

FILED

June 8, 2012

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Workman, Justice, concurring:

I concur with the result reached by the majority regarding rehabilitative alimony, permanent spousal support and attorney fees and costs.

I write separately to focus on a principle of law that has been clearly stated by this Court since 1996, but which seems to frequently be ignored by domestic relations attorneys and judges. As we set forth in syllabus point four of *Banker v. Banker*, 196 W. Va. 535, 474 S.E.2d 465 (1996), and which the majority correctly reiterates in the opinion::

In divorce actions, an award of attorney's fees rests initially within the sound discretion of the family law master and should not be disturbed on appeal absent an abuse of discretion. In determining whether to award attorney's fees, the family law master should consider a wide array of factors including the party's ability to pay his or her own fee, the beneficial results obtained by the attorney, the parties' respective financial conditions, the effect of the attorney's fees on each party's standard of living, *the degree of fault of either party making the divorce action necessary*, and the reasonableness of the attorney's fee request.

196 W. Va. at 538, 474 S.E.2d at 468 (emphasis added). In reaching this holding in *Banker*, the Court stated that

[t]he circuit court's determination to deny the defendant attorney's fees and expert witness fees was narrowly focused

upon the relative financial parity in the distribution of marital assets. The determination of this issue is to be accorded far greater scope than that given by the circuit court. The evidence is sufficient to support a finding that this marriage would not have been brought to this point but for the plaintiff's continued affairs with his former secretary. Furthermore, the evidence in this case reveals incontestably that the defendant entered this proceeding with clean hands. In divorce cases, the "fault" factor is premised upon the notion that it is unfair to force a litigant to pay for the cost of litigation that is wholly caused by the misconduct of the opposing party. *Yet, neither the family law master nor the circuit court gave "fault" any reasonable or fair consideration.* Thus, we find the failure to give sufficient consideration to a significant factor constitutes an abuse of discretion requiring a remand for further consideration. Upon remand, it must be determined whether the defendant is entitled to have the reasonable cost of her attorney's fees and expert witness fees, including the cost of prosecuting this appeal, but only after considering all the appropriate factors, including the fault of the plaintiff.

Id. at 550, 474 S.E.2d at 480 (emphasis added).

Later that same year, in *Roger v. Rogers*, 197 W. Va. 365, 475 S.E.2d 457 (1996), this Court held in syllabus point four that

[i]n appropriate circumstances, an enhancement of an award of maintenance/alimony based on the degree of fault is justified. Enhancement of a maintenance/alimony award by a fault premium may be awarded when additional support is required to reimburse the injured spouse for expenses directly related to the fault or to assure that the injured spouse continues to have the standard of living enjoyed during the marriage. A fault premium may also be applied to discourage the fault or behavior that contributed to the dissolution of the marriage. In determining an award of maintenance/alimony enhanced by a

fault premium, the circuit court must consider the concrete financial realities of the parties.

197 W. Va. at 367, 475 S.E.2d at 459.

Yet in case after case, that principle is ignored. Although in many divorce cases, there may be insufficient income and assets to make a premium alimony award based on aggravated fault, in many (such as the instant one), there is significant income from which such an award can be made.

Because this case is being remanded for consideration of an attorney's fee and costs award, I want to reiterate this Court's well-established case law regarding consideration that should be given to the fault of either party in causing the dissolution of the marriage.

In the instant action, despite evidence that the divorce was due to the extramarital affairs of the Respondent husband, neither the family court nor the circuit court awarded any attorney's fees and costs to the Petitioner. Rather, the family court only considered the fault of the Respondent husband as follows: "The Wife has alleged fault on the Husband's part as an additional factor in granting her request for alimony. While there is some merit to the Wife's claim, the court does not give significant weight to the fault on the Husband's part. . . ."

Concerning attorney's fees, the family court determined that the Petitioner had sufficient assets awarded to her with which to pay her own attorney's fees, that neither party had acted in "bad faith" during the proceedings, and that the Petitioner's fees were "significantly greater" than the Respondent's fees. The circuit court, in its Order affirming the family court, made similar conclusions.

While the divorce was granted based on irreconcilable differences, evidence and argument on the issue of the parties' fault was introduced and heard. On appeal, the Petitioner argued that the breakdown of the marriage was the direct result of her inability to forgive the Respondent for a third infidelity. Further, the Petitioner had, by agreement of the parties, given up her career in 1992 to be a full-time homemaker and mother to three children.

Contrary to the family court's and circuit's courts conclusions, although how the parties' conduct themselves during the proceedings may be relevant, the lower courts' focus on how the parties behaved during the proceedings in this case is simply not what is at issue. The lack of consideration by the family court and circuit court to the issue of marital misconduct in bringing about the need for a divorce action is the problem in this case. *Banker*, 196 W. Va. at 538, 474 S.E.2d at 468. Succinctly stated, but for the Respondent's repeated extra-marital affairs, the Petitioner would not have had to hire a lawyer and incur

attorney's fees and costs to pursue a divorce action. On remand, due consideration should be given to the "degree of fault of either party making the divorce action necessary." *Id*

For the foregoing reasons, I respectfully concur.