

No. 33043

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

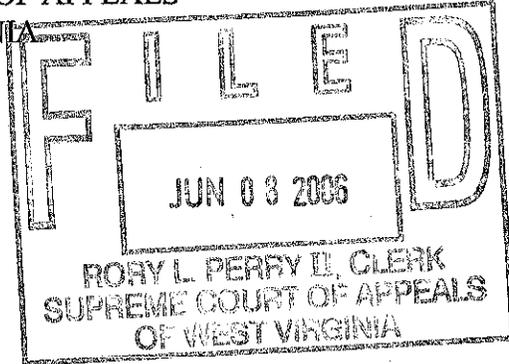
PATRICIA E. FITZGERALD,

Petitioner below,

and

EARL L. FITZGERALD,

Respondent below.



PETITIONER'S BRIEF UPON CERTIFIED
QUESTION FROM THE CIRCUIT
COURT OF PUTNAM COUNTY

Submitted by:

Beverly S. Selby (WV Bar No. 4721)
1200 Boulevard Tower
1018 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 342-0411

Nature of Proceedings

This case comes before this Honorable Court upon certified questions propounded by the Honorable N. Edward Eagloski, II, Judge of the Circuit Court of Putnam County pursuant to West Virginia Code, §58-5-2 and Rule 13 of the West Virginia Rules of Appellate Procedure. The underlying case is a divorce proceeding in which all matters have been resolved except issues concerning how to treat Workers' Compensation benefits. The questions certified by the circuit court and the circuit court's responses thereto are as follows:

QUESTION NO. 1: What portion, if any, of a lump sum Workers' Compensation permanent total disability award is considered a marital asset?

COURT'S RESPONSE: The Court FINDS that any portion of a lump sum Workers' Compensation permanent total disability award that represents payments that should have been received during the period of the parties' marriage are considered a marital asset.

QUESTION NO. 2: If so, what portion, if any, of a lump sum Workers' Compensation permanent total disability award should be considered an award for pain and suffering?

COURT'S RESPONSE: The circuit court adopts the analysis of the family court and FINDS that the 25% of the Workers' Compensation award for pain and suffering is the injured spouse's separate property.

QUESTION NO. 3: How should the family court, and upon review, the circuit court, distribute that portion, if any, of a lump sum Workers' Compensation permanent total disability award that is considered marital property?

COURT'S RESPONSE: The Court FINDS that the remaining lump sum Workers' Compensation permanent total disability award would then be subject to equitable distribution as any other marital asset.

QUESTION NO. 4: Is the injured spouse entitled to any reimbursement of part of a lump sum Workers' Compensation permanent total disability award that was received prior to the parties' separation?

COURT'S RESPONSE: The Court FINDS that the injured spouse is not entitled to any reimbursement unless there is a showing that this lump sum payment has been kept in some segregated account and was not consumed during the marriage. The Court FINDS that the portion of a Workers' Compensation permanent total disability award that was received prior to the parties' separation would have been consumed by the parties during the marriage and the injured spouse is not entitled to be reimbursed his 25% by the non-injured spouse.

Statement of Facts

The facts of this case are not in dispute and are set forth in the order of the circuit court. The parties to this action were husband and wife, married on May 28, 1989 and separated on January 4, 2002. During the marriage, Earl L. Fitzgerald (hereafter "Husband") was injured on the job and was eventually awarded a permanent total disability to begin retroactive to December 1, 1992. Husband received payments of \$90,654.27 during the marriage. However, a final decision by Workers' Compensation was not actually entered until October 25, 2002, during the period of the separation but prior to the divorce. From that decision, husband received an additional \$106,406.62 as a back award, covering the period from December 1, 1992 through October 24, 2001, a period during which the parties were married and living together.

In its Order on Workers' Compensation Benefits entered April 7, 2004, the family court found that the back award of \$106,462.62 covered a period during which the parties were married and cohabiting together and was, thus, marital property. Of course, the family court

found the \$90,654.27 received and consumed during the marriage was also marital property. Given that the family court deemed the Workers Compensation benefits compensation for lost wages, the family court found wife had no interest in future benefits, but used future monthly benefits in calculating child support. (In a previous order dated August 12, 2003, the family court denied alimony to the wife. Wife waived her interest in husband's pension benefits and husband waived his interest in her's as part of their property settlement.)

The family court found that husband should receive 25% of the total amount received for husband's pain and suffering. That is, the family court added $\$90,654.27 + \$106,462.62 = \$197,060.89$, then took 25% which equaled $\$49,265.62$. The family court deducted $\$49,265.62$ from the lump-sum award of $\$106,406.62$, leaving a balance of $\$57,141.40$, which the family court found represented back wages, was thus marital property, and awarded one-half ($\frac{1}{2}$) or $\$28,570.70$ to the wife.

Initially, wife filed a Motion to Reconsider only the family court's apparent misapplication of its own formula. Wife's position was that 25% should have been deducted from each award separately, not all of it from the 2002 lump-sum award of $\$106,406.42$. Wife argued that the family court was erroneously requiring Wife to reimburse Husband for 25% of monies already received and consumed during the marriage. The family court disagreed and denied the Motion to Reconsider. Husband then filed his appeal seeking to have 100% of the 2002 lump sum award ($\$106,406.62$) declared his separate property. Wife responded to his appeal and sought to have 100% of the award declared marital property and that she be awarded 50% or $\$53,203.31$. She also appealed the denial of her Motion to Reconsider.

Husband appealed on the grounds that the underlying decision by the Family Court was “arbitrary and capricious, without basis in either law or fact” and “that the Court abused its discretion in its attempted equitable distribution of the Respondent’s Workers Compensation award.” Further, the Husband alleged that “there is no basis in law, no West Virginia precedent or other binding guideline in West Virginia jurisprudence to make such a distribution.”

The Putnam County Circuit Court considered both appeals and agreed that the issue of how to treat Workers’ Compensation Benefits for purposes of equitable distribution has never been decided by this Court. The circuit court determined that it could not rule in this matter without the guidance of this Court and certified the following questions:

Questions and Court Response

QUESTION NO. 1: What portion, if any, of a lump sum Workers’ Compensation permanent total disability award is considered a marital asset?

COURT’S RESPONSE: The Court FINDS that any portion of a lump sum Workers’ Compensation permanent total disability award that represents payments that should have been received during the period of the parties’ marriage are considered a marital asset.

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While addressing these issues by certifying the questions, the circuit court has in essence ruled on the issues on appeal. It adopted the analysis of the family court and found that 25% of the Workers' Compensation award represents pain and suffering. The circuit court then essentially reversed the family court and granted the motion to reconsider on the issue of whether a party who receives Workers' Compensation during the marriage is entitled to be reimbursed 25% by the other spouse upon divorce and ruled that the injured spouse was not entitled to such reimbursement.

Assignment of Error

1. The circuit court erred when it found that 25% of a Workers' Compensation award constitutes an award for pain and suffering as no authority exists for this arbitrary decision. A lump sum award for lost wages resulting from an injury received during the marriage

and for benefits due during the marriage is a marital asset and the family court and circuit court erred in finding otherwise.

2. The circuit court erred when it required Wife to retroactively reimburse Husband for 25% of monies received from Workers' Compensation during the period of the marriage, asserting that she owed this back to him for his pain and suffering.

Points and Authorities

West Virginia Code, §23-4-6

West Virginia Code, §23-4-25

West Virginia Code, §48-7-101

West Virginia Code, §48-7-106

Capfer v. Capfer, 187 W.Va. 396, 419 S.E.2d 464 (1992)

Conrad v. Conrad, 612 S.E.2d (W. Va. 2005)

Hampstead v. Hampstead, 184 W.Va. 272, 400 S.E.2d 280 (1980)

Hardy v. Hardy, 197 W.Va. 243, 475 S.E.2d 335 (1996)

Holstein v. Holstein, 186 W.Va. 385, 412 S.E.2d 786 (1991)

Huber v. Huber, 200 W.Va. 446, 490 S.E.2d 48 (1997)

Kaminsky v. Kaminsky, 181 W.Va. 583, 383 S.E.2d 548 (1989)

Koontz v. Koontz, 183 W.Va. 477, 396 S.E.2d 439 (1990)

Metz v. Metz, 61 P.3d 383 (Wyo. 2003)

Schrader v. Schrader, 196 W.Va. 579, 474 S.E.2d 579 (1996)

Staton v. Staton, ___ W.Va. ___, ___ S.E.2d ___ (2005); No. 32562

Whiting v. Whiting, 183 W.Va. 451, 396 S.E.2d 413 (1990)

Argument and Discussion of Law

Chapter 23 of the West Virginia Code sets forth the West Virginia Workers' Compensation statutes. It is clear that Workers' Compensation benefits are intended to replace a worker's wages and are based upon lost wages. In West Virginia Code, §23-4-6, benefits are calculated based on average weekly wages. No reference is made to pain, suffering or other damages. Indeed, West Virginia Code, §23-4-25 sets forth the manner in which the amount of any permanent total disability benefits is to be reduced if the worker later earns income. Clearly,

Workers' Compensation benefits are tied to wages and wages alone. As such, they are marital property.

W. Va. Code § 48-1-233 (2001) (Repl. Vol. 2004), defines marital property, in pertinent part, as follows:

(1) All property and earnings acquired by either spouse during a marriage, including every valuable right and interest, corporeal or incorporeal, tangible or intangible, real or personal, regardless of the form of ownership, whether legal or beneficial, whether individually held, held in trust by a third party, or whether held by the parties to the marriage in some form of co-ownership such as joint tenancy or tenancy in common, joint tenancy with the right of survivorship, or any other form of shared ownership recognized in other jurisdictions without this state, except that marital property does not include separate property as defined in section 1-238 [W. Va. Code § 48-1-238]

West Virginia Code, §48-7-101 provides:

Except as otherwise provided in this section, upon every judgment of annulment, divorce or separation, the Court shall divide the marital property of the parties equally between the parties.
(Emphasis added).

It is well-settled that the law in West Virginia expresses a marked preference for characterizing property acquired during a marriage as marital property. Koontz v. Koontz, 183 W.Va. 477, 396 S.E.2d 439 (1990); Hampstead v. Hampstead, 184 W.Va. 272, 400 S.E.2d 280 (1980); Capfer v. Capfer, 187 W.Va. 396, 419 S.E.2d 464 (1992); Schrader v. Schrader, 196 W.Va. 579, 474 S.E.2d 579 (1996).

Recently, in the case of Conrad v. Conrad, 612 S.E.2d (W. Va. 2005) this Court in a *per curiam* opinion found a long-term disability policy to be marital property to be distributed equally between the parties without regard to who had suffered the disability.

In Holstein v. Holstein, funds were found to be marital property where a husband transferred the proceeds of a personal injury settlement into a joint account with his wife. The

Court found these to be gifts to the marital estate. Holstein v. Holstein, 186 W.Va. 385, 412 S.E.2d 786 (1991). Also helpful is Kaminsky v. Kaminsky, 181 W.Va. 583, 383 S.E.2d 548 (1989), in which the husband received a monthly benefit from Black Lung and Social Security, most of which were expended for the benefit of the parties prior to the divorce action. The Court found that this money was marital property and that the remaining amounts in accounts when the divorce commenced could properly be considered marital property subject to equitable distribution. This Court made no provision for excluding a certain percentage for pain and suffering in the Kaminsky case. This is analogous to the \$106,406.62 lump-sum payment received by the Fitzgeralds for monies that would have been paid to husband during the period of the marriage.

In its Order, the family court cited several cases analogous to the case at bar. In Huber v. Huber, 200 W.Va. 446, 490 S.E.2d 48 (1997), an injured spouse claimed money for non-economic loss. The Court found that the spouse seeking to claim non-economic losses as separate property, must do so by a preponderance of the evidence. Further, should he fail to do so, such property must be classified as marital property and "divided accordingly." That is, divided equally 50/50 between the parties.

The burden of proving that a part or all of a personal injury recovery is non-marital is on the party seeking a non-marital classification. Hardy v. Hardy, 197 W.Va. 243, 475 S.E.2d 335 (1996). Husband has not met this burden. In the case at bar Husband presented no evidence as to why the Court should consider the entire Workers' Compensation award to be for his pain and suffering. Indeed, such a position is untenable. Until Husband received his awards, the only family income was his pension and the income earned by Wife. The lump-sum was

reimbursement for the income the family failed to receive while the Workers' Compensation claim was processed. Clearly, this is a marital asset. The award was obviously to compensate Mr. Fitzgerald for his loss of income. Income is a marital asset.

The most recent case in which the Court addressed a similar issue is Staton v. Staton, ___ W.Va. ___; ___ S.E.2d ___ (decided December 2005) (No. 32562). The Staton case involved a police disability pension. In syllabus point 2 of that case the court reiterated its long-standing preference for finding property acquired during the marriage to be marital property.

“W. Va. Code, 48-2-1(e)(1) (1986) [W. Va. Code § 48-1-233 (2001) (Repl. Vol. 2004)], defining all property acquired during the marriage as marital property except for certain limited categories of property which are considered separate or nonmarital, expresses a marked preference for characterizing the property of the parties to a divorce action as marital property.” Syllabus point 3, *Whiting v. Whiting*, 183 W. Va. 451, 396 S.E.2d 413 (1990).

The issue in the Staton case was to what extent the disability pension was compensation for disability versus a pension payment. Future earnings were at issue, which is not the situation in the instant case. This Court again adopted a “case-by-case analysis.”

“Therefore, we previously discussed and now specifically hold that benefits that actually compensate for disability are separate property because such monies are personal to the spouse who receives them. In some cases, benefits will need to be separated into a retirement component and a true disability component, classifying the retirement component as marital property and the disability component as separate disability benefits are, or are not, marital property subject to distribution Rather, the . . . determination [must be made] on a case-by-case basis according to the particular facts[,] giving careful consideration to the entire marital property and keeping an eye toward a just and equitable distribution.” *Id.*, 216 W. Va. At ___, 612 S.E.2d at 776-77 (quoting *Metz v. Metz*, 61 P.3d 383 (Wyo. 2003)).

Again, in the case at bar, wife is not seeking to lay claim to any portion of the husband's future earnings from Workers' Compensation. She accepts and agrees with the ruling of the family court that Workers' Compensation is to "compensate" for lost wages. Workers' Compensation is distinguishable from the situation in the Staton case because Workers' Compensation is not a pension program. Wife is merely seeking to recover her portion of a marital asset which was not received during the marriage because the husband's Workers' Compensation claim was still in litigation.

In Huber and Staton, this Court has indicated it favors addressing these issues on a "case-by-case" basis. Wife urges the Court not to adopt such an approach with Workers' Compensation cases. As Family Court Judge William Watkins pointed out in his decision, "the Court has considered requiring the parties to present accountants or economists, but finds that to do so would be a waste of the parties' money and of everyone's time. In a personal injury case, evidence is regularly presented about the plaintiff's income potential, the effect of their injuries on their daily lives and so forth. Workers' Compensation was designed, in part, to eliminate that. A public policy decision was made to replace the traditional tort system with a schedule of compensation for work-related injuries. The amount of pain and suffering does not effect the outcome of the Workers' Compensation award." Wife agrees. Judge Watkins went on to say, "But, just as clearly, the injured spouse has experienced pain and suffering while the other spouse has not, and it would be fundamentally unfair not to acknowledge this." Maybe so, but by what means shall a family court decide on a case-by-case basis how much pain and suffering one individual has endured over another? Are we to have a mini trial within a final divorce hearing? As this Court is well-aware, the vast majority of family court litigants handle their cases *pro se*.

Are we to expect these individuals to subpoena doctors, economists and other experts to testify as to what percentage of an individual litigant's Workers' Compensation award should be considered pain and suffering?

Again, the Workers' Compensation statute is clear. Workers' Compensation benefits are tied to wages and only to wages. As wages, they are marital property, and a wife is entitled to one-half (1/2) of any Workers' Compensation benefits accrued during the period of the marriage. Certainly, Workers' Compensation benefits are not, as husband proposes, 100% for pain and suffering only. If Workers' Compensation are not compensation for lost wages, then they must be considered more in the nature of a pension payment and, thus, the wife would be entitled to a portion of future payments.

While Wife urges this Court to find that 100% of a lump sum back award of Workers' Compensation benefits is marital property, should this Court agree with the rulings of the lower court in its responses to the first three certified questions, the Court should also agree with the circuit court's response to the fourth question.

QUESTION NO. 4: Is the injured spouse entitled to any reimbursement of part of a lump sum Workers' Compensation permanent total disability award that was received prior to the parties' separation?

COURT'S RESPONSE: The Court FINDS that the injured spouse is not entitled to any reimbursement unless there is a showing that this lump sum payment has been kept in some segregated account and was not consumed during the marriage. The Court FINDS that the portion of a Workers' Compensation permanent total disability award that was received prior to the parties' separation would have been consumed by the parties during the marriage and the injured spouse is not entitled to be reimbursed his 25% by the non-injured spouse.

In paragraph 15 of the family court's Order, it states "the Respondent's Workers' Compensation attorney provided a printout showing additional payments of \$90,654.27 during the marriage . . ." This sum was consumed during the marriage and Wife makes no claim to any portion of that amount. However, the family court found that Wife should reimburse Husband for 25% of the \$90,654.27 received and consumed during the marriage. If this Court finds that 25% represents an award for pain and suffering, Husband has already received and spent his 25% of the \$90,654.27. Husband cannot argue that because this money was consumed during the marriage, he never got his 25%. However, this is what the family court erroneously ruled.

There is error in the family court's application of its own formula in paragraph 16 of the Order in which the family court took 25% of the total amount received (\$197,060.89) which the family court calculated to be \$49,265.62. This total amount included the \$90,654.27 which was consumed during the marriage. The family court then subtracted the \$49,265.62 from the lump sum award of \$106,406.62. In this way, the family court was effectively reimbursing Mr. Fitzgerald for 25% of the \$90,654.27 which he already received and consumed during the period of the marriage. This allowed the Husband to "double dip" into this marital asset.

The fallacy of the approach is obvious. Suppose there had been no lump sum back award? How would the family court propose a wife reimburse her ex-husband for his 25%? It is the Wife's position that 25% of \$106,406.62 (the second lump sum award) is \$26,601.66 and, under the family court's formula, \$26,601.66 should be awarded to the husband, Earl Fitzgerald, for pain and suffering. Under the family court's formula, the remaining \$79,804.96 should be divided 50/50 between the parties as a marital asset. Therefore, wife should receive \$39,902.48, not the \$28,570.70 calculated in the Order. The circuit court agreed with Wife in its response to this certified question.

WHEREFORE, Wife respectfully moves this Court to answer the certified questions finding that lump sum Workers' Compensation benefits received for the period in which the parties were married and living together are marital property subject to equitable distribution. Should this Court find that any portion of the award is for pain and suffering, the case should be remanded with instructions to the family court to recalculate the Wife's share of the Workers' Compensation benefits deducting that percentage from the lump-sum benefit of \$106,406.62 and then dividing equally the remainder.

Patricia Fitzgerald, now Eskins

By counsel,



Beverly S. Selby (WV Bar No. 4721)

1200 Boulevard Tower

1018 Kanawha Boulevard, East

Charleston, West Virginia 25301

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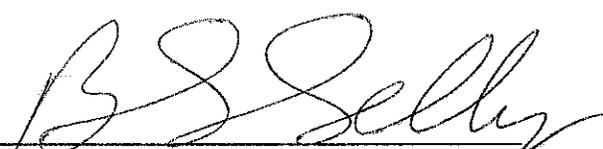
and

EARL L. FITZGERALD,

Respondent below.

CERTIFICATE OF SERVICE

I, Beverly S. Selby, hereby certify that I have served a true and exact copy of the foregoing Petitioner's Brief upon Certified Question from the Circuit Court of Putnam County on the Respondent below, Earl L. Fitzgerald, by forwarding said copy to Anthony Shawn D. Bayliss, Esquire, 403 Pennsylvania Avenue, Charleston, West Virginia 25302, via regular United States mail to his last-known address on this the 7 day of June, 2006, in a properly stamped and addressed envelope.



Beverly S. Selby (WV Bar #4721)
Boulevard Tower, Suite 1200
1018 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 342-0411 / f (304) 342-0448
Counsel for Patricia E. Fitzgerald