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No. 33065

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

In Re: **The Marriage of**

MARY ELLEN GAINER,

Appellee/Petitioner Below

and

JOHN DAVID GAINER,

Appellant/Respondent Below.

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PUTNAM COUNTY CIRCUIT COURT

FROM THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA
CASE NO. 01-D-206

**PETITION FOR APPEAL
OF THE APPELLANT, JOHN DAVID GAINER**

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**I. THE KIND OF PROCEEDING AND NATURE OF THE
 RULING IN THE LOWER TRIBUNAL**

This is a civil action for divorce arising from the Family Court of Putnam County, West Virginia. On January 19, 2005, the Putnam County Family Court Judge entered a document captioned "Proposed Final Order of Divorce" that dissolved the marriage of the parties and purported to identify and divide the marital estate of the parties on an equitable basis.

On April 7, 2005, after an agreed extension of time to appeal, the appellant filed a petition for appeal from parts of the "Proposed Final Order of Divorce" with the Circuit Court of Putnam County, West Virginia, O. C. Spaulding presiding. The appellee cross-petitioned for appeal on the same date.

The circuit court affirmed a portion of the questioned order on June 16, 2005. The same June 16, 2005, order remanded certain issues to the family court. The family court entered an "Order on Remand" on July 15, 2005, and appellant again appealed to the circuit court on August 15, 2005. Finally, on September 12, 2005, the Circuit Court of Putnam County, West Virginia, entered a "Final Order Disposing of the Appeal." It is from this final order that appellant seeks an appeal to this Court.

II. STATEMENT OF THE FACTS OF THE CASE

John D. Gainer was born on October 5, 1950. In May 1970, at the age of 19 years and 7 months, Mr. Gainer enlisted in the United States Navy. Mr. Gainer was single and remained in that marital status for the entire 5 years, 11 months and 16 days of military service preceding his honorable discharge in May 1976. At the time of his discharge from the United States Navy, Mr. Gainer had earned no vested interest in any form of military retirement.

Eight months after his honorable discharge from the United States Navy, Mr. Gainer became employed by the West Virginia Department of Public Safety as a West Virginia State Policeman. Mr. Gainer remained in the State Police for a period of seven years and left that form of public service in December 1983. Mr. Gainer left the West Virginia State Police with no vested interest in that agency's retirement plan.

On August 20, 1977, sixteen months after he left the United States Navy with no vested retirement benefit, John Gainer married Mary Ellen Gainer. At the time of this marriage, Mr. Gainer had no vested interest in any retirement plan nor did he have sufficient years of service credit at either the West Virginia State Police or the United States Navy to earn any potential retirement benefit.

In January 1984, John Gainer became employed as a deputy United States Marshal. By virtue of his employment with the Marshal Service, Mr. Gainer became a participant in the basic federal Civil Service Retirement System. (hereinafter CSRS) As a CSRS

participant, John Gainer was excluded from participation in the Social Security system. He was, however, able to apply credit for his premarital military service to the end of his period of CSRS years in service, provided he work a full twenty years under the CSRS system, and paid into the system the sum of \$1,976.00.. (This amount was calculated to be 7% of John Gainer's total earnings while serving six years in the U. S. Navy) This sum was paid into the system shortly after Mr. Gainer joined the Marshals Service.

Mary Ellen Gainer, who was born July 15, 1956, worked during the marriage for the telephone company in its various morphings from Chesapeake & Potomac to Bell Atlantic and finally to Verizon. By virtue of her employment with this regulated utility, Mary Ellen Gainer earned credits towards a vested private pension. Unlike Mr. Gainer, she also participated in contributions to the Social Security system. Mrs. Gainer's first employment with the telephone company was on August 3, 1979.

On June 9, 2001, the parties separated. The date of separation of the parties is undisputed. Shortly thereafter, Mary Ellen Gainer commenced this civil action for divorce from John Gainer in the Family Court of Putnam County, West Virginia. At the time of this separation, Mrs. Gainer had worked for the "phone company" for 21 years and 10 months of the Gainers' 23-years and 10 months of life together. John Gainer was vested with a fixed retirement benefit based upon his 17-1/2 years of service as a Deputy United States Marshal during the course of his marriage.

Computation of the defined CSRS benefit vested to Mr. Gainer at the date of separation is a simple matter of mathematical calculation. First, one must determine the high-three year average compensation paid to Mr. Gainer immediately prior to the date of separation. In this case, the parties agree that this is in the amount of \$73,178.00. The CSRS formula then provides that Mr. Gainer is entitled to retirement credit of 1.50 % of this average for each of his first 5 years of credited service, 1.75% for each year 6 through 10 and 2% of the average for each year of service over 10. The system also allows a credit for accrued sick leave which gave Mr. Gainer a ½ year, or 1%, adjustment as of the date of separation. Mr. Gainer's 17-1/2 years of service during the marriage, together with his accrued sick leave, defines his benefit as 32.25% of his high-three average.

Applying this formula to Mr. Gainer's situation shows that at the date John and Mary Ellen Gainer separated--June 9, 2001--Mr. Gainer was vested in a defined pension benefit from the CSRS of \$23,599.90 per year, or 1,966.66 per month. This is the only pension benefit based on employment after the parties' marriage and before the parties' separation that John Gainer was, is, or ever could be entitled to from the CSRS.

At the trial of this case, Mr. Gainer offered the testimony of an expert witness named Ross A. Dionne. Mr. Dionne calculated John Gainer's vested retirement benefit at the date of the separation of the parties at \$1,966.66. Mr. Dionne further testified to a reasonable degree of certainty within his field of forensic economics that the present value of John Gainer's CSRS defined benefit pension as of June 9, 2001, was \$126,519.17. Mr. Dionne excluded from his calculation the credit to Mr. Gainer's CSRS pension attributable to the 6 years of service he had in the United States Navy before the marriage of the parties. John Gainer urged the Family Court to accept this present valuation of his date of separation vested defined benefit. Mr. Gainer proposed that the Court value Mrs. Gainer's retirement benefit as of the date of separation, offset one against the other, and allow Mrs. Gainer additional compensation from other marital assets to equal the difference in the value of the two plans. It is undisputed by the parties that Mr. Gainer's CSRS retirement benefit has a significantly higher value than Mrs. Gainer's plan which was valued by her expert witness at \$29,893.00. The family court did not use this method of division for Mr. Gainer's pension.

John Gainer's employment with the United States Marshal Service entitled him to participate in the "law enforcement and firefighter CSRS retirement." This is a program that enhances the retirement benefit of law enforcement personnel **after** 20 years of vested service in the system, excluding any credits for military service. Because Mr. Gainer only had 17-1/2 years of accredited CSRS at the date of separation, he was not vested in any way in the basic law enforcement and firefighter annuity. At the date of separation, Mr. Gainer was vested in a defined benefit equal to 32.25% of his high-three year average pre-separation earnings.

In January 2003, 2-1/2 years after the parties separated, Mr. Gainer achieved the milestone of 20 years employment in law enforcement. With that 20th anniversary, Mr. Gainer became vested in a pension equal to 50% of his high-three average pre-retirement salary plus 2% of that high-three average multiplied by years and whole months of service exceeding 20. This is a level of retirement benefits that would be unattainable under the basic CSRS plan Mr. Gainer was vested in at the date of his separation. Because of the nature of law enforcement work, Mr. Gainer has a mandatory retirement age; he must retire no later than October 5, 2007.

Mrs. Gainer presented a different and fundamentally flawed valuation of her husband's retirement benefit. Mary Ellen Gainer offered the testimony of Selby, Epperly and Associates who placed a "lump sum present value" at June 9, 2001, of \$305,602.00 on Mr. Gainer's pension. To arrive at this figure, Mrs. Gainer's expert applied flawed methodology. The witness used the undisputed high-three pre-separation salary for Mr. Gainer of \$73,178.00. However, the witness then applied to that high-three salary the formula to be used for computing the basic law enforcement and firefighter annuity as opposed to the method of computation for the basic CSRS annuity that Mr. Gainer was vested in at the date of separation. The witness, therefore, took advantage of and credited Mrs. Gainer with a formula for the computation of defined retirement benefits that Mr. Gainer did not become entitled to until 2-1/2 years after the date the parties separated. By using this post-separation acquired entitlement, and including premarital military service, the witness for Mrs. Gainer calculated John Gainer's vested monthly benefit as of his mandatory retirement date of **October 5, 2007**, to be in excess of \$4,200.00. Using this figure, which was inflated by post-separation entitlements, Mrs. Gainer's witness determined a "lump sum present value" at Mr. Gainer's mandatory retirement age--\$456,666.00--and then discounted that figure to a date of separation value of \$305,602.00. In all of these calculations, the only marital factor employed by Mrs. Gainer was the separation date high-three salary. Every other figure forming a basis for her calculations of Mr. Gainer's retirement benefit value relied upon premarital service years and post-separation entitlements.

Confronted with these widely divergent present value calculations, the family court seemed to be in a quandary. Without recognizing the flawed inclusion of premarital credit and post-separation entitlements in Mrs. Gainer's analysis, the family court simply stated in paragraphs 40 and 41 of its January 19, 2005, order the following:

“40. That each of the parties presented expert opinions regarding the present value of the pensions.

41. That the opinions of the experts were very different and could not be reconciled.”

Unable to reconcile that which appears fairly simple, the family court judge expressed an inability to value Mr. Gainer's pension benefit and distribute it in a lump sum payment through a cash settlement or offset from other available marital assets. Despite an appeal, a remand and a second order, the family court has still failed to appropriately value, or indeed to state any value for Mr. Gainer's vested defined pension benefits. Without such a valuation, Mr. Gainer is unable to offer a lump sum settlement and therefore disengage himself from his wife of over 20 years who chose to sue him for a divorce 17-1/2 years into his employment as a United States Marshal.

The Putnam County Family Court's January 19, 2005, order did not find a value for either of the parties' pension plans. Despite this shortcoming, the family court found that “because neither of the parties has sufficient assets to purchase the value of the other, the most appropriate method to divide the pension is by qualified order.” Then, without any direction as to method, the family court directed that “Counsel for the parties shall prepare qualified order to divide the respective plans of the parties.”

This January 19, 2005, order also found Mr. Gainer's premarital military service credits to be marital property but failed to make any finding relative to his basic law enforcement and firefighter annuity.

On appeal, the circuit court agreed that the family court erred when it failed to place a present value on Mr. Gainer's CSRS pension. The circuit court found that the family court erred in ordering the division of Mr. Gainer's CSRS pension through a qualified

order. The circuit court agreed that the family court had failed to determine whether Mr. Gainer's Hazardous Duty Incremental Retirement Plan (law enforcement and firefighters annuity) was or was not marital property. The case was remanded to the family court to correct these deficiencies.

On July 15, 2005, the family court issued its "Order on Remand." This order still failed to place a value on the parties' respective pension plans. It contained an unsupported finding that Mr. Gainer's basic law enforcement and firefighters annuity was marital property and it set forth an erroneous formula on the division of Mr. Gainer's pension benefits:

- a. The parties were married on August 20, 1977 and separated on June 9, 2001;
- b. In Ms. Gainer's financial disclosure, she indicates that she became employed at Verizon on August 3, 1979;
- c. On the attached document, Mr. Gainer's hiring dated [sic] for CSRS is December 27, 1983;
- d. Accordingly, Ms. Gainer has 21 years and 310 days at Verizon at separation and Mr. Gainer had 17 years and 164 days with the U.S. Marshall at separation, plus an additional 2165 days of military service purchased with marital funds;
- e. Mr. Gainer is entitled to the following portion of Ms. Gainer's retirement at Verizon, once she retires: monthly benefit divided by 2, multiplied by the product of 7981 days (21 years & 310 days, including leap years) divided by the total number of days credited service. For example, if Ms. Gainer retires after exactly 30 years of credited service, the multiplier will be 7981 divided by 10958 (number of days in 30 years, including leap years from August 3, 1979) or .7283. If her pension is \$1500 per month, Mr. Gainer is entitled to \$546.23 per month;
- f. Ms. Gainer is entitled to the following portion of Mr. Gainer's retirement from CSRS, once he retires: monthly benefit divided by 2, multiplied by the product of 8539 divided by the total number of days credited service. If Mr. Gainer is not credited with his prior military service that is pre-marital and 2165 days shall be subtracted. The Court could not find any information as to the fate of any retirement benefits accrued while Mr. Gainer was serving

with the W. Va. State Police, but the Court's ruling applies to it as well, in whatever manifestation, if any.

Without making a finding regarding the value of John Gainer's vested pension benefit, the family court has ordered a deferred method of division, applying some sort of hybrid coverture factor, based not on John Gainer's earnings at the date of separation, but on what his earnings will be 6-1/2 years past their date of separation. This will result in the ex-spouse reaping the benefits of John Gainer's promotions and increased earnings far past the date of separation and subsequent divorce. The net result of this approach, referred to by the family court as "a fixed and precise algorithm," is to bestow upon Mary Ellen Gainer a significant guaranteed percentage of whatever retirement benefits John Gainer receives after his mandatory retirement in 2007 regardless of the fact that those benefits will be based substantially on post separation/marital earnings, premarital military service and entitlement to a formula for the calculation of retirement that was earned by John Gainer 6-1/2 years **after** these parties separated.

The family court clearly abused its discretion by including a premarital military service in the calculation of John Gainer's retirement benefit as marital property. The family court erred as a matter of law in failing to make a specific finding regarding the value of John Gainer's vested retirement benefits. The family court further erred as a matter of law in directing a deferred division of such benefits without first determining that a present division on a lump sum basis was not possible. The family court also erred by directing the future division of Mr. Gainer's retirement benefits be based on his earnings at the time of his retirement, and not at the date of separation. This will allow Mrs. Gainer to benefit from Mr. Gainer's continued employment and job promotions far into the future, 6-1/2 years past their date of separation.

The family court failed to value the personal property at the marital residence that the parties had accumulated during the 24 years of marriage and awarded all the property at the marital residence to Mrs. Gainer. The court also failed to order the payment of any of the substantial marital debt to Mrs. Gainer. The family court used the present day difference in Mr. Gainer and Mrs. Gainer's income to justify the ruling. This again, gives

Mrs. Gainer the benefit of Mr. Gainer's post separation increased earnings. However, the family court did not consider the fact that Mr. Gainer's retirement is mandatory in less than two years. Upon Mr. Gainer's mandatory retirement, and after the portion of his retirement that he is required to make to Mrs. Gainer is deducted, his income will be substantially less than Mrs. Gainer as she continues to work and her income increases.

**III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL
AND THE MANNER IN WHICH THEY WERE DECIDED
IN THE LOWER TRIBUNAL**

A. The family court erred as a matter of law in failing to make a finding regarding the value of John Gainer's marital vested retirement benefits. The lower tribunal simply declined to make a finding in the face of contradictory testimony.

B. The family court erred as a matter of law in not ordering a division of John Gainer's basic CSRS pension plan, that was vested at the date of separation, and further erred by ordering a deferred division of John Gainer's CSRS law enforcement retirement plan that was not vested at the date of separation. This was done without first making a finding that the disparate value of that benefit made present lump sum distribution impossible.

C. The family court erred as a matter of law in ordering a deferred division of John Gainer's vested retirement benefits under a method that gives John Gainer's ex-wife the benefits of both premarital military service years, 1/2 of Mr. Gainer's post-separation increased future earnings, and Mr. Gainer's post-separation vesting in the basic law enforcement and firefighter annuity contained within the CSRS.

D. The family court erred as a matter of law in failing to recognize the inequities resulting from deferred distribution of John Gainer's CSRS vested pension benefit and Mrs. Gainer's private employer pension plan because of the fundamental differences between those two plans.

E. The family court erred as a matter of law in failing to value the personal property at the marital residence, along with the marital debt and failing to apportion them appropriately between the parties.

F. The family court abused its discretion in ordering the deferred distribution of the vested pension benefits of the parties.

G. The family court abused its discretion in finding that whatever method of distribution of pension benefits is used, that method should include credit for Mr. Gainer's premarital military service as one basis for valuation.

IV. POINTS AND AUTHORITIES RELIED UPON

W. Va. Code §48-1-237(6).

W. Va. Code §48-1-237(5).

W. Va. Code §48-7-104 (2001) (repl. vol. 2004).

Conrad v. Conrad, 216 W.Va. 696, 612 S.E.2d 772 (2005).

Lucas v. Lucas, 215 W.Va. 1, 592 S.E.2d 646 (2003).

Barrett v. Barrett, 202 W. Va. 424, 504 S.E.2d 659 (1998).

Claypoole v. Claypoole, 204 W.Va. 46, 511 S.E.2d 457 (1998).

Banker v. Banker, 196 W.Va. 535, 474 S.E.2d 465 (1996).

In Re: Queen, 196 W.Va. 442, 473 S.E.2d 483 (1996).

Stephen L. H. v. Sherry L. H., 195 W.Va. 384, 465 S.E.2d 841 (1995).

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

Butcher v. Butcher, 178 W.Va. 33, 357 S.E.2d 226 (1987).

Cross v. Cross, 178 W.Va. 563, 363 S.E.2d 449 (1987).

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

V. DISCUSSION OF LAW

A. STANDARD OF REVIEW

In syllabus point two of *Lucas v. Lucas*, 215 W.Va. 1, 592 S.E.2d 646 (2003), this Court held that:

In reviewing challenges to findings made by a family court judge that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review.

Further, in syllabus point one of *Banker v. Banker*, 196 W.Va. 535, 474 S.E.2d 465 (1996), this Court explained as follows: "A circuit court should review findings of fact made by a family law master only under a clearly erroneous standard, and it should review the application of law to the facts under an abuse of discretion standard." Syllabus Point 1, *Stephen L. H. v. Sherry L. H.*, 195 W.Va. 384, 465 S.E.2d 841 (1995)."

In determining whether a finding is "clearly erroneous," the court must determine whether such a finding is supported by substantial evidence. Under the clearly erroneous standard, the findings of fact and inferences drawn by the family court judge must be supported by substantial evidence and if such findings and inferences are not supported by substantial evidence, they must be overturned. *Stephen L. H. v. Sherry L. H.* 195 W.Va. 384, 465 S.E.2d 841 (1995). Substantial evidence requires more than a mere scintilla of proof. Substantial evidence is such relevant evidence that a reasonable mind may accept as adequate to support a conclusion. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *In Re: Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).

B. VALUATION OF JOHN GAINER'S VESTED RETIREMENT BENEFITS

John Gainer has never disputed that the 17-1/2 years of service credited towards his CSRS retirement benefit earned during the course of his marriage and prior to his separation from Mrs. Gainer is a marital asset subject to equitable distribution. That being the case, there is a duty incumbent upon the family court as a matter of law to value this marital asset. This duty of valuation of marital assets is the second step of the three-step process for equitable distribution set forth in syllabus point 1 in the case of *Whiting v. Whiting*, 183 W.Va. 451, 396 S.E.2d 413 (1990). Until this second step is taken, the family court cannot complete the three-step process of equitable distribution and "divide the marital estate between the parties . . .". *Whiting, supra*.

As a matter of law there is no basis for a family court simply to say, in essence, "I cannot decide" what the value of a marital asset is and then proceed to divide that unvalued asset on an arbitrary basis. Only when the family court fulfills its legal responsibility to classify property as marital or non-marital and to value the marital assets can the parties fairly participate in a proceeding for a distribution of those assets between them. As is evident from the multiple orders that concluded this case, the Family Court of Putnam County has never valued that portion of John Gainer's retirement benefit that constitutes marital property. The court simply stated that the testimony was "widely divergent" on this issue. Well, the resolution of widely divergent testimony is the function of a judge. The inability of a court to analyze and reconcile divergent testimony does not demonstrate that any action by the court based upon such indecision is supported by "substantial evidence."

Indeed, the contrary is true. Confronted with divergent testimony, the family court judge in Putnam County simply threw up his hands and imposed upon John Gainer a disfavored method for the valuation of Mr. Gainer's retirement. In the case of *Cross v. Cross*, 178 W.Va. 563, 363 S.E.2d 449 (1987), this court indicated that the **first priority** for the division of vested pension rights that had not yet matured, such as the pension rights of Mr. Gainer here, was a lump sum payment through cash settlement or offset from other available marital assets. Obviously, a valuation of pension rights by the family court is an

absolute precondition to either following this court's stated first preference or abandoning that preference in favor of a less favorable method of distribution.

Mr. Gainer has always wanted to follow this court's admonition in the *Cross* case and disentangle himself from Mrs. Gainer as quickly and cleanly as possible. To achieve this goal, Mr. Gainer offered substantial and uncontradicted evidence of the value of his pension benefit on the date these parties separated. On the other hand, his wife offered evidence of the value of Mr. Gainer's pension benefit as it would be at the time of his retirement, **6-/12 years after the parties separated**. For whatever reason, the family court judge did not assign Mr. Gainer's benefit either value. As a result, Mr. Gainer has been deprived of the opportunity to settle with his wife and disentangle himself from this failed marriage. If nothing else, the family court judge should be directed to value the subject pension benefits one way or the other. Only when that is done can a judgment be made whether the preferential methods of distribution of such benefits under *Cross* can or cannot be made.

Simply stated, the family court's direction for a deferred division of Mr. Gainer's retirement on some proportional basis is not supported by substantial evidence and is, therefore, clearly erroneous and arbitrary.

C. FAMILY COURT'S INCLUSION OF MR. GAINER'S RETIREMENT TO THE
BASIC LAW ENFORCEMENT AND FIREFIGHTER ANNUITY

What the family court has now ordered in this case is a "present division method of deferred distribution." According to the family court's order, the ex-Mrs. Gainer will be entitled to a fixed percentage of Mr. Gainer's CSRS pension **including** the basic law enforcement and firefighter annuity and credit for post-separation service commencing at the date of Mr. Gainer's mandatory retirement in October 2007.

This is erroneous as a matter of law for at least two reasons. First, *W. Va. Code* §48-7-104 (2001) (repl. vol. 2004) mandates that the court determine the net value of all marital property of the parties as of the **date of the separation** of the parties or as of such later date determined by the court to be more appropriate for obtaining an equitable result.

The date of separation of these parties preceded by 2-1/2 years the date upon which Mr. Gainer became entitled to the basic law enforcement and firefighter annuity. The family court made no finding regarding why any later date for division of this annuity would be appropriate to obtain an equitable result. Consequently, the family court's inclusion of the law enforcement and firefighter annuity in Mr. Gainer's retirement benefit is error as a matter of law. *See, Conrad v. Conrad*, 216 W.Va. 696, 612 S.E.2d 772 (2005).

Second, the family court's grant to Mrs. Gainer of retirement benefits earned by Mr. Gainer after separation flies in the face of this court's holdings in *Claypoole v. Claypoole*, 204 W.Va. 46, 511 S.E.2d 457 (1998) and *Barrett v. Barrett*, 202 W. Va. 424, 504 S.E.2d 659 (1998). In the *Claypoole* case, this court found that the lower court erred in awarding a portion of future pension benefits to one party when the other party continued to earn such benefits and contributed towards his retirement after a suit for divorce was commenced. The contributions of Mr. Claypoole to his pension plan, this court held, following the commencement of the divorce, were not marital assets. Likewise, in the instant case, Mr. Gainer's continued employment and post-separation entitlement to the basic law enforcement and firefighters annuity is not a marital asset. Even if it was, such an asset should have been valued separately by the family law court and this was not done.

The *Barrett* case involved the equitable distribution of CSRS benefits and benefits payable under other retirement plans. That is exactly the case we have here where Mr. Gainer's CSRS retirement and basic law enforcement and firefighters annuity is fundamentally different from the private pension plan participated in by his spouse. Confronted with a similar situation in *Barrett*, this court held:

"While it may be possible to craft an order that would apply to CSRS and the FERS benefits, the potential inequities that might result . . . because of the fundamental differences between the two plans, precludes that method for distributing the parties' pensions."

The same principle is applicable here where Mr. Gainer's retirement benefit may well more than double because of entitlements accruing to him **after** the separation of the parties and **after** his wife sued him for divorce.

D. PRE-MILITARY SERVICE CREDITS

John Gainer served in the United States military from May 1970 through May 1976. The parties were not married until August 20, 1977. Clearly any retirement benefits that Mr. Gainer is entitled to receive as a result of his premarital military time must be classified as his sole and separate property.

The family court found that "John Gainer testified that he purchased his military time for use in calculating his U. S. Marshal's service pension with wages earned during the marriage. The military time is, therefore, subject to equitable division." However, Mr. Gainer's premarital military service with the armed forces of the United States is creditable for Civil Service Retirement purposes only if (1) it was active service and terminated under honorable conditions, (2) it was performed before separating from a civilian position under the Retirement System, and (3) Mr. Gainer completed 20 years of service under CSRS. To receive credit for his premarital military service, Mr. Gainer was required, under federal law, to deposit an amount equal to 7% of his military basic pay within three years of being hired as a deputy United States marshal.

When Mr. Gainer was sworn in as a deputy United States Marshal, he began depositing monthly sums over a period of time directly from his paycheck that ultimately totaled \$1,976.00. The fact remains that no matter what amount of funds were paid as a deposit during the course of the marriage, Mr. Gainer would not be entitled to military credit towards his CSRS retirement if he had not served six years in the military prior to marriage. The increase in value in Mr. Gainer's separate property, his military service, resulted from conditions outside the control of the parties and his separate property. See *W. Va. Code* §48-1-237(6).

Mr. Gainer would not be entitled to any increase in the value of the CSRS unless he had physically served time in the military. When Mr. Gainer served in the military, he was not married. Mrs. Gainer did not provide homemaker services, child care services, or any services that were directly or indirectly related to Mr. Gainer's service in the Navy. The

only reason a 7% deposit of Mr. Gainer's basic military pay was made during the marriage is because that is what was required by federal regulations. It was outside the control of the parties.

The increase in Mr. Gainer's CSRS plan attributable to his military service was only realized and added to his retirement credits after he completed 20 years of credited service. Mr. Gainer reached this 20-year anniversary 2-1/2 years after the parties' separation. Since Mrs. Gainer sued her husband for divorce prior to his attaining 20 years credited service, she is not entitled to the increase in his CSRS due to his military service. It had not yet been realized as of the parties' date of separation on June 9, 2001. See *W. Va. Code* §48-1-237(5).

In *Butcher v. Butcher*, 178 W.Va. 33, 357 S.E.2d 226 (1987), the Court held that military retirement pay can be subject to equitable distribution. The Court made a theoretical distinction between a claim for equitable distribution of military retirement pay and a claim for alimony or child support. In regards to equitable distribution, the court states:

"The basis for such a claim was that the spouse seeking an interest in the property made a **substantial** economic contribution towards the acquisition of the property. Consequently, under the principals of unjust enrichment, it would be unfair to permit the spouse with title or possession to keep the entire interest." *Id.* at 40. (emphasis supplied)

Although there is now a presumption that property acquired during the marriage is marital property, the Court must not ignore the fact that the basis and rationale for making that presumption is that the spouse "made a substantial economic contribution toward the acquisition of the property." In this case, a \$1,976.00 deposit during the course of a 24-year marriage is not a substantial economic contribution towards Mr. Gainer's premarital military service. Mrs. Gainer may appropriately claim 1/2 of the \$1,976.00 deposit was her portion of marital funds. However, for the court to rule that the small monetary contribution of marital funds turned the premarital asset into marital property, is illogical and without legal basis. Furthermore, this ruling will unjustly enrich Mrs. Gainer by

entitling her to an additional \$140,868, over her projected lifetime, of Mr. Gainer's retirement benefits in return for her \$988.00 contribution.

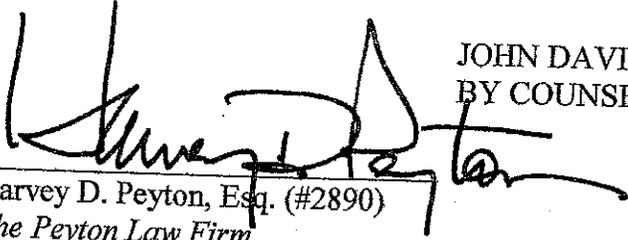
Mr. Gainer's premarital military service can be valued appropriately by considering the fact that his service in the U. S. Navy was responsible for his earning 93% of the pension enhancement and his payment of \$1,976.00 was compensation for the remaining 7%. Mrs. Gainer's entitlement can be mathematically calculated by the following calculation: $\frac{1}{2} \times .07 \times .12 = .42\%$. The .07 is the 7% payment and the .12 is the 12% add on to Mr. Gainer's retirement as a reward for his military service. Mrs. Gainer would be entitled to an additional portion of $\frac{42}{100^{\text{th}}}$ of 1% as recompense for the \$988 portion of the contribution that was her portion of the marital funds used.

VI. RELIEF PRAYED FOR

Appellant prays that the court grant an appeal; that the court reverse this final order insofar as it relates to the equitable distribution of John Gainer's vested retirement benefits and the assignment of the entirety of the marital debt to John Gainer; that the family court be directed that the appropriate pension plan to value is the non-law enforcement plan that John Gainer was vested in at the time of the parties' separation; that John Gainer be awarded his premarital military service as his sole and separate property; and that the marital personal property and marital debt be valued and apportioned appropriately.

RESPECTFULLY SUBMITTED,

JOHN DAVID GAINER
BY COUNSEL



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Counsel for John David Gainer

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

In Re: **The Marriage of**

MARY ELLEN GAINER,

Appellee/Petitioner Below

and

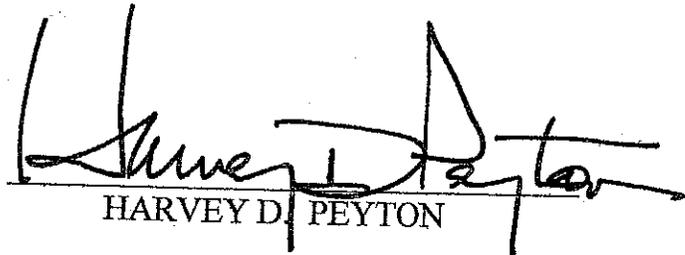
JOHN DAVID GAINER,

Appellant/Respondent Below.

CERTIFICATE OF SERVICE

I, Harvey D. Peyton, counsel for the Appellant, John David Gainer, do hereby certify that I have this 3rd day of January, 2005, served a copy of the foregoing "*Petition for Appeal of the Appellant, John David Gainer*" upon all parties of record by mailing a true copy thereof, by First Class United States Mail, postage prepaid, as follows:

Charles Phalen, Esquire
Bayliss & Phalen
403 Pennsylvania Avenue
Charleston, WV 25302
Counsel for Mary Ellen Gainer


HARVEY D. PEYTON