by Jerry Reiss and Michael R. Walsh

An In-Depth Look at Active Effort in the Appreciation of Nonmarital Assets

All assets acquired during marriage are presumed to be marital property.[1] These include assets brought into the marriage.[2] It is the burden of the spouse wishing to show otherwise to prove a nonmarital portion or portions.[3] When a spouse shows that nonmarital and marital assets were commingled, it is the burden of the spouse seeking a nonmarital classification to prove why these assets have not been transformed into marital property.[4] This is generally done by showing that these assets were kept separate and apart from other assets acquired or brought into the marriage or have separate characteristics that make them distinguishable from all other assets.[5] This means that assets readily identifiable, like an automobile, boat, or residence, cannot change ownership by the doctrine of commingling,[6] but only by a normal title transfer from one spouse to the other or to the spouses' joint names. Such a transfer is called an interspousal gift. When this occurs, it creates a very heavy burden on the spouse wishing to show otherwise.[7] Because monies are fungible, they must be kept in separate accounts and ownership must be separately titled and remain so during the marriage to retain its nonmarital character.[8]

Enhancement of Nonmarital Property

The earnings or growth of a nonmarital asset is deemed to be nonmarital property, unless the other spouse can show that it was actively managed during the marriage. This means proving that substantial time was spent in growing the asset. When active management of a nonmarital asset can be shown, it creates a presumption that the growth or income is marital property.[9] When growth or income is inextricably tied to the marital asset itself, this can sometimes transmute the entire asset into a marital category.[10] The other spouse can overcome this presumption, however, by showing that the growth included only passive effort.

Under F.S. §61.075(6), effort is either passive or active. In order to prove that the effort used in growing the asset is passive, there is an obligation to show correspondingly that it is not active, since the burden does not first exist unless the court finds that active management has occurred.[11] That often means showing that the same result could have been achieved with little or no effort and that the substantial labor used is really unrelated to the appreciation itself.[12]

Classification of Efforts

• *Active and Passive Effort* — F.S. §61.075(6)(a)1b defines "active effort" as "the enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both." There has been a great deal of confusion as to the meaning of this statute. But the key to understanding it is the phrase "resulting from" because the mere fact that there was effort does not in itself mean that the effort is otherwise "active." The growth in the asset must first result from that effort. It must be the primary causal source. Contrast this with income, which does not have to be the result of active effort. It may come from a nonmarital asset and, thus, provide only passive appreciation.

An encyclopedia definition of "passive income" is "income received on a regular basis with little effort required to maintain it. It is closely related to the concept of 'unearned income.'" It follows that passive income involves only passive effort. Therefore, the mere fact that the above quoted statute considers appreciation by passive effort to be a nonmarital asset is enough for one to conclude that when it takes little effort to produce that growth then that effort in and of itself should not transmute all of the appreciation in the subject asset in and to a marital classification, as many in the Fourth District cases have previously concluded.[13] When the effort involved in producing the growth is substantial, that sole fact does not mean that the asset is "actively" improved because the operative term in the determinative process reverts back to resulting from. When the same result could have been achieved with little or no effort, then it matters not that far more effort was really involved.[14]

• *Tangential Effort and Foundation of Efforts* — In reality, there are two other forms of effort discussed in the caselaw and the principles of

law cited therein: "tangential effort" and a "foundation of efforts."

Merriam Webster's Dictionary defines "tangential" as slightly or indirectly related to something; not closely connected to it. Therefore, tangential effort cannot be responsible for active improvement of a premarital asset because, by statute, if the premarital asset is actively improved, that improvement must necessarily result from the effort expended. By further example, if substantial effort was extended, in actively managing a pool of funds, then it is not active improvement if one can show that the effort was only tangential to the growth itself. This occurs when great effort was used to obtain a market result that could have been achieved in any event with little or no effort. For example, tangential effort occurs when one works past the cutoff date to vest a stock or option that was granted before the cutoff date, but is otherwise awarded now in recognition of past service.[15] The key point is that the growth involved may show tangential effort to be very substantial and yet it is found by the courts generally to be only a passive improvement.

Another type of effort is built on a foundation of efforts. A "foundation of efforts" is characterized when both marital and nonmarital effort contribute to the result.[16] When the result cannot possibly be achieved without the latter effort, many confuse the latter effort with what actually caused the given result. They justify the reasoning based on shining a light to allegedly reveal a "bright line" to the growth.[17] But no bright line alters the fact that the earlier effort built the foundation. Thus, remove the foundation and the end result could not have been achieved solely by the effort that followed. The operation of the foundation of efforts doctrine is in widespread use or is often characterized when a coverture or service fraction is used for the end result.

This concept revolves around employee perks, and other forms of compensation involving vesting, such as with stock options and stock,

Proving active growth with a nonmarital asset involves a two-step process. First, one must show active management of the asset, and the court must then make a finding that the asset was actively managed.

in which it has been previously determined that the stock awarded before the cutoff date is really only partially earned. Service-based vacation pay is built on a foundation of efforts because the amount of vacation time is determined by the amount of accumulated service. Pensions are built on a foundation of efforts. If it takes 20 years before an entitlement to benefits exists, the many cases classify it as only a "perk" that has not matured.[18] We also see this in pensions with an early retirement discount.[19] If the employee separated earlier than his or her normal retirement date, an early retirement discount may apply to the shared benefit. However, the spouse is not penalized based on a theoretical retirement on the cutoff date when the employee did not in fact separate early. A contingent fee may involve both marital and nonmarital effort and when it does, it will not materialize without the later effort. But that does not necessarily make it nonmarital property. It takes both marital and nonmarital effort to create the end result. Another type of effort is a hybrid between active and passive effort because both produce the end result.[20] One cannot classify the growth of an asset as marital or nonmarital by measuring only one effort. The marital period must contain growth attributable to the premarital period and the passive effort must be considered for the marital period.

Tools to Assist Classification of Efforts

Concluding the classification of efforts, there are tools that we use to aid the analysis in the classification of "the efforts" process. In truth, they often confuse the results as much as they help. Chief among them are "golden handcuff," "performance-based," "employer intent," and "cutoff date." Gleaning employer intent is seldom as simple as asking the CEO what he or she intended because what the CEO really intended can be shaped by the very circumstance of the inquiry. A CEO is not likely to admit that an unvested stock is already earned when the result of that testimony already allows the employed spouse to get one-half of that stock or change jobs thereafter and before the court awards any interest in the remaining one-half of the shares. If the stock vests on death, disability, or a change in company control produced by a merger/acquisition, that is indisputable proof of employer intent, despite what that testimony otherwise provides. All three can occur only one day after the cutoff date. Therefore, the frequency of the award, as suggested in *Jensen v. Jensen,* 824 So. 2d 315, 318-319 (Fla. 1st DCA 2002), may be moot. A key executive is essential to a smooth transition following the sale of the company and automatically vesting perks based on the company acquisition works against selling the business. Why would any CEO negotiate that benefit, unless it was already understood that the perk had already been earned by that person when it was granted, and the sole reason why it cannot be exercised before the merger is only about creating an incentive to otherwise remain employed through a "golden handcuff" transition?

The "cutoff date," defined by F.S. §61.075(7), is the last date that property may be acquired or sold for it to be classified as marital property. Its use in determining

nonmarital growth only adds to this confusion because the employer intent varies according to the circumstances upon which that intent is to be determined. Performance-based intent, used as a tool, adds to the confusion because performance-based perks can well have many nonperformance based components. Thus, all the term does is alert one to the likelihood that there will be a performance component in the perk asset, and that it must be separated out lest the entire value is swept into the nonmarital category.

Role That Active Management Plays

• *Active Management Under Florida Law* — Proving active growth with a nonmarital asset involves a two-step process.[21] First, one must show active management of the asset, and the court must then make a finding that the asset was actively managed. "Active management" only refers to the amount and quality of effort. Such a finding only means that the effort could have been responsible for the growth during the marriage. But as all assets acquired during the marriage are presumed marital, the burden then shifts to the owner of the asset to show why the appreciation is not marital property.[22] That would be done by showing into which category of effort it falls (and why) and by measuring how that effort contributed to the growth. For securities, this might include using market indexes (such as the DOW or the S&P 500) to create a baseline, where all growth below the baseline is nonmarital property and all growth above the line is actively improved, and, therefore, marital property.[23] If it is real estate, one might use the average increase in home values in a particular location.

Creating a baseline for a closely held business is far more complicated and requires looking at a number of other factors. As no conclusion of active effort can be made before active management is shown, one should first consider immediately challenging the court ruling on active management. Currently, Florida law is not that developed in this area, which brings us to the next point.

• *Active Management Under Missouri and North Carolina Law* — Most times, the court will make findings of active effort based only on perception, and little else. Because there is little caselaw in Florida dealing with active management,[24] that finding involves only pure discretion. Note that North Carolina and Missouri have developed this area of law by listing 11 criteria that the court should use before finding active management, based on measurements of the amount of effort and its quality. The Missouri Court of Appeals has repeatedly held that five factors must be shown in order for a spouse to be awarded a proportionate share of the increase in value of the other spouse's nonmarital property, including: "(1) a contribution of substantial services; (2) a direct correlation between those services and the increase in value; (3) the amount of the increase in value; (4) the performance of the services during the marriage; and (5) the value of the services, lack of compensation, or inadequate compensation."[25]

In adopting the Missouri criteria, the North Carolina court added the following six factors that a court must consider before concluding active management:[26]

> (1) [T]he nature of the investment; (2) the extent to which the investment decisions are made *only* by the party or parties, made by the party or parties in consultation with their investment broker, or solely made by the investment broker; (3) the frequency of contact between the investment broker and the parties; (4) whether the parties routinely made investment decisions in accordance with the recommendation of the investment broker, and the frequency with which the spouses made investment decisions contrary to the advice of the investment broker; [HN8] (5) whether the spouses conducted their own research and regularly monitored the investments in their accounts, or whether they primarily relied on information supplied by the investment broker; and (6) whether the decisions or other activities, if any, made solely by the parties directly contributed to the increased value of the investment account.[27]

• *Active Management and the Cutoff Date* — If one can show that the effort is unrelated to the growth, then that given effort is tangential to the growth. A prime example of tangential effort can be demonstrated with vesting in a stock option, particularly when all the criteria of the *Jenson* case are present.[28] The extra effort required to vest the options granted before the cutoff date is marital property even when annual awards are made to reward that extra effort after the cutoff date and despite the stock or options vesting on disability or

death.[29] Even though working past the cutoff date requires substantial effort, the grant was made based on service before the cutoff date, and, thus, the effort has nothing to do with the present appreciation. There are exceptions, however, based on the growth of company stock, when the employee is at top management, and when effort could then affect the growth of the company. But this exception is rare because no one individual is likely to have a measurable effect on the price of company stock. If there are targets set, then certainly the growth resulting from meeting the targets are clearly active improvements. But very few options have a target built into this goal.

The reader is encouraged to continue to monitor closely the development of Florida law as to this subject and the guidelines established in Missouri and North Carolina, and consider in advocating equitable distribution cases.

Rulings that utilize service fractions recognize that the property is built on a foundation of efforts.[30] Even when the vesting of the stock options require active effort, or when some of the service is needed for additional vesting, the marital service is just as responsible for future vesting as the service that comes after it. These rulings recognize that the vesting is built on a foundation of efforts (when used to create a benefit that did not exist on the cutoff date, as in mature benefits,) and service fractions are utilized to give the marital service its proper portion of the future vesting.[31] Retirement benefits and welfare benefits are the typical culprits when the issue of a foundation of efforts applies. Welfare benefits include workers' compensation, health benefits, disability benefits, vacation pay, prepaid legal service, and the like. The welfare benefits that create property do so only under the criteria set forth in *Weisfeld v. Weisfeld,* 545 So. 2d 1341 (Fla. 1989),[32] which is a ruling intended to apply *only* to welfare benefits, when nothing is earned and nothing vests. Note, however, that practically all district court decisions have nevertheless continued to apply *Weisfeld* in order to determine marital property of retirement benefits[33] (when vesting is addressed by two Florida Supreme Court rulings)[34] instead of the welfare portion of the disability retirement.[35] *Weisfeld* dealt with a workers' compensation benefit, a benefit that doesn't vest and is never earned in determining what portion is marital property.

> When measuring the growth of complicated financial instruments involving joint effort, the effort is no longer identifiable as either active or passive. Each incremental piece involves both efforts.

The Cutoff Date and Tangential Effort

If the effort involved in improving the marital property after the cutoff date is active, then the cutoff date works to create nonmarital property.[36] If the effort is instead passive, the improvement after the cutoff date is marital property. Therefore, if the effort improving something is tangential to the growth, it should not matter whether it is before or after the cutoff date. It is passive.

When unvested stock options require working after the cutoff date in order to vest, this work is considered passive improvement if the employer intent shows that the award was made for past service; but is considered active improvement if the intent shows that only the vested stock is awarded for past service.[37] In the first example, the work after the cutoff date is considered passive effort and the increased vesting afterwards is solely a golden handcuff. In the second example, the same work effort is considered active effort, but to the extent that the increment on extra vesting overlaps with the cutoff date, the work effort after the cutoff date, but before the incremental period ends involves tangential effort. After that, it involves active effort.[38] When a ripened benefit that may be shared is the issue, working past the cutoff date is also considered a passive effort.[39]

Where, under *Boyett v. Boyett*, 703 So. 2d 451 (Fla. 1997),[40] is the work effort earning the higher salary past the cutoff date one bit different than working the same extra years in order to qualify in the lesser early retirement discount (which is the equivalent to earning an early retirement subsidy)? If that ruling applies to salary, why does it not apply to the lesser reduction when it involves the exact same years worked?[41] Why is using the marital foundation theory proper provided it applies to benefits before the cutoff date?[42] When used that way, the benefits built during the marriage give credit to the earlier service for the foundation it built, by allowing the earlier nonmarital foundation share in the salary increases earned during the marriage. Why does the foundation treatment end with the cutoff date? Is what's good for the goose good for the gander, provided it happened before the cutoff date?[43]

In all of these questions, however, *Boyett* determined that for defined benefit pension plans, the higher salary earned after the cutoff date is nonmarital property when it is used to determine the marital portion of benefit. This means that cost-of-living adjustments on salary paid after the cutoff date create nonmarital property when it strictly applies to the service benefit accrued before the cutoff date. This represents the present law in Florida and as it is readily apparent, the court eviscerated the "marital foundation theory" at the cutoff date.

Subsequent district court decisions note a tendency from our

jurists to use the bright-line theory. This is particularly true when the issues before the courts do not involve complicated financial instruments. It is obviously apparent that, under scrutiny, the bright-line theory no longer works with these instruments, and the courts instead tend to revert back to the marital foundation theory by using coverture fractions because the property is earned with a foundation of efforts (and because it simplifies the measurement). This applies to executive stock options and executive stock, defined benefit pension plans, certain welfare benefit plans that work along defined benefit pension plan principles, like vacation pay, to gradually forgivable loans used in a signing bonus when given, and any type of perk or compensation the amount of which is service related.

Conclusion

The equitable distribution statute, F.S. §61.075, defines two types of effort used to improve property: active and passive. Even though passive effort is understood to involve little or no effort, if no part of the effort is active, then by statute it must be *passive*. Effort can be substantial and yet be passive if the same growth could have been achieved with little or no effort. In this case, the substantial effort is tangential to the growth, and the growth itself did not result from that effort. There is a fourth type of effort involved with the growth of certain assets. The relevant theory here is a foundation of efforts. It has nothing to do with the cutoff date because each incremental year is based on joint effort. Nothing built before it would have resulted in the growth it achieved afterward without both efforts, and this is particularly true for every incremental piece after the marriage began. Because of this joint effort, all increments since the work began are earned uniformly and they are all equal to one another. Conforming this growth to our statutory definition of the cutoff date, all that is necessary now is restricting the numerator to the marital months of service (ending with the cutoff date). The denominator should be all months building the fully matured property.

When measuring the growth of complicated financial instruments involving joint effort, the effort is no longer identifiable as either active or passive. Each incremental piece involves both efforts. This increases the marital service-related portion by the *passive* portion of each piece that follows the cutoff date, and the active portion after the cutoff date increases the amount of nonmarital property.❑

[1] The 1988 equitable distribution statute changed the *Ball v. Ball*, 335 So. 2d 5 (Fla. 1976), standard, when the nonowning spouse wanting to share property had the burden of proving a marital portion to the reverse burden, and when the owning spouse had the burden to show a nonmarital portion to be entitled to retain any portion of it. *See Robertson v. Robertson*, 593 So. 2d 491(Fla. 1991) (real property); *Crouch v. Crouch*, 898 So. 2d 177 (Fla. 5th DCA 2005) (all other property).

[2] FLA. STAT. §61.075(6)(a)1b (2014).

[3] *Robertson*, 593 So. 2d at 491; *Williams v. Williams*, 667 So. 2d 915, 916-917 (Fla. 2d DCA 1996); *Abdnour v. Abdnour*, 19 So. 3d 357, 364 (Fla. 2d DCA 2009).

[4] *Young v. Young*, 606 So. 2d 1267 (Fla. 1st DCA 1992); *Crouch*, 898 So. 2d at 177.

[5] *Williams v. Williams*, 686 So. 2d 805 (Fla. 4th DCA 1997); *Archer v. Archer*, 712 So. 2d 1198 (Fla. 5th DCA 1998); *Adkins v. Adkins*, 650 So. 2d 61 (Fla. 3d DCA 1994); *Belmont v. Belmont*, 761 So. 2d 406 (Fla. 2d DCA 2000); *O'Neil v. Drummond*, 824 So. 2d 1032 (Fla. 1st DCA 2002).

[6] *Robertson*, 593 So. 2d at 491; *Straley v. Frank*, 612 So. 2d 610 (Fla. 2d DCA 1992).

[7] *Robertson*, 593 So. 2d at 491; *Young*, 606 So. 2d at 1267; *Crouch*, 898 So. 2d at 177.

[8] Unless there were no transactions afterward: *See Crouch*, 898 So. 2d at 177; *Williams*, 686 So. 2d at 805; *Pinder v. Pinder*, 750 So. 2d 651 (Fla. 2d DCA 1999); and *Spielberger v. Spielberger*, 712 So. 2d 835 (Fla. 4th DCA 1998).

[9] *O'Neill v. O'Neill*, 868 So. 2d 3, 5 (Fla. 4th DCA 2004) (citing *Young v. Young*, 606 So. 2d 1267, 1270 (Fla. 1st DCA 1992)); *Augoshe v. Lehman*, 962 So. 2d 398, 402 (Fla. 2d DCA 2007); *Yitzhari v. Yitzhari*, 906 So. 2d 1250, 1254 (Fla. 3d DCA 2005).

[10] *Robbie v. Robbie*, 654 So. 2d 616, 617 (Fla. 4th DCA 2005).

[11] *O'Neill*, 868 So. 2d at 5 (citing *Young*, 606 So. 2d at 1270); *Augoshe*, 962 So. 2d at 402; *Yitzhari*, 906 So. 2d at 1254.

[12] *O'Neill*, 868 So. 2d at 4-5.

[13] *See, e.g., Pagano v. Pagano*, 665 So. 2d 370, 371-372 (Fla. 4th DCA 1996).

[14] *O'Neill*, 868 So. 2d at 4-5.

[15] In coming to its conclusion that the unvested stocks were awarded for marital effort, the court pointed out that the award obviously was made for past service because it was typical to award stock annually under the company policy. Concluding it was entirely for past service, the court noted that along with the award was a provision that provided immediate vesting should the employee die or become disabled one day afterward. *See Jensen v. Jensen*, 824 So. 2d 315, 318-319 (Fla. 1st DCA 2002).

[16] *Majauskas v. Majauskas*, 463 N.E. 2d 15, 21 (N.Y. 1984) (reaching an entirely different result on almost identical facts as existed in *Boyett v. Boyett*, 703 So. 2d 451 (Fla. 1997). *See also Parry v. Parry*, 933 So. 2d 9, 14 (Fla. 2d DCA 2006), which awards the portion of the vesting in a stock option that was earned after the cutoff date, based on the marital contribution that it had in the incremental vesting process. This is important because that work effort came after the cutoff date, when vesting was determined as the percentage of the benefit earned on the cutoff date.

[17] *HSBS Bank USA, NA v. Serban*, 148 So. 3d 1287, 1290-91 (Fla. 1st DCA 2014); *Jarrard v. Jarrard*, 157 So. 3d 332, n.4 (Fla. 2d DCA 2015); *Tradler v. Tradler*, 100 So. 3d 735 (Fla. 2d DCA

2012).

[18] *DeLoach v. DeLoach*, 590 So. 2d 956, 958 (Fla. 1st DCA 1991) (citing *Diffenderfer v. Diffenderfer*, 491 So. 2d 265, 266 (Fla. 1986)).

[19] *Boyett*, 703 So. 2d at 453.

[20] *Roberts v. Roberts*, 689 So. 2d 378, 388 (Fla. 4th DCA 1997) (citing *Williams*, 683 So. 2d at 1121).

[21] *See O'Neill*, 868 So. 2d at 4-5.

[22] *Id.*

[23] *Chapman v. Chapman*, 858 So. 2d 118, 18-19 (Fla. 4th DCA 2005)

[24] *Compare Adkins*, 650 So. 2d at 66 (no effort was involved) *with Fredel v. Fredel*, 531 So. 2d 981, 981-982 (Fla. 3d DCA 1988) (the value of the assets traded improved by 2,000 percent (20 times) over 20 years). This caselaw shows both extremes either where no or insignificant labor is involved, or where the labor was sufficient to create a full-time job over the 20 years. There is no caselaw in Florida that quantifies the amount or quality of labor, as North Carolina does, or which requires a five-step process showing that the increase was a direct result of the labors, as Missouri does before ruling that the increase involved active management.

[25] *Meservey v. Meservey*, 841 S.W.2d 240, 245-46 (Mo. Ct. App. 1992).

[26] These out-of-state rulings should have best been used in *Robbie*, when a person with a menial job worked that job and this effort was deemed active management. This is how *Pagano* was born and why most concluded from the two rulings that just a little bit of effort transformed the entire closely held business into marital property.

[27] *O'Brien v. O'Brien*, 508 S.E.2d 300, 307 (N.C. App. 1998).

[28] *Id.*

[29] *Jensen*, 824 So. 2d at 315.

[30] *Boyett*, 703 So. 2d at 453 (citing *Trant v. Trant*, 545 So. 2d 428, 429 (Fla. 2d DCA 1989)).

[31] *Parry*, 933 So. 2d at 14 (company stock); *Bikowitz v. Bikowitz*, 104 So. 3d 1137, 39-40 (Fla. 2d DCA, 2012) (proportionate share of an executive bonus); *Kumar v. Kumar*, 84 So. 3d 399 (Fla. 2d DCA 2012) (passive interest in a CD paid after the cutoff date); *Chehab v. Hamilton-Chehab*, 45 So. 3d 533, 535-536 (Fla. 5th DCA, 2012) (Disney stock awarded after the cutoff date, based on marital service before).

[32] *Weisfeld*, 545 So. 2d 1341 (Fla. 1989).

[33] *See Brogdon v. Brogdon*, 537 So. 2d 1064, 1066 (Fla 1st DCA 1988); *Pilney v. Pilney*, 658 So. 2d 1110, 11-12 (Fla. 5th DCA 1995); *Rumler v. Rumler*, 932 So. 2d 1165, 1166 (Fla. 2d DCA 2006); and *Gaffney v. Gaffney*, 965 So. 2d 1217, 1221 (Fla. 4th DCA 2007), all holding that only the retirement benefits earned before the onset of disability are property. *Weisfeld*, 545 So. 2d 1341 ("[T]he marital property subject to distribution includes the amount of the award for lost wages or lost earning capacity during the marriage of the parties and medical expenses paid out of marital funds during the marriage. The marital property should also include those funds for which no allocation can be made."). At the outset of permanent disability retirement, all future benefits vest. Retirement benefits can never be reduced (or changed). *Weisfeld* then applies to all other benefits. To the extent that benefits increase after the retirement age, these replace wages no differently than an ordinary retirement plan does. If the person is retired, he or she is not working, or would not be working. Those benefits (if any) fit the *Weisfeld* criteria as property, and as they were not originally part of the retirement benefit structure, they are now a true portion of the welfare benefit according to the design of the ruling.

[34] *See Florida Sheriff's Ass'n v. Dept. of Admin.*, 408 So. 2d 1033, 1037 (Fla. 1981); and *Branca v. City of Miramar*, 634 So. 2d 604, 606-607 (Fla. 1994), both holding that once vested the city or state cannot reduce benefits that were earned up to and including any future time that the legislature changes the benefits. Essentially, Florida aligned itself in 1981 with the anti-cutback rule provided for in ERISA.

[35] Florida courts continually confuse disability retirement with disability benefits by concluding that the enabling disability event converts the retirement benefits into disability benefits. That is not possible because both ERISA and stare decisis prevent this by embracing the anti-cutback rule. Disability retirement is a retirement benefit, and because of the onset of disability, it now *includes* a welfare disability component.

[36] *See Boyett*, 703 So. 2d at 453.

[37] *Ruberg v. Ruberg*, 848 So. 2d 1147, 52-53 (Fla. 2d DCA 2003).

[38] *Parry*, 933 So. 2d at 14. Increasing the vesting percentage itself involves tangential effort, but the extra property it creates is built on a foundation of efforts, and the extra property created involves both passive and active effort, divided strictly based on the proportion of time that the marriage plays in creating that extra property.

[39] *DeLoach*, 590 So. 2d at 958 (citing *Diffenderfer*, 491 So. 2d at 266). The unvested property is marital property under the statutes. Thus, working the marital years is the marital service portion of the entire property. That is the passive portion resulting from the foundation of efforts.

[40] *Boyett*, 703 So. 2d 451 (Fla. 1997).

[41] *HSBS Bank USA, NA*, 148 So. 3d at 1290-1291; *Jarrard*, 157 So. 3d at n.4; *Tradler*, 100 So. 3d at 735.

[42] *O'Brien*, 508 S.E.2d at 307.

[43] *See* Jerry Reiss & David A. Thompson, *Dividing Pension Property After Boyett, PI*, 75 FLA. B. J. 47 (Feb. 2001); Jerry Reiss & David A. Thompson, *Dividing Pension Property After Boyett, PII*, 75 FLA. B. J. 38 (Mar. 2001).

Michael R. Walsh *has a J.D., 1963, from Duke University. He is a member of The Florida Bar and the Orange County Bar Associations, and is Florida Bar certified in marital and family law. He maintains a law practice in Winter Park.*

Jerry Reiss *is licensed by the joint board (IRS/DOL) to do pension work and has 25 years of forensic experience on nearly every financial matter. He is a frequent contributor to The Florida Bar* Journal.

This column is submitted on behalf of the Family Law Section, Maria C. Gonzalez, chair, and Sarah Kay, editor.