No. 124676

In the

Supreme Court of Illinois

LOUISE ZAMUDIA f/k/a LOUISE OCHOA,

Plaintiff-Appellee,

v.

FRANK OCHOA, JR.,

Defendant-Appellant.

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

REPLY BRIEF OF APPELLANT FRANK OCHOA, JR.

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ARGUMENT

Considering the majority opinion from the Third District in the light cast by the Brief and Argument of Louise Zamudia provides a perspective on the opinion which actually reinforces the need for a reversal. It clarifies that the fundamental issue presented is – How is any interest in a pension to be characterized as marital or non-marital "acquired"? Section 503(a) directs that for purposes of an Illinois dissolution of marriage "marital property" means property "acquired" subsequent to the marriage.

Both of the parties, the trial court and the Third District consistently refer to the property being disputed as Frank Ochoa's State Retirement System Pension, which, while accurate, perhaps oversimplifies the more accurate description which is a right to receive monthly payments for life – what the financial and insurance system characterizes as an annuity. How does anyone "acquire" an annuity? More specifically, how does one acquire an Illinois public retirement system annuity? Louise's argument has certainly been consistent – both to the trial court, to the Third District and in her Brief and Argument to the Supreme Court. She contends:

> "Frank acquired his property right in his enhanced state benefit when he bought the permissive military credits while married to Louise." (Louise's Brief at page 14)

Again, in her Brief at page 15, she writes:

> "Frank's military service relates to the pension enhancement at issue here only because he and Louise paid the requisite monies to purchase the permissive service credits which make the enhancement marital property."

And then, at page 19:

> ". . . the pension at issue in this case requires a monetary contribution to the pension program in order to give meaning to Frank's active duty military service."

And finally, at page 20:

> "The pension enhancement only came into existence upon its purchase and that occurred while he was married to Louise."

It is submitted that Louise's reading of the Third District opinion misinterpreted that Court's explanation that the key factor was actually not the timing of the purchase, but rather the timing of the receipt of the first annuity payment. The *Ramsey* case, cited as being "instructive" involved a payment of the pension enhancement after the marriage had been dissolved. The Third District wrote that this *Ochoa* case is different from *Ramsey* not because of the timing of the payment but rather because:

> "Frank began receiving his annuity payments during the marriage."
> Opinion page 6.

This distinction then leads the Third District to the broad conclusion:

> ". . . to the extent that a pension benefit is a marital asset, any enhancement in value obtained during the marriage is also a marital asset subject to apportionment on an equitable basis."
> Opinion page 7.

That is the logical conclusion in the majority's opinion because it also announces that:

> ". . . the right to enhance the overall pension benefit accrued to his benefit as a result of his participation in the pension program, which provided the enhancement to member [sic] meeting the enhancement criteria."

Both Louis's argument and the Third District majority paint in broad strokes and in so doing, decline to consider two critical narrow aspects of the issue –

(1) What did the legislature intend when it used the term "acquire" in characterizing an asset as marital or non-marital? and

(2) What is the exact asset or property in this case and how was it "acquired"?

Instead of focusing on "acquire," the analysis uses terms like "derives" or "eligibility" to strain the conclusion to fit within the statute and existing case law.

ACQUIRE

Webster's New Collegiate Dictionary defines "acquire" as "to get as one's own" and "to come to have as a new or additional characteristic, trait or ability as by sustained effort or through environmental forces."

Black's Law Dictionary defines "acquire" as "to gain by any means, usually by one's own exertions."

THE PROPERTY

The "property" being divided in this case is an Illinois public pension annuity – not an insurance contract funded exclusively by payments, but a complex employee benefit package governed entirely by Illinois law and funded more by taxpayers than by participant contributions. Private pensions are governed by federal law known as ERISA and as such, are divided by a Qualified Domestic Relations Order. Illinois Public pensions, for all 13 Illinois Retirement Systems, including Judges' Pensions and General Assembly Pensions, are not subject to ERISA or to QDRO's. Since July 1, 1999, they are subject to division by QILDRO's. Additionally, by the same statute which characterizes all property as either

marital or non-marital, all pensions, both public and private, "may have both marital and non-marital characteristics." 750 ILCS 5/503(a)(6).

All Illinois public pension annuities calculate benefits upon a formula which factors in a combination of service credits and final average compensation. Contributions made by the employee are required under a separate statute but are not considered in the formula establishing benefits.

The question is – how does one acquire a public pension annuity? The answer is complicated. Indeed, Frank Ochoa's pension annuity benefits consisted of 320 service credits, considered along with his final average compensation.

There is no dispute whatsoever that the "regular service credits" Frank Ochoa earned by his employment prior to the marriage are deemed acquired prior to the marriage and are non-marital in character. "Regular service credits" earned during his employment after the marriage and before a dissolution are similarly indisputably marital in character. Thus, regardless of the timing or amounts or sources of contributions or the timing or amounts of disbursements, regular service credits are "acquired" or earned solely by virtue of when the work was performed – not when the pension goes into pay status or when the monetary contribution is made. Frank Ochoa also had 6 months permissive service credits from unused/unpaid sick time and 2.5 months of credits from sick/vacation time. These "enhancements" were not in dispute as to the timing of their acquisition only because there are no records of when they were acquired. Frank suggests that if he could have proven that all the unused sick or vacation time was during his years of regular service prior to the marriage, then those permissive credits would be non-marital, subject of course to

reimbursement to the marital estate of any purchase payment contributed during the marriage. Louise argues that since the purchase contribution occurred during the marriage, even permissive credits for vacation time unused ten years before the marriage would be marital regardless of when Frank actually "earned" or "acquired" the unused sick or vacation time. The Third District majority would presumably tell us that permissive service credits for unused sick or vacation time are a marital asset because they necessarily derive from the right to receive the pension and "to the extent" that the pension is a marital asset, the enhancement in value is also marital; although, it may also depend on whether the enhanced annuity began disbursement during the marriage since the Third District found that to be key.

However, if one accepts the definition of "acquired" as either the *Webster's* or *Black's* definitions, the permissive service credits in question – 48 months pursuant to 40 ILCS 5/14-104(j) which allow an employee to "establish service credit for a period of up to 4 years spent in active military service" suggest an acquisition at the time of the active military service. Indeed, by statute, the service credit is "established" by the active duty military service. Frank came to have those 48 months because of his sustained effort prior to the marriage. He gained them by his own exertions, not by writing a check or participating in the pension system and certainly he did not "acquire" them by accepting or cashing monthly benefit checks.

CONCLUSION

Frank Ochoa, by active duty military service many years before he met Louise Ochoa, "acquired" by his sustained effort and his own exertions, 48 months of permissive service credit for his State Employee Pension. By any terminology, the property interest "came into existence" or, as the Third District majority opinion writes in its second sentence, was "earned" before the marriage. The portion of the annuity of an additional $1,363.33 per month for life was not acquired by a purchase price of $9,088.86, but by actual service which the legislature chose to recognize and reward. It was not acquired because benefits were received during the marriage. The 48 months service credit and the portion of the annuity attributed to that credit is non-marital and the only interpretation of the statute under these facts is to reverse the Third District and reinstate the correct ruling of the trial court.

Respectfully submitted,

FRANK OCHOA, JR., Defendant-Petitioner
By WARD, MURRAY, PACE & JOHNSON, P.C.
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/s/ Paul A. Osborn
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 6 pages.

/s/ Paul A. Osborn
Paul A. Osborn

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

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

The undersigned, being first duly sworn, deposes and states that on August 14, 2019, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Appellant. Service of the Reply Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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

/s/ Paul A. Osborn
Paul A. Osborn

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

/s/ Paul A. Osborn
Paul A. Osborn

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