

FILED

July 12, 2006

released at 3:00 p.m.

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

Starcher, J., dissenting:

The majority opinion cogently says that, when an appellate court considers a party's complaint that a family court's distribution of marital property is inequitable, "one specific debt obviously cannot be analyzed in a vacuum and the comprehensive financial situation must be simultaneously evaluated[.]"

I dissent because the majority opinion ignored its own sage advice. The majority opinion focused its gaze solely upon the parties' marital house, and the debt to remodel that house, in a vacuum. The result is an opinion that tells the family court judge to go back and do what the family court has already done: ascertain the value of the parties' equity and debt, and make sure the equity and debt are equally divided. The majority opinion never really says what the family court did wrong; the case is remanded for nothing more than for the family court judge to go through the motions and, more likely than not, come to the same conclusions.

The parties in this case plainly – without question – made poor financial decisions. A fundamental rule of home improvement is that you never, ever invest so much money into your house that it becomes the most valuable house on the block. But that is exactly what the parties in this case did. They over-improved a home in a poor neighborhood. They invested \$62,500.00 into remodeling a \$44,000.00 house that, when all

was said and done, was still worth a grand total of \$44,000.00. These were not disputed figures; the parties *stipulated* to these numbers.

The majority opinion seems to suggest some confusion about where the money to finance these renovations came from. The money was not borrowed from some third party, like a bank. The financing was provided, indirectly, by the parties themselves. The money was borrowed against Mr. Sloan's 401K retirement account. So when the family court judge made Mr. Sloan solely responsible for paying the "debt," Mr. Sloan was ordered to do nothing other than putting money back into his future, into his retirement.

The family court judge has already balanced the equity and debt of the parties. The judge awarded Ms. Sloan the marital house plus a small portion of Mr. Sloan's 401K plan; Mr. Sloan was awarded the remaining positive value of his 401K. Mr. Sloan even concedes that he was "allowed to keep a slightly larger portion of his 401K."¹

If I read the majority opinion correctly, it seems to suggest that the family court judge should consider on remand, within its discretion, making Ms. Sloan pay some share of the "debt" owed to Mr. Sloan's 401K – but, to fairly do this, the family court judge would then need to allocate a greater portion of Mr. Sloan's 401K to Ms. Sloan, since she would be contributing to an increased future value of this asset. But to require Ms. Sloan make these

¹Mr. Sloan's real gripe is not that the marital assets were distributed unequally in a mathematical sense. His complaint is temporal, because he is being awarded the value of his 401K, an asset that he cannot use until the future when he retires, while his now-ex-wife is receiving the current use of a fully-remodeled house.

debt payments when she has no income would reach a punitive result – which appears to be the precise result desired by Mr. Sloan.²

The majority opinion puts much focus on the reasons why the parties remodeled their home.³ However, these reasons are irrelevant. The critical facts are that the parties were married for twenty-three years, and during the marriage they both agreed to expend marital assets to improve another marital asset, their home. Mr. Sloan earns in excess of \$100,000.00 per year, while Ms. Sloan has been a stay-at-home mother since 1983. I believe that the family court judge equitably divided the parties' assets, and fairly placed the burden and benefit of paying back the debt against the 401K plan on the only party with a salary: Mr. Sloan. The majority opinion's remand of this case, without any solid direction as to how the family court abused its discretion, therefore seems pointless.

Accordingly, I respectfully dissent.

²Let's try and put the parties' positions in concrete terms. Assume that Mr. Sloan's retirement plan was worth \$30.00, and the parties borrowed \$10.00 against that plan. That means the retirement plan has a net worth of \$20.00. Ms. Sloan essentially argues that the parties' marital home is worth \$20.00. If she keeps the home, and Mr. Sloan keeps the retirement plan, the parties' assets have been equitably split.

Mr. Sloan insists that Ms. Sloan – even though she has no income – must assist him in paying back the \$10.00 toward his retirement plan. Adopting Mr. Sloan's theory, Ms. Sloan would get \$20.00 in marital assets, but then have to pay out \$5.00 so that Mr. Sloan can retire with a \$30.00 asset. This is by no measure an equitable distribution of marital assets.

³The remodeling was ostensibly done so that Ms. Sloan's parents could comfortably move into the house.