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 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 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., 748. My primary disagreement with the majority relates to the analysis that we employ to make that determination, 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 occur-

rence 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. 268, 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. Id., 286. Similarly, in *Bornemann* v. *Bornemann*, supra, 245 Conn. 510, 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., 518. In addition, in *Krafick* v. *Krafick*, supra, 234 Conn. 785, 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., 797.

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 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 was unlikely to occur is not relevant 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. 286; *Bornemann* v. *Bornemann*, supra, 245 Conn. 518. 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 employment

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 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, § 5-192*l* (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 of the respective interest is concerned. Thus, if the majority considers the "ten or more years of vesting service" language of § 5-192*l* 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 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. 529. Moreover, we have recognized that "[e]xamining 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. 752 ("[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.

[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. 748. 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., 749–50.

[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. 270–71 and

n.7, 286.

[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. 797.

[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. 749–50 (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*.