S203561

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE THE MARRIAGE OF JULIE R. GREEN

and TIMOTHY P. GREEN

JULIE R. GREEN,

Respondent,

vs.

TIMOTHY P. GREEN,

Petitioner.

REPLY BRIEF ON THE MERITS

On Appeal from the Contra Costa County Superior Court, Case no. DR 41290, Hon. Charles B. Burch, Presiding, following a May 16, 2012 Opinion of the First District Court of Appeal, Division Four, in Case no. A129436

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I. INTRODUCTION

Although CalPERS public service is by statute credited "as it would be credited if the member had been in state service during his or her public service," respondent Julie Green ('Julie') insists that petitioner Timothy Green has no separate property interest whatsoever in credits resulting from his four years of premarital military service. (Government Code section 21034[1].) Her position is based on a misleading depiction of the facts[2] and a dubious construction of the law. The trial court has properly compensated the community for its contributions to the service credits, and its Order should be affirmed.

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[1] All further statutory references are to the Government Code.

[2] Julie's depiction of the 'facts' such distortions repeatedly represents to this Court that Timothy "agreed" that she could pay half of the post-separation installments, based solely on his statement that "parties can negotiate anything they want .... However Mr. Green **adamantly opposes** Ms. Green's request that she be permitted to participate in the post-separation buyback of his military time. (Compare AA 90 [emphasis added] and ABM pp. 5, 6, 19, 20, 32.) Her Answer Brief on the Merits repeatedly cites (and even quotes from) an unauthenticated document attached to her trial brief that was never admitted in evidence. (ABM 5, 6, 19, 20 [partial quote], 32; citing AA 131.) Julie also represents that "both parties' trial briefs estimate the value [of the service credits] at $140,000," when Timothy simply noted that Julie used this figure in her trial brief. (Compare ABM 10 and AA 115.)

II. ARGUMENT

A. THE EMPLOYER'S HYPOTHETICAL ABILITY TO STOP OFFERING MILITARY SERVICE CREDITS PRIOR TO TIMOTHY'S PURCHASE DID NOT RENDER HIS INTEREST AN 'EXPECTANCY'

The lynchpin of the Court of Appeal's Opinion is its erroneous conclusion, at Julie's urging, that just because Timothy's CalPERS employer hypothetically could have (but didn't) stop offering the military service credit option, the benefit was "no more than an 'expectancy,' which is not a property right divisible upon dissolution of marriage." (Opinion at p. 9.) This position improperly adopts a rationalization rejected by this Court 37 years ago.

> The principle established by these cases is that pensions become community property, subject to division in a divorce, when and to the extent that the party is certain to receive some payment or recovery of funds. To the extent that payment is, at the time of the divorce, subject to conditions which may or may not occur, the pension is an expectancy, not subject to division as community property.
> (*Williamson v. Williamson* (1962) 203 Cal.App.2d 8, 11; overruled by *In re Marriage of Brown* (1976) 15 Cal.3d 838, 844, 851 fn. 14.)

In contrast, modern cases recognize that "By its very nature, a pension right ... [is] generally **subject to changes in the terms of a retirement plan**, as well as to circumstances largely beyond [the parties'] control." (*In re Marriage of Lehman* (1998) 18 Cal. 4th 169, 183-184 [emphasis added].

See also *In re Marriage of Davis* (2004) 120 Cal.App.4th 1007, 1016-1017.) "The fact that a contractual right is contingent upon future events," such as the employer continuing the benefit and the employee exercising the option, "**does not degrade that right to an expectancy**. The law has long recognized that a contingent future interest is property **no matter how improbable the contingency**...." (*Brown, supra,* 15 Cal.3d at 846 fn. 8 [emphasis added][internal citations omitted].)

Contingent pension rights, such as military public service credits, are subject to property characterization, even if those rights are "subject to divestment" by subsequent events. (*Brown, supra,* 15 Cal.3d at 842 fn. 2 and accompanying text. See also *Lehman, supra,* 18 Cal.4th at 184.) Here, it is speculation that the employer theoretically could have (but in fact did not) discontinued the military service credit option, a scenario both "improbable" and which in any event doesn't render this valuable property right a mere 'expectancy.' (*Brown, supra,* 15 Cal.3d at 846 fn. 8; Opinion at pp. 8-11.)

As has been observed regarding analytically analogous[3] federal OASDI social security benefits:

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[3] Analysis of such benefits have been deemed "legally analogous to [such] other pension plans" as private retirement plans, pension rights created by act of the state Legislature, federal military pension benefits, and benefits afforded by the

> Although Congress **may have the power to terminate** OASDI benefits, **no one expects it to be exercised.** The California Supreme Court held military retirement pensions **subject to California property law** in *Fithian* ... **despite the fact** "the federal **government may increase, diminish, or completely abolish**" the plan. The fact that Congress, in its discretion, **may withdraw benefits** at any time **has no impact on the state's ability to characterize them** for its own purposes under local principles of property law. (*In re Marriage of Hillerman* (1980) 109 Cal. App. 3d 334, 340 [internal citations omitted][emphasis added]. See also *In re Marriage of Fithian* (1974) 10 Cal. 3d 592, 602 fn.14 & accompanying text.)

The error here is illustrated by the fact that, applying the Court of Appeal's logic, the Husband's option to purchase service credit in the *Sonne* case would have been deemed a 'mere contingency' not subject to property characterization prior to its exercise. (Cf. ABM 22-23.) Such an analysis is contrary to this Court's determination that, upon his transfer of a portion of his pension to his first wife, Mr. Sonne "retained, as his separate property, a right to recoup that service credit in the event [she] were to withdraw the assets in her nonmember account." (*In re Marriage of Sonne* (2010) 48 Cal. 4th 118, 126.)

The contingencies in *Sonne* – that the first wife would cash in the pension awarded to her, that the Legislature would not change Section 20751, and that then Mr. Sonne would redeposit the funds with interest – are

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federal civil service retirement plan. (*In re Marriage of Hillerman* (1980) 109 Cal. App. 3d 334, 340.)

no more speculative than those affecting Timothy's premarital right to exercise purchase military service credits. As with Mr. Sonne, prior to marriage Timothy already had a separate property right to purchase military service credits, because "property to which one spouse has acquired an equitable right before marriage is separate property, though such right is not perfected until after marriage." (*Ibid*; quoting *In re Marriage of Joaquin* (1987) 193 Cal.App.3d 1529, 1533. See also Petitioner's Request for Judicial Notice (10/24/12) CalPERS, Vested Rights of CalPERS Members (July 2011) p. 13.)

The Court of Appeal has found that prior to marriage Timothy held "wholly within his control ... the right to enter into a contract with CalPERS for the purchase of military service credit." Nonetheless, the Court of Appeal concluded that Timothy "did not hold a **contractual right** to the military service credit, derived from the terms of the employment contract," and therefore only had an expectancy interest. (Opinion at 10-11 [emphasis in original] [internal punctuation omitted].) Respectfully, this analysis is erroneous.

Under well established law, Timothy accrued a contractual right to purchase military service credits when his premarital CalPERS employment began:

> As a general rule, the terms and conditions of public employment are controlled by statute or ordinance rather than by contract. However, public employment gives rise to certain obligations which are protected by the contract clause of the Constitution. By entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer. (*California Association of Professional Scientists v. Schwartzenegger* (2006) 137 Cal.App.4th 371, 375-376. See also *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863; *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 38-39.)

The fact that Timothy did not exercise this preexisting contractual right until after the parties' marriage does not affect when this right vested:

> Insofar as the **time** of vesting is concerned, there is little reason to make a distinction between the periods before and after the pension payments are due. It is true that an employee does not earn the right to a full pension until he has completed the prescribed period of service, but he has actually earned some pension rights as soon as he has performed substantial services for his employer. ... [T]he mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due. Clearly, it cannot do so after all the contingencies have happened, and in our opinion it cannot do so at any time after a contractual duty to make salary payments has arisen, since a part of the compensation which the employee has at that time earned consists of his pension rights. (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855 [original emphasis in bold; added emphasis underlined]. See also *County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 43 fn. 13.)

The Court of Appeal was similarly mistaken in concluding that Timothy's fully matured premarital right to purchase military service credits was divested simply because "[p]resumably the employer could elect at some point to no longer be subject to section 21024." (Opinion at p. 9.) To the contrary, such pension rights are not so readily jettisoned:

> While some jurisdictions view public employees' retirement rights as a gratuity, California is firmly committed to the proposition that these rights are contractual; that **they are 'vested' in the sense that the lawmakers' power to alter them after they have been earned is quite limited**.... "By entering public service an employee obtains a **vested contractual right** to earn a pension on terms substantially equivalent to those then offered by the employer." (*Schwarzenegger, supra,* 137 Cal.App.4th at 383 [citations omitted][emphasis added] See also *Gatewood v. Board of Retirement* (1985) 175 Cal.App.3d 311, 319-320.)

In consonance with these principles, the Legislature has provided that a CalPERS contracting agency cannot reduce the retirement benefits of current employees unless an ordinance implementing the change is passed in a noticed public election, or the workers vote to approve the change. (See Sections 20460, 20471-20478.) By section 21024's own terms, any such change by a public employer would have to be done "by amendment to its contract made in the manner prescribed for approval of contracts," including negotiation with the employees' collective bargaining unit. (*San Bernardino Public Employees Association v. City of Fontana* (1998) 67 Cal.App.4th

1215, 1220; Section 3505.) In short, Timothy's employer could not simply abruptly terminate public service credit purchase rights, and Timothy would have received ample notice and opportunity to purchase the credits prior to any proposed change to this valuable retirement benefit.

Brown and its progeny reject the postulate that premarital pension rights dissipate into non-vested expectancies, if they are not exercised before marriage. (*Brown, supra,* 15 Cal.3d at 841-842.) Under *Sonne*, service credits available prior to marriage do not change character simply because purchase rights are exercised after marriage. (*Sonne, supra,* 48 Cal. 4th at 126-127.) Under the applicable principles, Timothy's right to purchase military public service credits vested prior to marriage, and was no mere 'expectancy.'

B. THE TRIAL COURT'S ORDER APPROPRIATELY REFLECTS THE COMMUNITY'S CONTRIBUTION TOWARD HUSBAND'S MILITARY SERVICE CREDITS

In *Lehman*, this Court directed that trial courts apportioning retirement benefits "must arrive at a result that is reasonable and fairly representative of the relative contributions of the community and separate estates." (*In re Lehman, supra,* 18 Cal.4th at 187.) [internal punctuation omitted].) Julie's position that the community is entitled to credit for 100% of Timothy's

premarital public service years fails to comport with this standard, and should be rejected. (ABM pp. 6, 20, 24, 35.)

Timothy paid a purchase price having two elements: (a) the amount of ordinary payroll retirement contributions that a CalPERS member would have made if working for a covered employer during the applicable public service period (plus interest); and (b) an actuarial value calculated by CalPERS to cover an "increase in employer liability" caused by the service credit purchase. (Sections 21024, subd. (b), 21050-21052.)[4]

Under the CalPERS statutes, both of these payments are "normal contributions," which by definition are part of the **annuity** portion of the retirement account. (Sections 20018, 20053, 21038; *Sonne, supra,* 48 Cal.App.4th at 127.) This classification is significant, because the ultimate retirement allowance:

> ... consists of an **annuity** (which is funded by member contributions deducted from the member's paycheck and interest thereon) and a **pension** (which is funded by employer contributions and which must be sufficient, when added to the annuity, to satisfy the amount specified in the benefit formula).

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[4] Julie is mistaken in claiming that section 21051 is inapplicable. (ABM p. 17 fn. 1.) Section 21050 says a service credit election should be accompanied by a payment, but doesn't say how the payment amount is determined. Section 21051 explains that the required contributions "in accordance with Section 21050" include payment of the annuity. (Section 21051, subd. (a)(1).)

(*Sonne, supra*, 148 Cal.App.4th at 121 [emphasis in original]. See also *Id.* at 127; Section 21362.)

Here, as in *Sonne*, there are "two distinct components of Husband's retirement allowance – the annuity and the pension – only one of which derived from Husband-Wife community contributions;" i.e., the annuity. (*Sonne, supra*, 148 Cal.App.4th at 124-125.) "The obligation of the employer to contribute to the pension component, on the other hand, derived from Husband's service.... Accordingly, the community had a claim only on the annuity component ... of Husband's retirement allowance." (*Id.* at 127-128.) The same is true here.

Under these circumstances, it is disturbing for Julie to insist that Timothy's life-imperiling military service supplied none of the consideration underlying the military service credits, and that by participating in $11,462.56 of marital payroll deductions the community acquired 100% of both the annuity and the pension for the four years Timothy spent serving in the Air Force. (ABM pp. 6, 20, 24, 35; AA 90.) Julie's self-serving insistence that public service credits are so inferior to actual service credits as to create no separate property interest whatsoever for the party actually performing the underlying premarital service is contrary to the statutory scheme. (ABM pp. 17-18, 27.)

Under section 21034, public service "may be credited as current or prior service, or both," and is credited "as it would be credited if the member had been in state service during his or her public service." Contrary to Julie's 'enhancement' argument, Timothy's military public service is no more 'fictive' than other forms of public service, such as creditable service for work performed at a public entity prior to its becoming a CalPERS agency (sections 21025, 21031), or time spent providing seasonal or temporary work for a CalPERS employer (section 21028). (Cf. ABM 29-34.) Pursuant to section 21034, the military service is "service that accrues a right to benefits, [and] qualifies to give the estate providing that service an interest in those benefits." (*In re Marriage of Frahm* (1996) 45 Cal.App.4th 536, 544. Cf. ACB p. 39.)

Thus, the only question here is whether the trial court properly compensated the community for its $11,462.56 contribution toward the annuity portion of Husband's service credits. The court ordered that the community be reimbursed for the amount it paid toward the service credit purchase price, plus interest at six percent interest (pinned to the rate CalPERS pays employees for refunded contributions). (AA 144, 156; RT 40-43; Section 20178.) This methodology was more than fair to the community.

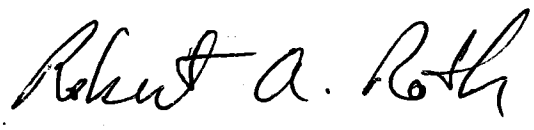
The price of the "increase in employer liability" annuity component of the purchase was, by statute, a precise actuarial value calculated by CalPERS. (Section 21052.) Likewise, the ordinary annuity contributions with interest for the four military service years was determined with certainty when CalPERS determined Timothy's payroll installment payment plan. (AA 143.) Given that neither party provided the court with an actuarial expert to determine the community contribution with more precision, reimbursement with interest was more than reasonable under the circumstances. Accordingly, the trial court's Order should be affirmed.

III. CONCLUSION

For the reasons stated herein, petitioner Timothy Green respectfully requests that this Court grant review; reverse the Court of Appeal's Opinion; affirm the trial court's order; and grant such other relief as the Court deems appropriate.

Date: January 30, 2013

Respectfully Submitted,
TARKINGTON, O'NEILL, BARRACK & CHONG



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IV. CERTIFICATION OF WORD COUNT

The text of this brief consists of less than 2,500 words, as counted by the word-processing program used to generate the brief.

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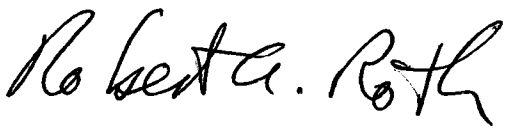

ROBERT A. ROTH

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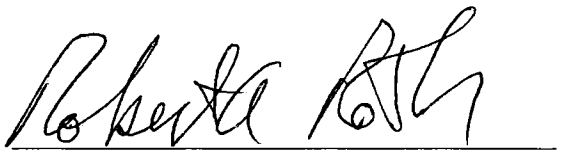
I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Date: January 30, 2013



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