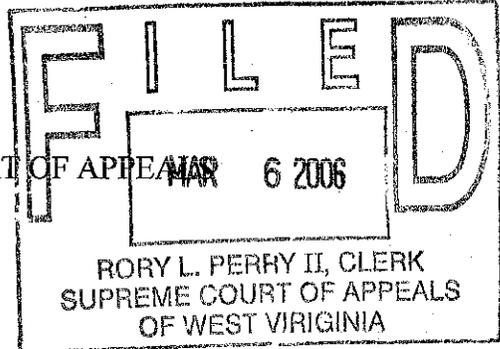


No.: 33065

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



In Re: Marriage of

MARY ELLEN GAINER,

Appellee/Petitioner Below

And

JOHN DAVID GAINER,

Appellant/Respondent Below.

FROM THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA
CASE 01-D-206

RESPONSE TO PETITION FOR APPEAL

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

Appellee agrees with the Appellant's rendition of the facts stated under this heading.

II. STATEMENT OF THE FACTS OF THE CASE

Appellee agrees with the majority of the basic facts as stated, such as Appellant's birth date, the years of Naval service, the years of employment Appellant was with the West Virginia State Police, and the fact that Appellant was not vested in any pension or retirement benefits before his current employment as a United States Marshal. Appellee also agrees with the date of marriage, Appellee's birth date, Appellee's employment history and pension and social security benefits. The final undisputed fact in this case is the separation date of June 9, 2001. The remainder of the facts as stated in Appellant's Petition for Appeal are contested and as stated in the Petition, are more argument than fact.

At the time of separation, Ms. Gainer was vested in a private pension plan with her employment and also participated in the Social Security system. John Gainer was vested in his Civil Service Retirement System (hereinafter CSRS) retirement plan based upon his years of service with the U.S. Marshals Service as well as the military service credit he purchased with marital funds.

In January 2003, while still married, Mr. Gainer completed his twentieth (20th) year of service with the U.S. Marshals Service. Mr. Gainer testified prior to attaining his twentieth year that he had always intended to complete his twenty years of service. As stated, he did complete his twenty years of service prior to the divorce.

Mr. Gainer's expert failed to credit, or even consider, the military service credits despite the fact that Mr. Gainer's own testimony confirmed that the service was purchased with funds earned during the marriage. Furthermore, Mr. Gainer's expert used the improper retirement of sixty-two (62), when his own counsel agrees that Mr. Gainer has a mandatory retirement date of October 5, 2007, making Mr. Gainer fifty-seven (57) years of age upon retirement.

In the valuation of Mr. Gainer's pension, Mrs. Gainer's expert properly applied a marital coverture factor to his calculations prior to stating his value of \$305,602.00.

There are not sufficient assets, other than the pensions of the parties, which would have allowed the Family Court Judge to provide a lump sum settlement from Mr. Gainer to Mrs. Gainer or vice-versa.

The Family Court's order provides an appropriate formula for the division of the parties' retirement plans.

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

Each of Appellant's points of errors will be discussed in the Discussion of Law.

IV. DISCUSSION OF LAW

A. Standard of Review

Appellee agrees with the Appellant's rendition of the standard of review.

B. Valuation of John Gainer's Vested Retirement Benefits

It is undisputed that the 17 ½ years of service credited to his CSRS retirement benefit was earned during the course of the marriage and is marital property and is subject to equitable distribution. However, one dispute lies in the value of the retirement plan and the method in which the family court divided the plan.

First, there is no dispute that the family court must follow three steps in classifying property, valuating property, and dividing property properly among the parties. *Whiting v. Whiting*, 183 W.Va. 451, 396 S.E.2d 413 (1990). Once the classification of marital/non-marital property is made, the property must be given a value, and then divided equitably between the parties. This Court has given guidance to lower courts for division of pension rights among the parties:

When a court is required to divide vested pension rights that have not yet matured as an incident to the equitable distribution of marital property at divorce, the court should be guided in the selection of a method of division by the desirability of disentangling the parties from one another as quickly and cleanly as possible. Consequently, a court should look to the following methods of dividing pension rights in this descending order of preference **unless peculiar facts and circumstances dictate otherwise**: 1) lump sum payment through a cash settlement or off-set from other available marital assets; 2) payment over time of the present value of the pension rights at the time of divorce to the non-working spouse; 3) **a court order requiring that the non-working spouse share in the benefits on a proportional basis when and if they mature.**

(emphasis added). *Syl. Pt. 5, Cross v. Cross*, 178 W.Va. 563, 363 S.E.2d 449 (1987).

“If, however, the circumstances do not warrant immediate distribution because there are insufficient assets in the estate to permit offset, or the present value of the future benefit is too difficult to ascertain, the trial court may find it necessary to utilize either the deferred distribution or the reserve jurisdiction method.” *McGee v. McGee*, 214 W.Va. 36, 585 S.E.2d 36 (2003). “Where retirement benefits are allocated utilizing

the deferred distribution method, the non-employee spouse is awarded a fixed percentage of retirement benefits to be distributed when such benefits mature.” *Syl. Pt. 5, Id.* The “significant advantage to the deferred distribution approaches is that, because they delay distribution until the pension benefits have vested and matured, they impose equally on the parties the risk of forfeiture.” *Id.* at 43, 43. However, even though this Court has given guidelines that the lower courts should follow in dividing pension plans,¹ it has also made clear that “[t]here is no fool-proof, scientific method regularly used by courts to divide retirement or pension benefits that have vested but not yet matured.” *Id.* at 454, 568.²

Appellant argues that the lower court failed to value Mr. Gainer’s CSRS pension in either order, and that the court “threw up his hands” and imposed a disfavorable method of dividing Mr. Gainer’s pension due the experts’ valuations being so far apart.³ While it is true that the family court gave no exact monetary valuation to Mr. Gainer’s pension plan, in either order, the court did state an extensive division method for both

¹ *Cross, supra.*

² It is also undisputed that the family court must make findings of fact and conclusions of law to support each step of the process stated above. *Id.* Appellee firmly believes that the lower court stated sufficient findings of facts and conclusions of law to support the decisions made classifying, valuating, and dividing the property.

³ It should be noted that in the Proposed Final Order of Divorce, the Family Court distributed **both** parties’ pensions by qualified order. In the Order on Remand, the court does not give a monetary value to the either parties’ pensions, but gives an extensive method of distribution upon maturation of **both** plans. Appellant is only arguing that Mr. Gainer’s pension was divided incorrectly and therefore seems to be accepting the fact that Mrs. Gainer’s plan was correctly divided when they were both divided by the same method at the time of distribution. Furthermore, Appellant argues that the court erred by not allowing him to disentangle himself from the Appellee by paying a lump sum cash settlement for his retirement, when he apparently agrees with the distribution of Mrs. Gainer’s retirement benefits, which do not mature at a set date in the future and would keep the parties further entangled awaiting Mrs. Gainer’s retirement for Mr. Gainer to receive his proportioned share.

pension plans based on a coverture factor⁴. The Court gave findings of facts for its reasoning for the method of distribution and the coverture factor division. Furthermore, the court stated its reasoning for not giving an exact monetary value to the plan in that it was dependent upon future contingencies. The court stated its calculation of the division, therefore, did not need to state an exact amount of valuation based on the above reasoning. Since “[c]alculation of present value [is] determined to be unnecessary where there is no immediate distribution,”⁵ the court’s reasoning and application of division to the pension plan was not clearly erroneous and should be upheld. Moreover, “trial courts typically have discretion in choosing the most appropriate methods of distributing the marital portion of pension benefits.” *McGee, supra*, at 45, 45.

In *Cross*, this Court further stated that “[u]nless pensions benefits are soon to be paid to the working spouse because of approaching retirement, at which point it is perhaps most convenient simply to allocate the benefits in proportion to the non-working spouse’s equitable share, the least satisfactory method of dividing a pension is to allocate part of it to the non-working spouse to be collected when and if the benefits are paid. . . . Nonetheless, when other methods of distribution are impossible, that is the method of last resort.” (emphasis added) *Cross* at 455, 570.

In the case *sub judice*, Mr. Gainer’s benefits are soon to be paid. He is required to retire in October 2007, rendering it most convenient to allocate the benefits in proportion to Mrs. Gainer’s equitable share. Moreover, the other two methods, lump sum distribution through cash settlement or other marital asset offset, nor payment over time of the present value at time of divorce, were not possible in this case because Mr. Gainer

⁴ The coverture factor was not raised as an issue for discussion, therefore, Appellee reserves the right to submit a brief on that topic if the Court so wishes.

⁵ *McGee*, citing *Tirmenstein v. Tirmenstein*, 539 N.E.2d 990 (Ind. Ct. App. 1989).

lacked the sufficient funds for a lump sum cash settlement. Likewise, there were also insufficient marital assets to offset the substantial amount of benefits. It was also impossible to order payment over time of the present value at the time of divorce due to the substantial amount of benefits to be paid and the lack of funds to make the payments. Mr. Gainer's benefits mature in October 2007, rendering the monies available to pay Mrs. Gainer her proportioned share at an exact determinate value, thus making the deferred distribution method the most practicable and equitable choice for both parties.

Furthermore, the funds could not have been withdrawn from the plan until retirement regardless of the method of distribution from the family court, thus further substantiating the reasoning of the family court for the deferred distribution method.

C. Family Court's Inclusion of Mr. Gainer's Retirement to the Basic Law Enforcement and Firefighter Annuity

In the *Order on Remand*, the court found that Basic Law Enforcement and Firefighter Annuity (hereinafter referred to as "annuity") was a marital asset and gave substantial evidence as to why the annuity was classified as such.

It is undisputed that the annuity could not vest until Mr. Gainer had been a U.S. Marshal for twenty years. Although at the time of separation, he had only 17 ½ years of service as a Marshal, this annuity vested while the parties were still married and before a final divorce order was entered. Moreover, whether the annuity vested or not was in the sole control of Mr. Gainer. All Mr. Gainer had to do was stay employed as a Marshal, no other requirements were conditioned. Mr. Gainer even testified at the hearing that he from the time of employment, he had planned to stay employed as a Marshal until

retirement, therefore, planning to be vested in the annuity. However, Appellant argues that the court erred by classifying this annuity as marital property since it did not vest until after separation.

The definition of "separate property" is found in *W.Va. Code §48-1-237* (2005), which states as follows:

- (1) Property acquired by a person before marriage;
- (2) Property acquired by a person during marriage in exchange for separate property which was acquired before the marriage;
- (3) Property acquired by a person during marriage, but excluded from treatment as marital property by a valid agreement of the parties entered into before or during the marriage;
- (4) Property acquired by a party during marriage by gift, bequest, devise, descent or distribution;
- (5) Property acquired by a party during a marriage but after the separation of the parties and before ordering an annulment, divorce or separate maintenance; or
- (6) Any increase in the value of separate property as defined in subdivision (1), (2), (3), (4), or (5) of this section which is due to inflation or to a change in market value resulting from conditions outside the control of the parties.

The code defines "marital property" 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, 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 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; and
- (2) The amount of any increase in value in the separate property of either of the parties to a marriage, which increase results from: (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property; or (B) work performed by either or both of the parties during the marriage.

W.Va. Code §48-1-233 (2005).

Also, the Court has held that “[t]he doctrine of equitable distribution permits a spouse, who has made a material economic contribution toward the acquisition of property which is titled in the name of or under the control of the other spouse, to claim an equitable interest in such property in a proceeding seeking a divorce.” *Syl. Pt. 2, LaRue*, 172 W.Va. 158, 304 S.E.2d 312 (1983).

As stated above, it is undisputed that the 17 ½ years of service as a U.S. Marshal is marital property since it was earned during the parties’ marriage. However, the dispute lies in the annuity enhancement characterized as marital property since it did not vest until 2 ½ years after separation. The Appellant argues that the holding is contrary to case law and therefore must be reversed.

In *Claypoole v. Claypoole*, 204 W.Va. 46, 511 S.E.2d 457 (1998), a per curiam opinion, this Court reversed a fifty-fifty division of benefits of retirement contributions made after the date of filing for divorce because Mr. Claypoole was working and contributing to the retirement fund after the commencement of the action. That is simply not the case here. Even though Mr. Gainer continued to work as a Marshal after the date of separation, he did not contribute to the retirement fund. Mr. Gainer does not make payments to the CSRS fund. His employer contributes the money. All Mr. Gainer was required to do was continuing working, as he did throughout the 17 ½ years of marriage where he was supported by his wife. Mr. Gainer is losing any economic value or contributions as in *Claypoole*.

Appellant next argues the *Barrett*⁶ case, another per curiam opinion, attempting to reason that the court should not have divided the retirement plan as it did because the parties’ plans are so fundamentally different that they should not be divided in the same

⁶ *Barrett v. Barrett*, 202 W.Va. 424, 504 S.E.2d 659 (1998).

way. That ruling in no way effects whether the annuity enhancement is a marital asset or separate property and the reasoning of the court's division of the retirement plan has already been discussed above.

The annuity enhancement should be classified as marital property based on the ruling in the *McGee* case. *Supra*. In that case, this Court held that "[i]n certain cases post-dissolution increases in a pension should be treated as separate property. However, a pension qualifies for separate property treatment of post-dissolution increases **only if the trial court can award the pension under the net present value theory at the time of dissolution. If the value of the pension cannot be divided at the time of dissolution but must be divided when it is received or could be received, then post-dissolution increases are marital property....**" (emphasis added). *Supra* at 45, 45.

In the case presently before the court, the annuity had vested at the time of dissolution, and the trial court could not award the pension under the net present value at the time of dissolution without including the annuity. Moreover, the annuity vested before the retirement plan matured, and the court deferred distribution until maturation, so the annuity should be marital property.

Furthermore, as stated above, Mrs. Gainer supported and contributed to Mr. Gainer's employment for 17 ½ years. Even though the annuity had not vested until after separation, the parties had agreed prior to employment that Mr. Gainer would be employed for the twenty years required for the annuity enhancement. Mrs. Gainer contributed toward the enhancement for almost all of the required years. The enhancement of the annuity was not something beyond the parties' control, such as the

market or inflation; it was in the sole control of Mr. Gainer to continue employment. Since the annuity enhanced marital property, it is therefore itself marital property.

Appellant next argues that Mrs. Gainer is not entitled to the annuity enhancement because the trial court should have determined the net value of the retirement at the date of separation, in which time the annuity had not yet vested. In support of his argument, Appellant cites *W.Va. Code §48-7-104*, which states that the court should determine the net value of all **marital property** of the parties as of the date of separation **or as of such later date determined by the court to be more appropriate for obtaining an equitable result**. Also under that statute, the court may decline to include the value of the marital property and fix the spouses' respective shares in such future payments if and when received if the value of the future payment is not known at the time of entering a final order or if the receipt is contingent on future events or not reasonably assured. The trial followed the statute to the letter by classifying the annuity as marital property and then dividing it once it matured based on a fix percentage. The trial court stated its reasoning for utilizing a later date of maturation of the plan because it was more appropriate in obtaining an equitable result. *See, Order on Remand ¶3*. Since the trial court followed the language of the statute, there can be no error.

D. Pre-Military Service Credits

Appellant's final argument is that the court erred by classifying the military service credits as marital property. He argues that since the service occurred before the marriage, it remains separate property no matter what. That just simply is contrary to the statute Appellant cites, along with numerous case law.

Mr. Gainer served our country from May 1970 to May 1976, when he was honorably discharged. The parties were not married until August 1977, sixteen months after Mr. Gainer was discharged from the Navy. At the time of discharge, Mr. Gainer was not vested in any retirement benefits from his military service. Therefore, at the time of discharge, as well as at the time of marriage, Mr. Gainer's military time had no monetary value.

After seven years of marriage, Mr. Gainer became employed as a U.S. Marshal and had an option to "purchase" his military time as credit towards the Marshal's CSRS retirement plan. Since the U.S. Marshal Service only participates in CSRS and not the social security system, CSRS is the only retirement plan available to Mr. Gainer. Therefore, "purchasing" the military time would enhance his retirement benefits because it would add an extra six years of service to his retirement pay upon his mandatory retirement at age fifty-seven. After discussing this option with his wife, the military time was purchased with marital funds from the joint marital account for the amount of \$1,976.00. shortly after his employment.

The family court ordered that the military time was subject to equitable division because Mr. Gainer testified that he purchased the time used with wages earned during the marriage. *Proposed Final Order of Divorce* ¶44. The court, therefore, correctly classified the military time as marital property, ordered that it be valued and divided by qualified order; thereby fulfilling the required three steps of division of property.

Appellant argues that the military time should not be classified as marital property since the time was served prior to the marriage.⁷

⁷ It should be noted that Appellant did not raise this issue on appeal to the Putnam County Circuit Court, and therefore, should not be considered by this Court at this time.

It is undisputed that Mr. Gainer served in the U.S. Navy for almost six years prior to his marriage to the Appellee. And at the time of marriage, that service, had it carried value, would have been separate property under the statute stated above defining separate property. However, in subsection two of the marital property definition statute, it is made clear that separate property value increased by marital funds becomes marital property.

At the time of the marriage, Mr. Gainer's military time had no value. It did not give him rights to retirement or any other benefits. Only after he became a U.S. Marshal during the course of the marriage, did the option become available for that time to have value. It was decided by the parties that the military time would be purchased and credited toward the CSRS pension – a marital decision to enhance the couples' future. The service was then purchased, as required by the government, within the three years of Marshal service. The key is that the service credit was purchased with marital funds. Therefore, the marital funds increased the value of the service credit, which under the language of the statute classifies the service as marital property.

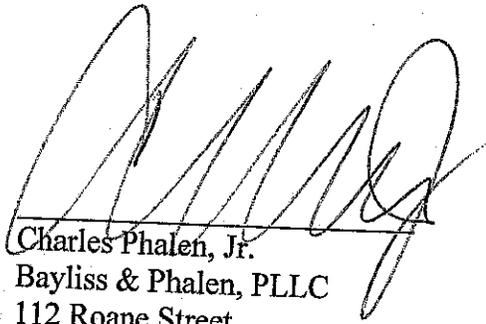
Appellant argues that Appellee failed to make a substantial economic contribution toward the acquisition of the property so the military time should not be marital property. The plan only required a 7% of military pay purchase price within the first three years of service as a Marshal. Appellee cannot be held responsible for not contributing more money when no more money was required. The important key to this case is that it does not matter that a "substantial" economic contribution was or was not made; it is the fact that the separate property's value was increased by marital funds based on a marital decision, thus making it marital property.

V. RELIEF PRAYED FOR

Appellee prays that this Honorable Court deny the appeal and affirm the final orders based on the above-stated grounds and reasoning.

Respectfully Submitted,

Mary Ellen Gainer,
By Counsel



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Appellee/Petitioner Below

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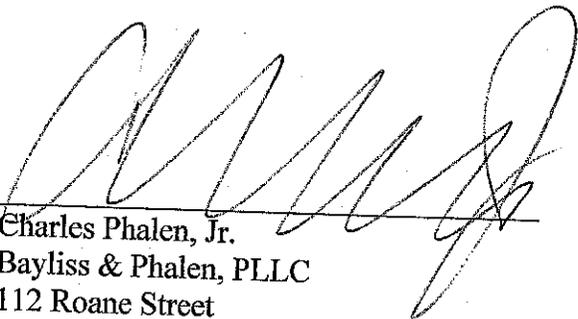
JOHN DAVID GAINER,

Appellant/Respondent Below.

CERTIFICATE OF SERVICE

I, Charles Phalen, Jr., counsel for Appellee, Mary Ellen Gainer, do hereby certify that I have served of a true and exact copy of the "RESPONSE TO PETITION FOR APPEAL" upon all parties of record by United States Postal Service, postage pre-paid, on this the 6th day of March 2006, as follows:

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