No. 21380 -- Sydney O. Metzner, Appellant v. William R. Metzner, Appellee

Neely, J., concurring in part and dissenting in part:

Now that the goose is cooked, Mrs. Metzner wants her share, but Mrs. Metzner did not pay for the goose, the fuel to cook it, the sauce to flavor it or even the pot to cook it in. The majority awards Mrs. Metzner the tender breast of the goose merely because the goose happened to wander into Mr. Metzner's yard while Mr. and Mrs. Metzner were still married. I dissent because Mrs. Metzner should pay for at least some of the costs of roasting the goose.

As I said dissenting in Charlton v. Charlton, 186 W. Va. 670, 678, 413 S.E.2d 911, 919 (1991): "...instead of being blunt about this Court's determination to make sure that women get whatever gold mine survives a nasty divorce while men get the shaft, the majority continues to pretend that they are 'interpreting' a sex neutral standard from...." W. Va. Code 48-2-1(c)(1) [1986], yet it is readily apparent that "[t]hey are not!" Therefore, to the extent that the majority opinion implies that mere acquisition of a contingent fee contract during marriage transforms it into marital

property for distribution purposes under W. Va. Code 48-2-1(c)(1), I must disagree.

The majority cites an Arizona case holding that "it is clear that the attorney's services performed during the marriage in fulfillment of the contract are community property and the community is entitled to what the percentage of the time expended as community labor bears to the time expended in reaching the ultimate recovery." Garrett v. Garrett, 683 P.2d 1166, 1170 (Ariz. App. 1983). Just as the portion of fees received for services performed during the marriage in fulfillment of the contract should be considered community property, the expenditures incurred by the lawyer in fulfillment of the contract should likewise be apportioned. In other words, if the former Mrs. Metzner wants to share in the profits from Mr. Metzner's legal efforts up to the time of divorce in fulfilling a contingent fee contract, she must pay her share of the costs incurred by him. And, the costs must be paid at the time of divorce, i.e., before the outcome is known, and not after the fact.

Mrs. Metzner wants a percentage share in the total fees realized under the contracts, therefore equity demands that she should have to contribute the same percentage of her money towards

the total costs of bringing in the fee. This is in keeping with the general theory behind marital property distribution. Property or assets gained through shared efforts, and expenditures to earn profits should be shared equally between the participants. W. Va. Code, 48-2-32(c) [1984], states:

> "In the absence of a valid agreement, the court shall presume that all marital property is to be divided equally between the parties but may alter this distribution, without regard to any attribution of fault to either party which may be alleged or proved in the course of the action, after a consideration of the following [factors]...." [emphasis added].

The majority is awarding Mrs. Metzner a windfall here because she is not bearing her share of the costs incurred in earning the contingent fee. West Virginia is an equitable distribution state. The majority, in deciding to consider contingent fee contracts for marital property purposes, must not end it's equitable analysis there.

Equitable distribution under W. Va. Code 48-2-1 [1992], et seq., is a three step process: the first step is to classify

[1]An order directing unequal distribution of marital property must specifically refer to the factors in W. Va. Code 48-2-32(c), and the facts in the record which support application of those factors. See Somerville v. Somerville, 179 W. Va. 386, 369 S.E.2d 459 (1988).

the parties' property as marital or nonmarital; the second step is to value the marital assets; and the third step is to divide the marital estate between the parties in accordance with the principles contained in W. Va. Code 48-2-32 [1984]. See Syllabus Point 1, Signorelli v. Signorelli, 189 W. Va. 710, 434 S.E. 2d 382 (1993), Syllabus Point 2, Wood v. Wood, 184 W. Va. 744, 403 S.E.2d 761 (1991), Syllabus Point 1, Whiting v. Whiting, 183 W. Va. 451, 396 S.E.2d 413 (1990). The valuation of risky, costly, and speculative interests must be addressed with equal enthusiasm and concern for fairness-- this is the area where the majority fails.

Equity is defined as "freedom from bias or favoritism". The majority, in the continuing and unfortunate tradition of Whiting v. Whiting, 183 W. Va. 451, 396 S.E.2d 413 [1990], remains blinded by gender when fashioning decisions in the marital property arena. This gender bias has made the majority unable to contemplate an evenhanded distribution of communal liabilities incurred in the process of the acquisition of marital assets, when such costs should be shared equally by the party not actively practicing law.

[2]Webster's New Collegiate Dictionary, p. 387 (G. & C. Merriam Company, 1977)

In 1984, the Hon. Lawrence H. Cooke, speaking at a press conference announcing the formation of the New York Task Force on Women in the Courts, defined gender bias as "decisions...made or actions taken because of weight given to preconceived notions of sexual roles rather than upon a fair and unswayed appraisal of merit as to each person or situation." By continuing to treat women differently from men, the Courts are ultimately doing society as a whole a grave injustice. The findings of the numerous state task forces on gender bias in the courts agree with this view.

The Report of the New York Task Force on Women in the Courts states that: "[G]ender bias...is a pervasive problem with grave consequences... Cultural stereotypes of women's role in marriage and in society daily distort courts' application of substantive law. Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference, and hostility." Other states agree. For example, the Connecticut Task Force on gender bias concluded "women are treated differently from

---

[3]Report of the New York Task Force on Women in the Courts, 15 FORDHAM URB. L.J. 15, 16 (1986-87) (hereinafter New York Task Force Report).

[4]New York Task Force Report, supra note 3, at 17-18.

[5]The West Virginia Task Force on Gender Bias has not yet released a report on the conditions in this state.

men in the justice system and, because of it, many suffer from unfairness, embarrassment, emotional pain, professional deprivation and economic hardship." Report of the Connecticut Task Force, Gender, Justice and the Courts 12 (1991). See also The Preliminary Report of the Ninth Circuit Gender Bias Task Force, Discussion Draft, July 1992; Final Report of the Washington State Task Force on Gender & Justice in the Courts xiii, (1989) ("Bias is any action or attitude that interferes with impartial judgment.")

We have an obligation to take into consideration the fair market value of any marital asset subject to distribution. In Syllabus Point 4, Kimble v. Kimble, 186 W. Va. 147, 411 S.E.2d 472 (1991), we held that: "[i]n computing the value of any net asset, the indebtedness owed against such asset should ordinarily be deducted from its fair market value." See also Signorelli v. Signorelli, 189 W. Va. 710, 434 S.E. 2d 382 [1993]. In this case, Mrs. Metzner seeks to recover contingent fees, when the bulk of the work done to recover the fee is the result of post-separation work performed by Mr. Metzner (i.e. not marital property subject to distribution). Furthermore, Mrs. Metzner expects to recover her "share" without any contribution to the post-separation costs and liabilities paid directly out of Mr. Metzner's personal account during his efforts to win the cases. The majority, in awarding her

one-sided demands, once again denies justice at a husband's expense, reinforcing the sexual stereotype of all men being "deep pockets" to whom money means nothing.

Fairness and consistency is all I ask. Furthermore, our recent decisions in domestic cases should receive a prominent place on the agenda of the newly formed West Virginia Task Force on Gender Bias in the Courts.

Fairness dictates that Mrs. Metzner's recovery be reduced by her share of post-separation overhead costs incurred by Mr. Metzner as a result of post-separation hours he worked on the case. She also should be expected to bear some of Mr. Metzner's post-separation costs in preparing these cases that cannot be recovered from the clients. Such costs include expert witness fees, deposition costs, telephone, travel, and other litigation-related expenses that Mr. Metzner paid from his personal funds. The Court should also reduce Mrs. Metzner's share by the amount of any taxes that Mr. Metzner might be expected to pay on her share of his taxable

[6]Overhead, the cost to operate and maintain the law office, can be calculated by dividing the average annual cost by the days spent working on the fee cases at issue in this case. See Brief for Appellee, p. 45, Oct. 28, 1993.

income. See Hudson v. Hudson, 184 W. Va. 202, 399 S.E. 2d 913 [1990]; Bettinger v. Bettinger, 183 W. Va. 528, 396 S.E.2d 709 [1990].

The majority's pattern of misuse of the equitable distribution statute continues with this case. When one party is given the rewards, without the costs, of another party's independent efforts, unjust enrichment results. In LaRue v. LaRue, 172 W. Va. 158, 164, 304 S.E.2d 312, 316 (1983) (citation omitted), overruled on other grounds, Butcher v. Butcher, 178 W. Va. 33, 357 S.E.2d 226 [1987], we stated that claims for equitable distribution of marital property evolved out of circumstances where "the spouse seeking an interest in the property had made a substantial economic contribution toward the acquisition of the property." To the extent that such a contribution is lacking in Mrs. Metzner's case, her share of the fees should be reduced. The majority's valuation of Mrs. Metzner's share of the contingent fees earned by Mr. Metzner is simply unfair. One might say Mr. Metzner's goose was cooked.

[7]Appellee's brief laid out the valuation scale for deductions to Mrs. Metzner's share of the contingent fees based upon the direct, indirect, and tax expenses payable out of Mr. Metzner's pocket in the course of working on these cases.