintiff).

LAVERY, C.J., and DRANGINIS and DUPONT, Js.

LAVERY, C.J.

The defendant, Michael Ricciuti, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Barbara Ricciuti. On appeal, the defendant claims that the court improperly (1) awarded 25 percent of his pension to the plaintiff, (2) determined that the value of the parties' real property at 289 Old Toll

Road in Madison was $175,000 and (3) ordered him to refinance the real properties he was awarded to pay the property distribution of $136,000 that was awarded to the plaintiff. We affirm the judgment of the trial court.

The court made the following factual findings that are not in dispute on appeal. The parties were married on July 16, 1977. They have four children who were born to them during their marriage.[1] The plaintiff was forty-four years old at the time of the dissolution of the marriage. She graduated from high school and has one year of college education. Since May, 1998, the plaintiff has owned a 50 percent share in Spacolli Enterprises, LLC, a home improvement business. That share is valued at $12,000. In November, 2000, the plaintiff injured her back and was scheduled to return to work after surgery. The court found that she has an earning capacity of $400 per week.

[74 Conn.App. 122] The defendant is fifty-eight years old and is in generally good health. From 1974 to 1996, he was employed with the United States Department of Defense. The defendant receives a pension from the Department of Defense in the amount of $642 per week. Since September, 2000, the defendant has been employed as a teacher at Xavier High School in Middletown, where he receives a weekly net income of $462.

The parties owned a marital home at 299 Old Toll Road in Madison, which is not encumbered by any mortgages or liens. The parties stipulated that the value of that property was $240,000. The parties also owned property at 289 Old Toll Road in Madison, which is encumbered by a mortgage with a principal balance of $100,000. The value of that property was in dispute at trial and now on appeal. Both parties presented expert appraisal testimony as to the value of 289 Old Toll Road. The court determined that the value of the property was $175,000.

The court found that the plaintiff was at fault for the breakdown of the marriage due to two extramarital affairs. One of those affairs was with her business partner at Spacolli Enterprises, Frank Sanzero, with whom the plaintiff planned to live after the dissolution of the marriage. The court awarded no alimony to the plaintiff.

The following financial awards that are the subject of the defendant's appeal were made by the court. First, the plaintiff was awarded 25 percent of the defendant's monthly pension from the Department of Defense. Second, the plaintiff was awarded $136,000 as a property distribution. The defendant was ordered to pay the plaintiff's property distribution through a refinancing of the

properties at 289 and 299 Old Toll Road, which were awarded to the defendant by the court.

I

The defendant first claims that the court improperly awarded the plaintiff 25 percent of his pension. On [74 Conn.App. 123] appeal, he argues that his pension is not property that may be assigned pursuant to General Statutes § 46b-81.[2] We disagree.

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The court has the authority to distribute the property of either spouse after dissolving a marriage. General Statutes § 46b-81 provides in relevant part that the court "(a) ... may assign to either the husband or wife all or any part of the estate of the other .... (c) In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party ... shall consider the length of the marriage, the causes for the ... dissolution of the marriage ... the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

Our Supreme Court has concluded that vested pension benefits are property that the trial court may [74 Conn.App. 124] assign.[3] *Krafick v. Krafick,* 234 Conn. 783, 798, 663 A.2d 365 (1995). In *Krafick,* the court explained that "[i]t is widely recognized that the primary aim of property distribution is to recognize that marriage is, among other things, a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute--directly and indirectly, financially and nonfinancially-- *the fruits of which* are distributable at divorce....

"Pension benefits are widely recognized as among the most valuable assets that parties have when a marriage ends.... Pension benefits are an economic resource acquired with the fruits of the wage earner spouse's labors which would otherwise have been utilized by the parties during the marriage to purchase other deferred income assets.... Both the nonemployed spouse and his or her wage earning marital partner have the same retirement goals and expectancies regarding the pension benefits as they would if they provided for their later years by using wage income to purchase other investments." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id. at 795-96, 663 A.2d 365.

Here, the defendant began receiving a pension from the Department of Defense after his retirement in 1996. The pension accrued over twenty-two years, during nineteen of which the parties were married. The court, therefore, correctly determined that the defendant's pension was subject to distribution under § 46b-81.

[74 Conn.App. 125]

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We must next determine whether the court's award to the plaintiff of 25 percent of the defendant's pension was proper. "The well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts.... As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case, such as demeanor and attitude of the parties to the hearing.... In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Sowinski v. Sowinski,* 72 Conn.App. 25, 30, 804 A.2d 872 (2002).

The court made detailed factual findings and applied those facts to the factors set forth in § 46b-81 (c) that a court must consider when distributing property after dissolving a marriage.[4] Specifically, the court stated in its memorandum of decision: "The plaintiff is entitled

to a portion of the defendant's pension benefits given the accrual of those benefits over the course of their lengthy marriage, the plaintiff's contributions, both financial and nonfinancial, to the marriage, and her lack of pension benefits of her own. The plaintiff's fault in ultimately causing the breakdown of her marriage, the significant disparity in the parties' ages and, given that disparity, the plaintiff's greater ability to acquire capital assets in the future counsel for a diminished distribution [74 Conn.App. 126] to her. After carefully considering all of the statutory criteria set forth in General Statutes § 46b-81, I award the plaintiff 25 percent of the defendant's monthly pension benefits." The court's findings are supported by the record, and its application of those facts to the statutory considerations in § 46b-81 (c) demonstrate that the court did not abuse its discretion in awarding the plaintiff 25 percent of the defendant's pension.

II

The defendant next claims that the court improperly determined the value of the property at 289 Old Toll Road. He argues that the court's conclusion that the value of the property was $175,000 was clearly erroneous and not supported by the evidence. We are not persuaded.

The following additional facts are necessary for our resolution of the defendant's claim. At trial, the plaintiff provided expert appraisal testimony from Gordon S. Williams. Williams valued the property at $175,000 utilizing a sales comparison approach. The defendant offered the expert appraisal testimony of Thomas Boyle. Boyle also used a sales comparison method and valued the property at $145,000. The court ultimately determined that the value of the property was $175,000.

"We have long held that a finding of fact is reversed only when it is clearly erroneous.... A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.)

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Hammick v. Hammick, 71 Conn.App. 680, 686, 803 A.2d 373 (2002). We note that "a trial court has broad discretion in determining the value of property. In assessing the value of ... property ... the trier arrives at his own conclusions by weighing the opinions of the appraisers, the claims [74 Conn.App. 127] of the parties, and his own general knowledge of the elements going to establish value, and then employs the most appropriate method of determining valuation.... The trial court has the right to accept so much of the testimony of the experts and the recognized appraisal methods which they employed as he finds applicable; his determination is reviewable only if he misapplies, overlooks, or gives a wrong or improper effect to any test or consideration which it was his duty to regard." (Internal quotation marks omitted.) *Porter v. Porter,* 61 Conn.App. 791, 799-800, 769 A.2d 725 (2001).

Here, the court reviewed the evidence offered at trial and determined the value of the property to be $175,000. The court's determination is supported by adequate evidence in the record, including that from the plaintiff's expert witness. Our review of the record and transcripts provides no indication that the court's conclusion was clearly erroneous.

III

The defendant's final claim on appeal is that the court improperly ordered him to refinance the properties, which he was awarded, to pay the plaintiff her property distribution award of $136,000. We disagree.

As previously stated, this court will not reverse a financial order in a domestic relations case unless there was an abuse of discretion. *Sowinski v. Sowinski,* supra, 72 Conn.App. at 30, 804 A.2d 872. "In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did.... [I]n determining [whether there has been an abuse of discretion] the unquestioned rule is that

great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness." (Citation omitted; internal quotation marks omitted.) Id.

[74 Conn.App. 128] The defendant argues that the court abused its discretion because he is fifty-eight years old, and the plaintiff was awarded 25 percent of his monthly pension, thereby reducing his income. Those facts, the defendant asserts, cause refinancing to become a financial burden, and the court must hear evidence concerning the ability of the defendant to refinance Before it can make such an order. There is, however, no evidence of an abuse of discretion.

The court had evidence that a refinancing arrangement was agreed on and contemplated by the parties, and noted that in its memorandum of decision.[5] In addition,

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the court had the financial affidavits of the parties as evidence when it issued its orders, and, thus, it was able to determine the respective financial needs and abilities of each party. Given those facts, the court had a reasonable basis on which to order the defendant to refinance the properties to pay the plaintiff's property [74 Conn.App. 129] distribution award of $136,000, and, therefore, there was no abuse of discretion.

The judgment is affirmed.

In this opinion the other Judges concurred.

Notes:

[1] Only one child was a minor at the time of trial.

[2] In his appellate brief and at oral argument, the defendant argues that the court did not consider that his pension was in lieu of social security benefits and that the defendant is not eligible for social security benefits, although the plaintiff may be eligible. The defendant, therefore, argues that his pension should not be considered as property for distribution, or, in the alternative, that the case be remanded to the trial court for consideration of whether any social security benefits of the plaintiff should have been considered in the property distribution.

There was, however, no evidence presented at trial concerning the relationship between the defendant's pension and social security, nor was any evidence offered concerning the plaintiff's eligibility for social security. The defendant is limited on appeal to the evidence presented at trial and "cannot be permitted to rely upon matters never called to the attention of any trier of fact. The factual issue [the defendant] seek[s] to raise for the first time on appeal cannot be adequately explored at this stage of the proceeding." *Beechwood Gardens Tenants' Assn. v. Dept. of Housing,* 214 Conn. 505, 516, 572 A.2d 989 (1990); see also *Gupta v. New Britain General Hospital,* 239 Conn. 574, 593 n. 16, 687 A.2d 111 (1996). We therefore decline to review the defendant's new factual allegations raised for the first time on appeal.

[3] In doing so, our Supreme Court stated that "[p]ension benefits represent a form of deferred compensation for services rendered.... They do not constitute mere gratuities ... as the interest in receiving such benefits is contractual in nature. Whether the plan is contributory or noncontributory, the employee receives a lesser present compensation plus the contractual right to the future benefits payable under the pension plan.... [Vested pension benefits] are contract rights of value.... As contractual rights, pension benefits are a type of *intangible* property...." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Krafick v. Krafick,* supra, 234 Conn. at 794-95, 663 A.2d 365.

[4] General Statutes § 46b-81 (c) provides in relevant part that the court "shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

[5] In the defendant's proposed orders, proposal number five states: "Within six (6) months the [defendant] shall obtain mortgages to purchase [the plaintiff's] share of the properties...."

Also, the following colloquy occurred at trial:

"The Court: And ... let me ask you. I briefly looked at the proposed orders, and it may be in there, but with respect to the marital home, what is your proposal? I understand it's [75 percent 25 percent]. But are you requesting that [the defendant] be able to live with [one of the parties' children] and then it be sold when he graduates from high school or what is the proposal?

"[Defendant's Counsel]: No, my proposal is [that] the plaintiff quitclaim her interest in the two properties to [the defendant] and that within six months, he obtain

refinancing, and mortgage, to pay off that equity to [the plaintiff], and we didn't make any statement, but clearly the order could be a lien on the property or something to protect that interest.

"The Court: And I understand the percentages you dispute ... but my understanding is [that the plaintiff] does not want the properties.

"[Plaintiff's Counsel]: Correct.

"The Court: And I take it you have no problem with him paying it through a refinancing of the properties; is that correct?

"[Plaintiff's Counsel]: No, Your Honor.

"The Court: Okay."

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188 A.3d 743 (Conn.App. 2018)
181 Conn.App. 822
Tracy M. THOMASI
v.
Edward J. THOMASI, Sr.
Nos. AC 39452, AC 39814
Appellate Court of Connecticut
May 15, 2018

Argued December 5, 2017

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[Copyrighted Material Omitted]

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[Copyrighted Material Omitted]

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Appeal from Superior Court in the judicial district of New Haven at Meriden, Klatt, J.

Timothy J. Fitzgerald, with whom was Douglas T. Barall, for the appellant in AC 39452 and appellee in AC 39814 (plaintiff).

Maria F. McKeon, for the appellee in AC 39452 and appellant in AC 39814 (defendant).

Keller, Prescott and Bishop, Js.

OPINION

BISHOP, J.

[181 Conn.App. 824] These appeals arise from the dissolution of marriage between the plaintiff, Tracy M. Thomasi,[1] and the defendant, Edward J. Thomasi, Sr. In AC 39452, the plaintiff appeals from the postdissolution order of the trial court regarding the division of the defendant's defined benefit pension plan. In her appeal, the plaintiff argues that the court erred in determining that the term "marital portion," as used in the parties' marital dissolution agreement regarding a division of the defendant's defined benefit pension plan, clearly and unambiguously provided for the coverture method to be utilized in calculating the marital portion. We conclude that the term, under the limited circumstances of this case, contains a latent ambiguity, and, accordingly, reverse the judgment of the trial court.

In AC 39814, the defendant appeals from the trial court's postdissolution orders denying his motion for alimony modification and interpreting the dissolution agreement to require him to make payments to the plaintiff from his pension plan retroactive to the date of the marital dissolution. On this claim, he makes four arguments that the court erred (1) by finding that he did not experience a substantial change in his financial circumstances justifying a downward modification in his alimony obligation; (2) by declining to consider the plaintiff's receipt of settlement proceeds from a personal injury lawsuit; (3) by improperly taking into consideration his receipt of a pension; and (4) by [181 Conn.App. 825] determining that the dissolution agreement requires him to make pension payments to the plaintiff as of the date of the marital dissolution even though the qualified domestic relations order (QDRO) contemplated by their agreement was not then in place. We agree with the trial court that a fair reading of the agreement requires the defendant to begin making payments from his pension to the plaintiff as of the date of the dissolution. We do not believe, however, that the record supports the court's finding that the defendant's loss of employment was due to his own fault. Accordingly, we reverse in part, and affirm in part, the orders of the trial court.

The following facts pertain to both appeals. The defendant began working for the state of Connecticut in November, 1967, and, as a state employee, he participated in the Connecticut state employees retirement system, which features a defined benefit pension program.[2] The parties were married on April 5, 1991, by

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which time the defendant had accrued twenty-four years and four months of state service. The defendant retired from state employment on June 1, 2003, after thirty-seven years and six months of service. The marriage of the parties was dissolved on July 22, 2015. Thus, the parties were married for a total of approximately twenty-four years and three months. Although the defendant was employed by the state for a total of 426 months, the parties' marriage spanned 145 months within this period, or approximately 34 percent of the defendant's total period of employment with the state.

[181 Conn.App. 826] As part of the parties' property settlement agreement, paragraph 9B of the dissolution agreement provided: "Husband shall immediately transfer one-half of the marital portion of [h]usband's [s]tate of Connecticut [p]ension [p]lan that is currently in pay status to [w]ife valued as of the date of dissolution and including cost of living over the payment period. This transfer shall be by a QDRO[3] that shall be drafted by Attorney Elizabeth McMahon, with the parties splitting Attorney McMahon's fees equally. The [c]ourt will retain jurisdiction over this entire [p]aragraph to effectuate the intent of the parties." (Footnote added.)

I

AC 39452

In this appeal, the parties do not dispute that the term "marital portion" refers to the amount of pension benefit earned during the course of the marriage, and agree that the plaintiff is entitled to one half of that [181 Conn.App. 827] amount. Thus, the term "marital portion" is not patently ambiguous.[4] The question remains, however, whether the term, as used in the parties' marital dissolution agreement, contains a latent ambiguity because there is more than one method for calculating the marital portion of a defined benefit pension.

The following additional facts and procedural history are relevant to the resolution of this appeal. Following the marital dissolution, Attorney McMahon sent a letter dated September 17, 2015, along with a drafted domestic relations order to both parties. In the letter, Attorney McMahon stated in relevant part: "Since the judgment does not specify how to determine

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the marital portion, I have used a coverture fraction .... If this approach is not acceptable to [either party], please let me know and then contact your attorneys for guidance." The September 17, 2015 domestic relations order prepared by Attorney McMahon was signed by the defendant, but not by the plaintiff. On October 26, 2015, Attorney McMahon recirculated a revised domestic relations order, dated September 26, 2015, which corrected a miscalculation in the coverture formula. Later, on December 2, 2015, Attorney McMahon sent a letter to the parties and their prior attorneys stating in relevant part: "The judgment does not specify how the marital portion is to be calculated, and there is more than one way to do so. My role is to craft an order that is consistent with the judgment; I do not advocate for either party. If the parties cannot reach an agreement on their own, they will have to return to court for clarification of the judgment." Pursuant to a request from the defendant's prior counsel, Attorney McMahon drafted a revised domestic relations order on January 11, 2016, [181 Conn.App. 828] that utilized the subtraction method to calculate the marital portion.

Following the marital dissolution and over a period of several months, the parties, through counsel, exchanged correspondence regarding their disagreement on how to calculate the marital portion of the defendant's pension in accordance with the terms of the marital dissolution agreement, and both parties filed several motions reflecting their disagreement. In conjunction with these exchanges, the plaintiff received a correspondence from the State of Connecticut Retirement Services Division dated December 9, 2014, which had been sent to the defendant.[5] This letter outlined the defendant's participation in the state employees retirement system. The correspondence indicates that as of April 5, 1991, the date of the parties' marriage, the defendant

had accrued the right to receive $1833 as a monthly pension benefit upon the normal retirement age of sixty-five. The letter states, as well, that by the time the defendant retired on June 1, 2003, his monthly benefit had risen to $5227.49. As of the date of the parties' marital dissolution, his monthly benefit had risen to $6937.92 due to cost of living increases built into the pension plan. Neither the contents nor accuracy of this letter is disputed by the parties.

A hearing on the parties' motions was scheduled for May 23, 2016. At the hearing, and in response to arguments that there are different methods to calculate the "marital portion" of the defendant's pension benefits, [181 Conn.App. 829] the court stated the following: "[A]s far as the court is concerned, if Attorney McMahon, the person preparing the qualified domestic relations order says the word marital portion is ambiguous to her, [t]hen, I think you have an argument. The bottom line ... you are going to have to have [Attorney McMahon] in here, to testify, that [the] term is ambiguous." The court further opined that it would not permit testimony from other individuals until it heard from Attorney McMahon.

Consequently, on July 7, 2016, the court heard testimony from Attorney McMahon. She stated that when she first reviewed the dissolution agreement, to her, "marital portion meant one thing.... I have seen

other approaches in other cases. That's not how I do it. So I didn't see an ambiguity initially, but ... when a discussion arose and I saw the parties were ... taking different approaches, then I thought either approach could fit what the judgment [stated]." When the plaintiff's counsel asked Attorney McMahon "if marital portion, standing alone without any further formula or description, was ambiguous," she replied in the affirmative.

On cross-examination by the defendant's counsel, the following exchange occurred:

"Q. [W]hen you get no other instruction from the court or from the parties or you see the agreement as you did in this, do you ... normally use the coverture method?

"A. I do.

"Q. Okay. The subtraction method, is that a method you ever use?

"A. Only if it's specified in the judgment."

On that same day, the court issued an order, stating: "The court heard evidence on the motions in limine [181 Conn.App. 830] and finds the contract in the separation agreement is clear and unambiguous regarding [paragraph] 9B, 'marital portion.' The last sentence of the paragraph, the court determines means the enforcement of the signing of the [QDRO] by the parties. The other motions are moot. See transcript ... for the elaboration of the court's ruling and findings."

The transcript of the July 7, 2016 hearing reveals that the court stated: "I see nothing ambiguous or hear nothing and determine nothing ambiguous about the language. It is the typical language that you see ... in a situation such ... as this.... [T]estimony from Attorney McMahon established just that, there is nothing ambiguous. The parties agreed to use Attorney McMahon, therefore, they agreed to use her method of calculation and she clearly testified as to what her method of calculation was. Moreover, [paragraph] 9C of the parties' agreement uses the same ... term, marital portion, and there's no claim of ambiguity there."[6] Finding no ambiguity in the language of the agreement, the court concluded that the September 26, 2015 domestic relations order which employed the coverture method of determining the marital portion of a monthly pension benefit was the appropriate version to be enforced. This appeal followed.

We begin with our standard of review. "It is well established that a separation agreement, incorporated by reference into a judgment of dissolution, is to be regarded and construed as a contract.... Accordingly, our review of a trial court's interpretation of a [181 Conn.App. 831]

separation agreement is guided by the general principles governing the construction of contracts.... A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction.... If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law.... When the language of a contract is ambiguous, [however] the determination of the parties' intent is a question of fact, and the trial court's interpretation

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is subject to reversal on appeal only if it is clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Remillard v. Remillard,* 297 Conn. 345, 354-55, 999 A.2d 713 (2010).

"[T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and ... the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract.... Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity .... Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Watkins v. Watkins,* 152 Conn.App. 99, 104, 96 A.3d 1264 (2014). "A word is ambiguous when it is capable of being interpreted by reasonably well informed persons in either of two or more senses.... Ambiguous can be defined as unclear or uncertain, or that which is susceptible of more than one interpretation, or understood in more ways than one." (Internal [181 Conn.App. 832] quotation marks omitted.) *Flaherty v. Flaherty,* 120 Conn.App. 266, 269, 990 A.2d 1274 (2010).

As noted, the plaintiff asserts that she believed the parties intended to calculate the domestic relations order by utilizing the subtraction method. Attorney McMahon testified that determination of the marital portion by this method involves taking "the benefit earned as of the date of marriage and subtract[ing] it from the benefit earned as of the date of divorce.... [T]he difference would be what they call the marital portion." See generally E. Brandt, "*Valuation, Allocation, and Distribution of Retirement Plans at Divorce: Where Are We?"* 35 Fam. L.Q. 469, 476-81 (2001); M. Snyder, "*Challenges in Valuing Pension Plans,"* 35 Fam. L.Q. 235, 249 (2001).

In her postjudgment motions, the plaintiff, using the subtraction method for determining the marital portion of the defendant's pension and the data provided by the State Retirement Services Division, determined that the defendant's pension benefit had increased by $5104.92 (benefit on date of marital dissolution less accrued benefit on date of marriage) and therefore, her marital portion is half that amount, or $2552.46. On the basis of these calculations and by application of the subtraction method, the plaintiff asserted that her share of the defendant's monthly pension benefit as of the date of the marital dissolution should be 36.7 percent of the defendant's total pension equaling $2552.46.

The defendant does not dispute the mathematical consequences of applying the subtraction method for determining the marital portion of a defined benefit pension plan. He disputes only the propriety of utilizing this approach. Thus, it is not disputed that the defendant's premarital monthly pension value was $1833 as of the date of the marriage and that his pension benefit [181 Conn.App. 833] had risen to $6937.92 as of the date of the marital dissolution. Subtracting the lesser from the greater results in a marital portion of $5104.92, representing the increase in benefit accrued during the course of the marriage. One half of this amount is $2552.46 or 36.7 percent of the total monthly pension payment due to the defendant as of the date of the marital dissolution. As discussed earlier in this opinion, this calculation was reflected in Attorney McMahon's January 11, 2016 domestic relations order draft prepared at

the behest of the defendant.[7]

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In contrast, the defendant contends that the parties agreed to execute the September 26, 2015 domestic relations order initially drafted by Attorney McMahon, in which she employed the coverture method of determining the marital portion. There, the defendant indicates that Attorney McMahon used "the marital portion of the defendant's [s]tate of Connecticut [p]ension [p]lan calculated using the fraction where the numerator equals the number of months married during the years of employment by the defendant and the denominator equals the total years of credited service for the [defendant's] employment by the [s]tate of Connecticut." Attorney McMahon testified that the determination of the marital portion by this method involves: "[Taking] the years of benefits accrued during the marriage over the total years of benefits accrued as of the date of divorce and then multiply that times the benefit earned as of date of divorce and that would give you the marital portion."[8] Under the coverture fraction, as [181 Conn.App. 834] calculated by Attorney McMahon and recited in her September 17, 2015 letter to the parties, the plaintiff's one half of the marital portion of the monthly pension payment would be $1180.83, or 17.02 percent of the defendant's total pension entitlement as of the date of marital dissolution.[9]

As noted, the different methods of calculation in this instance yield substantially different portions of the pension benefits to the plaintiff. The plaintiff argues that the court erred when it concluded that the language was clear and unambiguous because Attorney McMahon's preferred methodology for determining the marital portion of a pension is not set forth in paragraph 9B of the dissolution agreement. In short, the plaintiff asserts that the court's reference to factors outside of the language utilized in the agreement is a demonstration itself that the language is not clear and unambiguous and is "susceptible to more than one reasonable interpretation." From the record, and notwithstanding the court's conclusion, Attorney McMahon's testimony plainly supports this conclusion. Nevertheless, the defendant maintains that the court properly found that paragraph 9B of the dissolution agreement unambiguously provided for the domestic relations order to be [181 Conn.App. 835] drafted by Attorney McMahon using the coverture fraction on the basis of her testimony that

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this is the approach she routinely utilizes in drafting pension division orders.

"A latent ambiguity arises from extraneous or collateral facts which make the meaning of a written instrument uncertain although the language thereof be clear and unambiguous. The usual instance of a latent ambiguity is one in which a writing refers to a particular person or thing and is thus apparently clear on its face, but upon application to external objects is found to fit two or more of them equally." (Internal quotation marks omitted.) *Heyman Associates No. 1 v. Ins. Co. of Pennsylvania,* 231 Conn. 756, 782, 653 A.2d 122 (1995). That is precisely the circumstance the court faced in the case at hand. Here, the ambiguity of the term "marital portion" arises not from the language of the contract itself, but instead from the fact, gleaned from extraneous evidence, that there is more than one method for determining the marital portion of a defined benefit plan. The evidence adduced at the hearing on this issue demonstrates that computations utilizing the two methodologies result in significantly different outcomes in terms of the monthly payments to be received by the nonemployee spouse and, reciprocally, the amount of the monthly benefit to be retained by the employee spouse.

The court determined that the term "marital portion" was unambiguous, not on the basis of the language itself, but on the basis that Attorney McMahon, the expert whose services the parties agreed to effectuate their pension agreement, typically uses the coverture method. Although we conclude that the term "marital portion" is clear and unambiguous in the sense that the parties agree to its general meaning, the term, nevertheless, contains a latent ambiguity under

the specific circumstances of this case.

[181 Conn.App. 836] On the basis of our review of the dissolution agreement, we conclude that the trial court incorrectly determined that the language in paragraph 9B is clear and unambiguous. The term "marital portion" of the defendant's pension contains a latent ambiguity because the determination of that amount is not self-defining and can be deduced by using more than one methodology, each of which yields a significantly different outcome. Also, the term "marital portion" is not elsewhere defined in the dissolution agreement. As noted, although Attorney McMahon expressed a preference for utilizing the coverture method for determining the marital portion of a pension, she, with equal clarity, also acknowledged the legitimacy of the use of the subtraction option for making such a determination.[10] Because the term "marital portion" can be reasonably susceptible to more than one method of calculation not specified in the parties' agreement, a latent ambiguity exists in the parties' agreement.

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In its decision to rely on extrinsic evidence to resolve the parties' disagreement as to the import of the term "marital portion," the court's focus on Attorney McMahon's usual practice was misplaced. Rather, the task of the court in resolving the ambiguity was to discern the [181 Conn.App. 837] intent of the parties in employing the language at issue.[11] See *Buell Industries, Inc. v. Greater New York Mutual Ins. Co.,* 259 Conn. 527, 546 n.17, 791 A.2d 489 (2002) ("[E]xtrinsic evidence may be introduced to clarify the meaning of terms in an integrated contract.... Such evidence may not be used, however, once the terms are found to have a clear and unambiguous meaning ...." [Citation omitted; emphasis omitted.]). Although it was not inappropriate for the court to hear evidence from Attorney McMahon as to her normal approach for determining the marital portion of a defined benefit plan when the particular methodology has not been specified to her, the focus of this testimony should have been on Attorney McMahon's knowledge of the parties' intent in employing the language at hand and whether the parties were aware of her usual practice when referring this matter to her. The court should also have permitted testimony from the parties as to their intentions in employing the language in question.

And yet, notwithstanding the testimony from Attorney McMahon that there is more than one methodology employed to determine the marital portion of a defined benefit pension, the court concluded that there was "nothing ambiguous about the language" because the parties agreed to use Attorney McMahon. In reaching this conclusion, the court was legally incorrect.[12] [181 Conn.App. 838] Accordingly, the trial court's postjudgment order regarding the division of the defendant's defined benefit pension plan cannot stand.

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II

AC 39814

As noted previously in this opinion, in AC 39814, the defendant claims that the court incorrectly denied his motion for alimony modification and interpreted the dissolution agreement to require him to make payments to the plaintiff from his pension plan retroactive to the date of the marital dissolution. We review each of his claims in turn.

At the outset, we note the following additional pertinent facts and procedural history. In her March 18, 2016 motion for contempt, the plaintiff requested, due to the fact that the domestic relations order had not been completed, that the defendant be ordered to make retroactive payments for her portion of his monthly pension benefits effective as of July 22, 2015, the date of the marital dissolution judgment. The court conducted a [181 Conn.App. 839] hearing on September 27, 2016, in which the parties testified and provided argument on the issues of retroactive payments and attorney's fees in response to the plaintiff's motion. The court issued a memorandum of decision on October 6,

2016, in which it determined that the plaintiff's portion of the defendant's monthly pension benefits "are a property distribution and the amount to be calculated as owed to the plaintiff is to be calculated from the date of dissolution." The court declined to grant either parties' requests for attorney's fees. The court denied the defendant's subsequent motion to reconsider and/or reargue.

Additionally, on June 24, 2016, the defendant filed a motion to modify alimony alleging a substantial change in his circumstances due to a loss of employment. The defendant filed an amended motion to modify alimony on October 24, 2016, additionally alleging that the plaintiff had a significant increase in her income due to her receipt of a settlement stemming from a claim she had made in an unrelated civil litigation. Following a hearing on November 3, 2016, the court determined that because the defendant "was clearly not laid off" and that it was his "own fault that he's no longer employed," his attendant loss of earnings could not be considered in assessing whether he had experienced a substantial change in his financial circumstances. The court further articulated that it considered the defendant's receipt of monthly pension benefits as income. The court determined, as well, that the receipt by each party of certain settlement proceeds from civil litigation should not be considered in assessing whether either had experienced a substantial change in financial circumstances after their marital dissolution because it was "property distribution." Thus, the court denied the defendant's motion to modify alimony in an order dated November 3, 2016. This appeal followed.

[181 Conn.App. 840] A

We first address the court's denial of the defendant's motion to modify alimony. On appeal, the defendant claims that the court incorrectly determined that he caused his own loss of employment and therefore that factor could not be considered in assessing his quest for a reduction of his alimony obligation. The defendant claims, as well, that the court erred in declining to consider the plaintiff's receipt of lawsuit settlement proceeds in assessing whether she had experienced an upward change in her financial circumstances. Finally, the defendant asserts that the court should not have considered his receipt of pension benefits as income for purposes of assessing his motion for a modification of alimony. We conclude that the record does not support the court's conclusion that the defendant caused his own loss of employment through his own fault. Therefore, the court's order denying the defendant's motion

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for a modification of alimony premised on this conclusion cannot stand.

Our legal principles and standard of review governing the modification of an award of alimony are well established. "Our review of a trial court's granting or denial of a motion for modification of alimony is governed by the abuse of discretion standard.... To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous.... In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action.... Trial courts have broad discretion in deciding motions for modification." (Internal quotation marks omitted.) *Spencer v. Spencer,* 177 Conn.App. 504, 526, 173 A.3d 1 (2017), cert. granted, 328 Conn. 903, 177 A.3d 565 (2018). "A finding of fact is clearly erroneous when there is no evidence in the record to support it ... or when [181 Conn.App. 841] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.... Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings.... In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached.... Instead, we make every reasonable presumption ... in favor of the trial court's ruling." (Internal quotation marks omitted.) *Ackerman v. Sobol Family Partnership, LLP,* 298 Conn. 495, 507-508, 4 A.3d 288 (2010).

Modification of alimony in this case is governed by General Statutes § 46b-86 (a),[13] and the party seeking the modification has the burden of proving a substantial change in circumstances of either party. *Spencer v. Spencer, supra,* 177 Conn.App. at 526-27, 173 A.3d 1. "When presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties.... Second, if the court finds a substantial change in circumstances, it may properly consider [181 Conn.App. 842] the motion and, on the basis of the ... § 46b-82 criteria, make an order for modification.... The court has the authority to issue a modification only if it conforms the order to the distinct and definite changes in the circumstances of the parties.... Simply put, before the court may modify an alimony award pursuant to § 46b-86 [a], it must make a threshold finding of a substantial change in circumstances with respect to one of the parties..... A finding of a substantial change in circumstances is subject to the clearly erroneous standard of review." (Citation omitted; internal quotation marks omitted.) *Id.,* at 527, 173 A.3d 1.

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"A conclusion that there has been a substantial change in financial circumstances justifying a modification of alimony based only on income is erroneous; rather, the present overall circumstances of the parties must be compared with the circumstances existing at the time of the original award to determine if there has been substantial change." (Internal quotation marks omitted.) *Coury v. Coury,* 161 Conn.App. 271, 283, 128 A.3d 517 (2015). Lastly, "[t]o qualify as a substantial change in circumstances, a change or alleged inability to pay must be excusable and not brought about by the defendant's own fault." (Internal quotation marks omitted.) *Tittle v. Skipp-Tittle,* 161 Conn.App. 542, 551, 128 A.3d 590 (2015); see also *Sanchione v. Sanchione,* 173 Conn. 397, 407, 378 A.2d 522 (1977) (" 'Inability to pay' does not automatically entitle a party to a decrease of an alimony order. It must be excusable and not brought about by the defendant's own fault. There is no way to determine simply from the affidavits and finding what factors the court considered ... whether his inability to pay was a result of his own extravagance, neglect, misconduct or other unacceptable reason ....").

Accordingly, in order to demonstrate a substantial change in financial circumstances, a party seeking a [181 Conn.App. 843] reduction of alimony based on a loss of income has the burden of proving not only the loss of earnings but that the inability to pay "must be excusable and not brought about by the defendant's own fault." (Internal quotation marks omitted.) *Tittle v. Skipp-Tittle, supra,* 161 Conn.App. at 551, 128 A.3d 590. Here, the defendant testified that he was laid off from his position as director of facilities at Albertus Magnus College (college) on April 5, 2016, where he had been earning just over $75,000 per year, and that he has been unable to find employment since then. On cross-examination, the defendant acknowledged that a former coworker had brought a pending civil action against him and the college. As evidence of this claim, the plaintiff filed a copy of the revised complaint in that action. The plaintiff also filed a copy of a proposed separation agreement and letter from the college, dated April 5, 2016, addressed to the defendant. Although a representative of the college signed the separation agreement, the defendant did not. The letter states in relevant part: "This will confirm the discussion that we had today to the effect that your employment with [the college] is terminated as of the close of business today .... If you decline to execute the [separate agreement] ... the [c]ollege's offer to enter into the [separation agreement] will automatically be rescinded as of the close of business on April 26, 2016." The defendant testified that he did not sign the agreement because he "wasn't sure [he] agreed with the severance."[14] Thereafter, the defendant received unemployment compensation for twenty-six weeks. The defendant testified that he has continued to seek employment since being terminated by the college but without success.

The defendant testified that he believes he lost his job because his position was being cut by the college. [181 Conn.App. 844] He further stated that the college did not object to his collection of unemployment, which he understood would have been unavailable to him had he been fired. In response to plaintiff's counsel's inquiries as to whether he thought he was at fault for the termination of his employment, the defendant asserted that he was not. The defendant

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also stated that there were no reprimands or criticisms against him in his personnel file at the college.

At the end of the hearing, the court calculated that the defendant received a total gross annual income of $92,560 based upon his social security and pension benefits. The court also stated: "And, quite frankly, I credit the evidence that shows that [the defendant] was clearly not laid off, and I find that [it is] the defendant's own fault that he's no longer employed and making this $75,000 per year.... To qualify for a substantial change in circumstances, a change or alleged inability to pay must be excusable and not brought about by the defendant's own fault. I find credible testimony that it clearly was brought about by his own fault. There's evidence of [the college's] letter .... There's evidence regarding the revised [c]omplaint.... [H]is actions ultimately led to what was clearly ... an offer to either retire or get fired. He was clearly not laid off as he testified to. So I'm making a finding that any reduction in his income was at the fault of the defendant." The court concluded that the defendant had not met his burden in demonstrating a significant change in financial circumstances as to warrant a modification and, accordingly, denied his motion to modify alimony.

As the party seeking the modification, the defendant had the burden of proving a substantial change in his financial circumstances. It is undisputed that the defendant is no longer employed by the college, resulting in a loss of income of approximately $75,000 per year. [181 Conn.App. 845] Evidence and testimony was presented during the hearing to support this claim. The court also credited the defendant's testimony that he had been actively seeking alternative employment.

In opposition to the defendant's motions to modify alimony, the plaintiff submitted the revised complaint against him and the college, the proposed separation agreement between him and the college, which the defendant never signed, and an accompanying letter. This evidence was proffered to demonstrate that the change in the defendant's circumstances was not excusable because it was brought about by his own fault. Although the court correctly opined that a party who suffers a diminution in earnings through his or her own fault is not thereby entitled to a reduction of an alimony obligation, there was no credible evidence adduced at the hearing on the motion to modify that the defendant, in fact, lost his employment with the college through his own fault.[15] Thus, from our careful review of the record, we conclude that the court's factual conclusion that the defendant caused his discharge from employment through his own fault finds no support in the record. The court's reliance on an unsigned employment separation agreement and a third party's revised complaint as evidence that the defendant caused his own termination of employment was incorrect. In sum, innuendo aside, whether the defendant was laid off or terminated by the college, there was no evidence presented to the court that the defendant's loss of employment was due to his own fault.

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[181 Conn.App. 846] As noted, the defendant testified that his personnel file from the college, which was available during the hearing, contained no reprimands or criticisms regarding his service to the college. The submission of a revised complaint from a former coworker that named the defendant, the college, and others as parties and contained claims for workers' compensation retaliation and infliction of emotional distress, was merely an unproved allegation without any supporting evidence. As

such, the mere allegations set forth in this complaint could not suffice as any proof of culpable behavior by the defendant during his employment with the college. Moreover, the complaint contains no allegation that the defendant was terminated due to his own fault.[16]

In response, the plaintiff cites this court's opinion in *Tittle v. Skipp-Tittle, supra,* 161 Conn.App. at 546, 551, 128 A.3d 590, in which a panel of this court determined that evidence showing the party seeking a modification of alimony had been arrested for stalking and for violating a protective order provided a sufficient basis for determining that any change in her financial circumstances had been caused by her own fault. The facts in *Tittle* and those we face in the present case, however, are not parallel. In *Tittle*, the court could reasonably consider the moving party's arrests as evidence of fault, because in order for the arrests to occur an independent magistrate had to have found probable cause of culpable conduct. In the case at hand, however, the court was confronted with mere allegations without any factual support.

In sum, although we recognize it is the duty of a moving party in a motion to modify alimony or support [181 Conn.App. 847] to demonstrate that an inability to pay is not due to his or her own "extravagance, neglect, misconduct or other unacceptable reason"; *Sanchione v.* Sanchione, supra, 173 Conn. at 407, 378 A.2d 522; the court's conclusion in this matter that the defendant was at fault for his loss of employment finds no factual support in the record.

After reviewing the record, we are "left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Spencer v. Spencer, supra,* 177 Conn.App. at 513-14, 173 A.3d 1. Although the court, as the fact finder, is free to weigh and interpret evidence and determine credibility; see *Watrous v. Watrous,* 108 Conn.App. 813, 823, 949 A.2d 557 (2008); there was insufficient evidence to show that the defendant was fired, rather than mutually separated or laid off, from his employment with the college. Even if we make every reasonable presumption in favor of the court's ruling, the record simply does not support the court's finding that the defendant lost his employment through his own fault. Accordingly, we conclude that the court's determination that the defendant caused his own termination of employment was clearly erroneous as it was not supported by any evidence in the record. Cf. *Bauer v. Bauer,* 173 Conn.App. 595, 606, 164 A.3d 796 (2017) (trial court's findings that defendant was not culpable for his termination of employment were supported by record and court concluded that defendant proved substantial change in circumstances).

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In conjunction with the court's denial of his motion to modify alimony, the defendant also claims that the court should have considered the plaintiff's receipt of the proceeds from a personal injury claim and the court should not have taken into account his receipt of pension benefits.[17] We are unpersuaded by either claim. As [181 Conn.App. 848] to the plaintiff's receipt of the proceeds from a personal injury claim, the parties dealt specifically with this topic in their marital dissolution agreement. Paragraph 9G states as follows: "Any funds received by either party from his or her pending personal injury law suits shall be retained by that party free and clear from any claim of the other." Because this contingency was provided for in the parties' agreement, it was well within the court's discretion to disregard the plaintiff's subsequent receipt of the anticipated funds. See *Ceddia v. Ceddia,* 164 Conn.App. 266, 271, 137 A.3d 830 (2016) ("[a]n appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented" [internal quotation marks omitted]).

Finally, in assessing the defendant's motion to modify alimony, it was appropriate for the court to consider his present overall circumstances in assessing whether he had experienced a substantial change in his financial condition. Accordingly, in taking the defendant's receipt of pension benefits into consideration, the

court committed no error.[18] See *Krafick v. Krafick,* 234 Conn. 783, 804-806, 663 A.2d 365 (1995); see also *Dinunzio v. Dinunzio,* 180 Conn.App. 64, 72-75, 182 A.3d 706 (2018).

Therefore, the court's order denying the defendant's motion for modification of alimony cannot stand and further proceedings are necessary.[19]

[181 Conn.App. 849] B

We next address the issue of whether the court properly determined that the dissolution agreement provided for the plaintiff's receipt of pension benefits from the defendant as of the date of the marital dissolution. The defendant claims that because the dissolution agreement contemplated the preparation of a domestic relations order to effectuate the parties' pension agreement, the court's order for a division of pension benefits would only

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become operable once such an order was put in place and that there was no provision in the judgment requiring him to make interim payments. The plaintiff responds that the language of the agreement and judgment provide for her receipt of pension benefits to take place immediately following the judgment and, thus, she is entitled to retroactive payments for the period of time between the date of the dissolution and the effective date of the domestic relations order (gap period).

We restate our standard of review when interpreting the language of a marital dissolution agreement. "If a contract is unambiguous within its four corners, the intent of the parties is a question of law, requiring plenary review.... If, however, a contract is ambiguous, the clearly erroneous standard of review is used because the intent of the parties is a question of fact." (Citation omitted.) *Kremenitzer v. Kremenitzer,* 81 Conn.App. 135, 140, 838 A.2d 1026 (2004).

The relevant section of the dissolution agreement, paragraph 9B, bears repeating: "Husband *shall immediately transfer* one-half of the marital portion of [h]usband's [s]tate of Connecticut [p]ension [p]lan that is [181 Conn.App. 850] currently in pay status to [w]ife valued as of the date of dissolution and including cost of living over the payment period. This transfer shall be by a QDRO that shall be drafted by Attorney Elizabeth McMahon ...." (Emphasis added.)

We are unpersuaded by the defendant's contention that the parties "negotiated the agreement to provide that payments begin after the [domestic relations order] was put in place." The dissolution agreement plainly states that the defendant "shall immediately transfer" one half of the marital portion of his pension plan as of the date of dissolution. The agreement does not state that the plaintiff would realize her entitlement only once the domestic relations order was put in place.

It is well established that pension benefits are a form of property. See *Cifaldi v. Cifaldi,* 118 Conn.App. 325, 331, 983 A.2d 293 (2009). In *Cifaldi*, this court opined: "A QDRO is merely an administrative tool used to effectuate the transfer of marital property, in this case pension benefits, from an employee to a nonemployee spouse." *Id.,* at 332, 983 A.2d 293. "Given the well recognized importance of pension benefits as a piece of marital property, the obvious significance of pension benefits to any property allocation made as part of a dissolution judgment and the expectations of the parties to that judgment, we do not read the parties' agreement ... to make the vesting of the plaintiff's property interest in a portion of the defendant's pension benefits to be in some way contingent on the successful processing of the QDROs. To put it simply, we conclude that the plaintiff's property interest in portions of the defendant's pension benefits was not predicated on the processing of paperwork ...." (Footnote omitted.) *Id.,* at 332-33, 983 A.2d 293. The reasoning of *Cifaldi* is applicable to the circumstances at hand. [181 Conn.App. 851] We disagree with the defendant's perspective, in which a party could reduce his or her liability to the other party by simply delaying the processing

of the domestic relations order. Accordingly, as of the date of the dissolution, the plaintiff was entitled, as her own property, to receive one half of the marital portion of the defendant's monthly pension benefits. Her entitlement was not contingent on a successfully executed domestic relations order.

The defendant further contends that the court failed to adjust for taxes when it ordered retroactive payments for the gap period. As a result, he asserts that he is required to pay the plaintiff a disproportionate amount from each pension payment because of federal and state tax withholdings.

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In response, the plaintiff states that "an appropriate tax adjustment can be fashioned" once the marital portion and the dollar amount of the postjudgment payments during the gap period have been calculated, and the defendant establishes the amount of taxes he has already paid. We agree that the defendant's retroactive payments should be adjusted for any tax liability he incurred for the portion of his pension that was intended for the plaintiff as her share of the marital portion. See *Cifaldi v.* Cifaldi, supra, 118 Conn.App. at 336, 983 A.2d 293 ("court could ... determine the amount of taxes, if any, that the defendant paid on the overpayments he received and reduce the plaintiff's remuneration accordingly").

The court's order regarding the pension is incomplete, as the retroactive amount must be determined once the court determines, after a hearing, the amount due to the plaintiff and then adjusts that amount for taxes the defendant has already paid on the portion to be received by the plaintiff.

In AC 39452, the judgment is reversed and the case is remanded for further proceedings consistent with [181 Conn.App. 852] this opinion. In AC 39814, the court's order denying the defendant's modification of alimony is reversed and the case is remanded for further proceedings according to law; the court's order regarding the pension is reversed in part and the case is remanded for further proceedings consistent with this opinion; the order regarding the pension is affirmed in all other respects.

In this opinion the other judges concurred.

Notes:

[1] The plaintiff is now known as Tracy Andreoli.

[2] Generally, a defined benefit pension plan is one in which the periodic benefit to be provided to an employee participant is stated, in plan documents, in terms of a formula based on the employee's earnings, length of employment service and the plan's vesting requirements. In contrast, a defined contribution plan is one which sets forth, in some specified manner, the amount of the employer's periodic contribution to an employee's retirement plan. In sum, one defines the benefit to be received; the other the contribution to be made.

[3] A qualified domestic relations order, or QDRO, is "an order of the court assigning to an alternate payee, in compliance with the Internal Revenue Code, 26 U.S.C. § 414 (p), the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1056 (d) (3), and General Statutes § 46b-81, a portion or all of the benefits payable to a participant in a retirement plan." *Kremenitzer v. Kremenitzer,* 81 Conn.App. 135, 136 n.1, 838 A.2d 1026 (2004). A QDRO "is the exclusive means by which to assign to a nonemployee spouse all or any portion of pension benefits provided by a plan that is governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq." (Internal quotation marks omitted.) *Richman v. Wallman,* 172 Conn.App. 616, 617 n.1, 161 A.3d 666 (2017).

We note, however, that the procedures set forth in the United States Code for a QDRO do not apply to a governmental pension plan, such as the Connecticut state employees retirement systems. See 29 U.S.C. § 1003 (b) (1). Accordingly, a "qualified domestic relations order" does not apply to the defendant's state government pension plan. Neither the parties nor the court has claimed any impropriety in the characterization of the QDRO in the dissolution agreement; accordingly, we only note the mischaracterization and will refer to the QDRO as a "domestic relations order" in this opinion. See *Bender v. Bender,* 258 Conn. 733, 738 n.3, 785 A.2d 197 (2001); accord *Krafick v. Krafick,* 234 Conn. 783, 786-87 n.4, 663 A.2d 365 (1995); *Hansen v. Hansen,* 80 Conn.App. 609, 612-13 n.2, 836 A.2d 1228 (2003).

[4] "A patent ambiguity is evident on the face of the contract, from the language of the contract itself ...." (Footnote omitted.) 17A C.J.S., Contracts § 388 (2018).

[5] We note that the letter states in relevant part: "Please be advised that [the state employees retirement system] is a governmental retirement plan and, as such, is exempt under United States Code, Title 29, Section 1003 from the federal requirements of the Employee Retirement Security Act (ERISA) as they pertain to a Qualified Domestic Relations Order. However, [the state employees retirement system] will divide a member's benefit in recognition of child or spousal support obligations when so ordered by a Connecticut court ...." See footnote 3 of this opinion.

[6] Paragraph 9C of the parties' marital dissolution agreement concerns the division of the parties' retirement accounts. There, the parties agreed to equalize the marital portions of their retirement accounts valued as of the date of dissolution by a transfer of a sum certain from the defendant's defined contribution plan to the plaintiff. Because the amount to be transferred was specified, the use of the term "marital portions" in this paragraph is merely descriptive and not operational.

[7] We note that the January 11, 2016 domestic relations order utilizing the subtraction method was requested by the defendant's prior counsel. Furthermore, evidence in the record shows that the defendant's prior counsel gave the calculations to Attorney McMahon via an e-mail correspondence on January 11, 2016.

[8] "The numerator of [the coverture] fraction is the number of months between the commencement of the employee-spouse's employment (or other date on which earning of the subject benefit was commenced) and the date of dissolution. The denominator of the fraction is the total number of months between the commencement of the accumulation of the benefit and the date on which the options first become exercisable, or the pension or other benefit becomes payable. The resulting portion of the total options granted represents the amount earned during the marriage." (Footnote omitted.) A. Rutkin, S. Oldham & K. Hogan, 7 Connecticut Practices Series: Family Law (3d Ed. 2010) § 29:6, p. 608.

For a general discussion on classification, valuation and distribution of pension benefits, see *Krafick v. Krafick,* 234 Conn. 783, 663 A.2d 365 (1995). See generally 24 Am.Jur.2d, Divorce and Separation § 551 (2018) (alternative methods of valuing and distributing pension rights); 27C C.J.S., Divorce § 969 (2018) (valuation and allocation of pensions).

[9] Attorney McMahon divided 145 months (months of service from April 5, 1991 [date of marriage] to June 1, 2003 [retirement date]) by 426 months (months of service from November 27, 1967 [date of employment] to June 1, 2003). This resulted in a marital portion of 34.04 percent, of which one half is 17.02 percent.

[10] Although there are different methods in calculating a marital portion; see, e.g., E. *Brandt, supra,* 35 Fam. L.Q. 472-81; we note that "there is no set formula that a court must follow when dividing the parties' assets, including pension benefits." (Internal quotation marks omitted.) *Kent v. DiPaola,* 178 Conn.App. 424, 435, 175 A.3d 601 (2017). For a detailed discussion on the coverture fraction and comparison to the present value difference method (subtraction method), see 2 B. Turner, Equitable Distribution of Property (3d Ed. 2005) § 6.25, p. 149-63.

A search of other jurisdictions reveals that Washington appellate courts have debated the use of the coverture fraction and subtraction method. See generally *In re Marriage of Rockwell*, 141 Wn.App. 235, 253-54, 170 P.3d 572 (2007), review denied, 163 Wn.2d 1055, 187 P.3d 752 (2008); *In re Chavez*, 80 Wn.App. 432, 436, 909 P.2d 314, review denied, 129 Wn.2d 1016, 917 P.2d 576 (1996).

[11] In *Ranfone v. Ranfone,* 119 Conn.App. 341, 346, 987 A.2d 1088 (2010), this court affirmed the trial court's application of latent ambiguity to the interpretation of its original pension order in a marital dissolution action. "[L]atent ambiguities are those which appear only as the result of extrinsic or collateral evidence showing that a word, thought to have but one meaning, actually

has two or more meanings.... Latent ambiguities [can] be shown and explained by pleading and parol proof." (Internal quotation marks omitted.) *Id*. See also *Kronholm v. Kronholm,* 16 Conn.App. 124, 131, 547 A.2d 61 (1988) ("[e]xtrinsic evidence is admissible to assist the court in resolving the question of intent where the terms of a contract are either latently or patently ambiguous").

[12] We leave to the trial court, on remand, the determination of whether the court, in conjunction with resolving the meaning of the term utilized for purpose of the pension division, must then reconsider all of its financial orders under the mosaic doctrine. "Individual financial orders in a dissolution action are part of the carefully crafted mosaic that comprises the entire asset reallocation plan.... Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements. Consistent with that approach, our courts have utilized the mosaic doctrine as a remedial device that allows reviewing courts to remand cases for reconsideration of all financial orders even though the review process might reveal a flaw only in the alimony, property distribution or child support awards." (Internal quotation marks omitted.) *Barcelo v. Barcelo,* 158 Conn.App. 201, 226, 118 A.3d 657, cert. denied, 319 Conn. 910, 123 A.3d 882 (2015).

"Every improper order, however, does not necessarily merit a reconsideration of all of the trial court's financial orders. A financial order is severable when it is not in any way interdependent with other orders and is not improperly based on a factor that is linked to other factors.... In other words, an order is severable if its impropriety does not place the correctness of the other orders in question." (Citation omitted; internal quotations marks omitted.) Id.

[13] General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support, an order for alimony ... may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party .... After the date of judgment, modification of any child support order issued before, on or after July 1, 1990, may be made upon a showing of such substantial change of circumstances, whether or not such change of circumstances was contemplated at the time of dissolution. By written agreement, stipulation or decision of the court, those items or circumstances that were contemplated and are not to be changed may be specified in the written agreement, stipulation or decision of the court.... If a court, after hearing, finds that a substantial change in circumstances of either party has occurred, the court shall determine what modification of alimony, if any, is appropriate, considering the criteria set forth in section 46b-82."

[14] The defendant further clarified that he signed a different separation agreement, but the college "turned it down." That agreement was not produced as evidence in the course of these proceedings.

[15] See *Schade v. Schade,* 110 Conn.App. 57, 65 n.6, 954 A.2d 846 ("[I]f a party's culpable conduct causes an inability to pay an alimony award, then the threshold question of whether a substantial change of circumstances exists is not met. Accordingly, a trial court may not then modify the alimony award."), cert. denied, 289 Conn. 945, 959 A.2d 1009 (2008); see also *Bauer v. Bauer,* 173 Conn.App. 595, 600, 164 A.3d 796 (2017) ("The burden of proving an inability to pay rests with the obligor. Whether the obligor has established his inability to pay by credible evidence is a question of fact.

The obligor must establish that he cannot comply, or was unable to do so.").

[16] We take judicial notice that the case in the revised complaint was dismissed on December 6, 2017. *Hardy* v. *Albertus Magnus College*, Superior Court, judicial district of New Haven, Docket No. CV-16-6059830-S. Appellate courts have the authority to take judicial notice of files of

the trial court in the same or other cases. *McCarthy v. Commissioner of Correction,* 217 Conn. 568, 580 n.15, 587 A.2d 116 (1991); *Disciplinary Counsel v. Villeneuve,* 126 Conn.App. 692, 703 n.15, 14 A.3d 358 (2011).

[17] We address the issues in the interest of judicial economy, on the assumption that the issues will likely arise on remand. *Mueller v. Tepler,* 312 Conn. 631, 646 n.14, 95 A.3d 1011 (2014).

[18] To the extent that the defendant claims that the court erroneously considered his total pension benefit, which included the plaintiff's marital portion, as part of his financial circumstances in assessing his motion to modify, we agree. On remand, once the court determines the amount of the defendant's defined benefit pension which must be allocated to the plaintiff as her share of the marital portion, that amount may not be considered by the court as part of the defendant's financial circumstances for alimony purposes. See *Krafick v. Krafick, supra*, 234 Conn. at 804-805 n.26, 663 A.2d 365.

[19] We recognize that on remand, the defendant, in order to prove a substantial change in circumstances due to loss of employment, has the burden of proving that his inability to pay must be excusable and not brought about by the his own fault. If the defendant was culpable for his own termination of employment, it would foreclose the threshold determination of a substantial change in circumstances. See *Olson v. Mohammadu,* 310 Conn. 665, 674, 81 A.3d 215 (2013) ("in order to meet the threshold of a substantial change in circumstances, the alleged inability to pay must be excusable and not brought about by the defendant's own fault." [internal quotation marks omitted]); see also *Sanchione v. Sanchione, supra*, 173 Conn. at 407, 378 A.2d 522.

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903 A.2d 679 (Conn.App. 2006)
97 Conn.App. 278
Claudette TRACEY
v.
Robert TRACEY.
No. 27078.
Court of Appeals of Connecticut
August 29, 2006

Argued May 22, 2006.

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Vincent Federico, Jr., Branford, for the appellant (defendant).

Noah Eisenhandler, for the appellee (plaintiff).

FLYNN, C.J., and ROGERS and HENNESSY, Js.

ROGERS, J.

[97 Conn.App. 279] General Statutes § 46b-62 [1] vests in the trial court the discretion to award attorney's

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fees to defend an appeal following a judgment of dissolution. The question Before us is whether a judge who decides a dissolution proceeding necessarily is required, under canon 3(c) of the Code of Judicial Conduct, to disqualify himself or herself from ruling on a postjudgment motion for fees to defend an appeal.

The underlying facts are not in dispute. In the fall of 1994, the plaintiff, Claudette Tracey, sought a dissolution of her thirteen year marriage to the defendant, Robert Tracey. Following a trial, the court, *Munro, J.,* dissolved the marriage, entered various financial orders and awarded joint legal custody of the parties' two children. Judgment was rendered on July 18, 2005. From that judgment, the defendant appealed to this court on August 3, 2005. In response, the plaintiff filed with the trial court a motion that requested attorney's fees "in order for [the] plaintiff's counsel to defend the filing of an appeal by the defendant [of the underlying matter]." The motion was predicated on the plaintiff's inability to pay for representation to defend the appeal.

[97 Conn.App. 280] The court held a hearing on the motion on September 1, 2005, at the outset of which the defendant orally moved that the judge disqualify herself. [2] In response, the court inquired as to what decisional law supported the motion; counsel for the defendant conceded that he knew of none. The court then denied the motion and proceeded with the evidentiary hearing. The court heard testimony from both the defendant and the plaintiff and reviewed their respective financial affidavits. At the conclusion of the hearing, the court ordered an allowance of $4500 to be paid by the defendant within thirty days. This appeal followed.

As a preliminary matter, we note that the defendant has not alleged any specific act of bias on the part of the trial judge. [3] Cf. *State v. Webb,* 238 Conn. 389, 462, 680 A.2d 147 (1996) (defendant claimed judge's comments at sentencing, including comment regarding defendant's " 'cruelty,' " demonstrated actual bias), aff'd after remand, 252 Conn. 128, 750 A.2d 448, cert. [97 Conn.App. 281] denied, 531 U.S. 835, 121 S.Ct. 93, 148 L.Ed.2d 53 (2000). Moreover, he does not claim that the court abused its discretion in awarding attorney's fees pursuant to § 46b-62. His sole contention is that canon 3(c) of the Code of Judicial Conduct requires a trial judge who has decided a dissolution action to disqualify himself or herself from ruling on a subsequent motion for fees to defend an appeal from that

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judgment in order to avoid the appearance of partiality.

Canon 3(c) of the Code of Judicial Conduct governs judicial disqualification. That canon provides in relevant part that "(1) A judge should disqualify himself or herself in a proceeding in

which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (A) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding...." Canon 3(c) thus encompasses two distinct grounds for disqualification: actual bias and the appearance of partiality. "The appearance and the existence of impartiality are both essential elements of a fair trial." (Internal quotation marks omitted.) *Consiglio v. Consiglio,* 48 Conn.App. 654, 659, 711 A.2d 765 (1998). As such, "[t]o prevail on its claim of a violation of this canon, [a party] need not show actual bias. The [party] has met its burden if it can prove that the conduct in question gave rise to a reasonable appearance of impropriety." [4] *Abington Ltd. Partnership v. Heublein,* 246 Conn. 815, 819-20, 717 A.2d 1232 (1998), aff'd after remand, 257 Conn. 570, 778 A.2d 885 (2001). As the defendant has not alleged actual bias, the proper inquiry is whether the involvement of a trial judge in a [97 Conn.App. 282] motion for fees to defend an appeal from a judgment rendered by that same judge gives rise to a reasonable appearance of impropriety.

That inquiry is governed by the abuse of discretion standard of review. Id., at 824, 717 A.2d 1232. In applying that standard, we ask "whether an objective observer reasonably would doubt the judge's impartiality given the circumstances.... If an objective observer, in view of all of the facts would reasonably doubt the court's impartiality, the court's discretion would be abused if a motion to recuse were not granted. In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling.... Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Citation omitted; internal quotation marks omitted.) *Joyner v. Commissioner of Correction,* 55 Conn.App. 602, 609, 740 A.2d 424 (1999).

At its essence, the defendant's claim asks us to articulate a per se rule governing disqualification of judges that presumes judicial bias against a party each time a judgment is appealed. For several reasons, we decline that invitation.

First, the defendant's claim that there should be a per se rule conflicts with the precedent of our Supreme Court that "each case of alleged judicial impropriety *must* be evaluated on its own facts...." (Emphasis added.) *Abington Ltd. Partnership v. Heublein,* supra, 246 Conn. at 826, 717 A.2d 1232; see also *Joyner v. Commissioner of Correction,* supra, 55 Conn.App. at 609, 740 A.2d 424. Second, such a rule would directly conflict with a common practice of Connecticut courts. [5] Our appellate reports are replete with cases in which the same [97 Conn.App. 283] trial judge rendered judgment dissolving a marriage and

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then decided a subsequent motion for fees to defend an appeal. See, e.g., *Eslami v. Eslami,* 218 Conn. 801, 591 A.2d 411 (1991); *Blake v. Blake,* 211 Conn. 485, 560 A.2d 396 (1989); *Anderson v. Anderson,* 191 Conn. 46, 463 A.2d 578 (1983); *Barnes v. Barnes,* 190 Conn. 491, 460 A.2d 1302 (1983); *Brown v. Brown,* 190 Conn. 345, 460 A.2d 1287 (1983); *El Idrissi v. El Idrissi,* 173 Conn. 295, 377 A.2d 330 (1977); *Nowell v. Nowell,* 157 Conn. 470, 254 A.2d 889, cert. denied, 396 U.S. 844, 90 S.Ct. 68, 24 L.Ed.2d 94 (1969); *Bielan v. Bielan,* 135 Conn. 163, 62 A.2d 664 (1948); *Grosch v. Grosch,* 39 Conn.App. 614, 665 A.2d 918 (1995); *Gibson v. Gibson,* 34 Conn.App. 139, 640 A.2d 145 (1994); *Gallagher v. Gallagher,* 29 Conn.App. 482, 616 A.2d 281(1992); *Mailly v. Mailly,* 13 Conn.App. 185, 535 A.2d 385 (1988); *Bratz v. Bratz,* 4 Conn.App. 504, 495 A.2d 292 (1985); *Fisher v. Fisher,* 4 Conn.App. 97, 492 A.2d 525 (1985); *Holmes v. Holmes,* 2 Conn.App. 380, 478 A.2d 1046 (1984). The defendant's position, if adopted, also has the potential to open a Pandora's box within the judicial system. The defendant's claim posits that once a trial judge decides a matter Before him or her, the judge necessarily is biased against any subsequent action challenging the validity or propriety of that judgment. That claim is

not limited in its application to motions for fees to defend an appeal. Rather, it would apply with equal force to numerous postjudgment motions that trial judges regularly consider, such as motions for a new trial or for reconsideration.

Our consideration is further informed by three precepts discussed in Connecticut decisions addressing the appearance of impropriety. The first concerns the so-called extrajudicial source rule, which holds that the bias or prejudice sufficient to result in a disqualification "must stem from an extrajudicial source and result in [97 Conn.App. 284] an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.,* 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *Barca v. Barca,* 15 Conn.App. 604, 613, 546 A.2d 887, cert. denied, 209 Conn. 824, 552 A.2d 430 (1988). There was no evidence presented in this case that Judge Munro's decision was based on anything other than what she learned from her participation in the case.

A second precept pertains to a judge's involvement in multiple proceedings with the same party. In *State v. Webb,* supra, 238 Conn. at 461, 680 A.2d 147, our Supreme Court rejected "the defendant's argument that the mere fact that the same trial judge presided over both trials raises a reasonable question about the judge's impartiality. Courts have routinely held that the prior appearance of a party Before a trial judge does not reflect upon the judge's impartiality in a subsequent action involving that party." See also *In re Heather L.,* 274 Conn. 174, 177, 874 A.2d 796 (2005) ("respondent has provided no authority for the proposition that a judge's familiarity with a party's personal history by virtue of the judge's participation in a prior proceeding, standing alone and without any showing of bias, requires disqualification").

Finally, speculation is insufficient to establish an appearance of impropriety. As this court has explained, "[a] factual basis is necessary to determine whether a reasonable person, knowing all of the circumstances, might reasonably question the trial judge's impartiality.... It is a fundamental principle that to demonstrate bias sufficient to support a claim of judicial disqualification, the due administration of justice requires that such a demonstration be based on more than opinion or conclusion.... Vague and unverified assertions of opinion, speculation and conjecture cannot support a motion to recuse.... In

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addition, it is clear that adverse rulings by the judge do not amount to evidence [97 Conn.App. 285] of bias sufficient to support a claim of judicial disqualification." [6] (Citations omitted; internal quotation marks omitted.) *State v. Bunker,* 89 Conn.App. 605, 613, 874 A.2d 301, cert. granted on other grounds, 275 Conn. 903, 882 A.2d 677 (2005); see also *State v. Shabazz,* 246 Conn. 746, 769-70, 719 A.2d 440 (1998) (mere speculation insufficient), cert. denied, 525 U.S. 1179, 119 S.Ct. 1116, 143 L.Ed.2d 111 (1999). Rather, it is the moving party's burden to prove that the conduct in question gives rise to a reasonable appearance of impropriety. *Abington Ltd. Partnership v. Heublein,* supra, 246 Conn. at 820, 717 A.2d 1232. Therefore, our evaluation of the defendant's claim must center on whether the defendant proved that an objective observer reasonably would conclude that the act of filing an appeal from the judgment of a particular trial court, standing alone, automatically biases that judge against a party. Speculation has no place in that evaluation.

Without submitting any evidence in support of his claim, the defendant asks us to ratify his presumption that trial judges enter certain postjudgment proceedings with an inherent bias against a particular party. That we will not do. "[T]he law will not suppose a possibility of bias or favour in a judge, who is already sworn to [97 Conn.App. 286] administer impartial justice, and whose authority greatly depends upon that presumption and idea." *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 820, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986), quoting 3 W. Blackstone, Commentaries 361. To our eyes, the defendant's contention is mere speculation and conjecture divorced from any factual predicate of partiality.

Finally, we are mindful that review of the court's denial of the defendant's motion to disqualify is subject to the abuse of discretion standard. *Abington Ltd. Partnership v. Heublein,* supra, 246 Conn. at 824, 717 A.2d 1232. That standard requires us to indulge every reasonable presumption in favor of the correctness of the court's determination. Applying that standard to the present case, we reject the defendant's contention that an objective observer reasonably would conclude that the mere act of filing an appeal from the judgment of a particular trial court automatically biases that judge against a party in a postjudgment proceeding. The court therefore did not abuse its discretion in denying the motion to disqualify.

The judgment is affirmed.

In this opinion the other Judges concurred.

Notes:

[1] General Statutes § 46b-62 provides in relevant part: "In any proceeding seeking relief under the provisions of this chapter ... the court may order either spouse ... to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82...." That statute applies to motions for fees to defend an appeal. See, e.g., *Barnes v. Barnes,* 190 Conn. 491, 495, 460 A.2d 1302 (1983); *Larson v. Larson,* 89 Conn.App. 57, 70, 872 A.2d 912, cert. denied, 274 Conn. 915, 879 A.2d 892 (2005); *Messina v. Messina,* 22 Conn.App. 136, 140-41, 576 A.2d 579 (1990).

General Statutes 46b-82(a) provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall hear the witnesses, if any, of each party ... shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties...."

[2] We note that the defendant failed to comply with Practice Book § 1-23, which governs motions for judicial disqualification. Section 1-23 requires such motions to "be in writing and shall be accompanied by an affidavit setting forth the facts relied upon to show the grounds for disqualification and a certificate of the counsel of record that the motion is made in good faith. The motion shall be filed no less than ten days Before the time the case is called for trial or hearing, unless good cause is shown for failure to file within such time." Despite that procedural infirmity, we nevertheless address the merits of the defendant's claim due to the fact that the court acted on the defendant's oral motion without objection by the plaintiff and the gravity of the matter Before us. As our Supreme Court noted more than one-half century ago, "[n]o more elementary statement concerning the judiciary can be made than that the conduct of the trial judge must be characterized by the highest degree of impartiality." *Felix v. Hall-Brooke Sanitarium,* 140 Conn. 496, 501, 101 A.2d 500 (1953). Put more simply, "justice must satisfy the appearance of justice." *Offutt v. United States,* 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954).

[3] Although the defendant states in his brief that "[n]early all of the cases on this subject have some evidence of a judge making some kind of comment on the record that made the aggrieved party ... believe the judge might be prejudiced," he does not identify any such comment by the trial judge in the present case.

[4] One commentator has described the appearance of impropriety as "an inclusive catch-all provision" for analysis of alleged disqualifying judicial conduct. L. Abramson, "Appearance of Impropriety: Deciding When A Judge's Impartiality Might Reasonably Be Questioned," 14 Geo. J. Legal Ethics 55, 59 (2000).

[5] "Other things being equal, the more common a potentially biasing circumstance is ... the less that circumstance is likely to appear to a knowledgeable observer to be a sign of partiality." R. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges (1996) § 5.8.2, p. 172.

[6] At oral argument, counsel for the defendant opined that the "common man on the street" would deem the trial judge in the present case partial. Alleged disqualifying judicial conduct, however, should not be viewed through the perspective of the uninformed common person. "Courts should determine questions as to the appearance of impropriety or bias not by considering what a straw poll of the partly informed man-in-the-street would show or on the basis of possibilities and unsubstantiated allegations. Courts instead should examine the record, facts, and the law and then decide whether a reasonable person, if fully informed of the facts and circumstances underlying the grounds on which disqualification was sought, would conclude that the court's impartiality might reasonably be questioned, would harbor significant doubts about the judge's impartiality, or would disqualify the judge even though no actual bias has been shown." (Internal quotation marks omitted.) R. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges (1996) § 5.8.2, p. 171.
