INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

BRADLEY L. BOWE

Petitioner Below, Petitioner,

v. No.: 23-ICA-370

MELISSA A. BOWE

Respondent Below, Respondent.

PETITIONER'S REPLY BRIEF

Submitted by:

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A.

The Respondent Failed to Respond to Petitioner's Argument Based Upon W.Va. Code §48-7-103

In Petitioner's supporting brief, p. 8, Petitioner presents argument based upon the provisions in West Virginia Code §48-7-103. That statute guides the family courts concerning the all-important subject of dividing marital property. In the Respondent's Brief no mention is made as a responsive argument, nor is West Virginia Code §48-7-103 mentioned.

Giving due regard to, and a very liberal interpretation, of the argument in Respondent's Brief, pp. 8-9, to the effect that "[all] Petitioner's arguments are irrelevant. . ." perhaps Respondent does respond.[1] However, it appears to that Petitioner the response fails to meet the dictate contained in Revised Rule of Appellate Procedure 10(d). The Petitioner submits that this statute should control any consideration of the property division in this case. Under §48-7-103(1)(B) the division should be altered by the contributions made to the marital estate by the VA disability benefit funds.

In relevant part this statute directs that a Court "shall presume" an equal division of property, but that division may be altered upon proof that contributions were made from "funds which are separate property. . . contributed to the acquisition, preservation and maintenance, or increase in value of marital property." The foregoing consideration is integral to the process of determining the division of marital property. This part of our law was overlooked by the Court

[1]Appellate Rule 10(d) states in pertinent part that "If the Respondent's brief fails to respond to an assignment of error, the Court will assume that Respondent agrees with the Petitioner's view of the issue.

below just as this argument has been overlooked by the Respondent. Petitioner's point is not irrelevant as the consideration of such a contribution is a required component of the accepted analysis. This analysis is consistent with, and supported by, prevailing precedent, *Chafin v. Chafin, 505 S.E. 2d 679 (W.Va. 1998), syl pt. 3*; *Somerville v. Somerville, 369 S.E. 2d 459 (W.Va. 1998), syl pt. 1*.

The amount of the contributions made from VA disability benefits by this Petitioner to increase in value, the estate, and for use in maintenance, acquisition and preservation of the marital assets is well known in this case as it was and continues to be the central argument. In the Order under appeal the Court below finds that W.Va. Code §48-7-103 is to be applied, but fails to go through the statutorily identified contributions in this case, JA 5 paragraph 27.

B.

The Respondent's Reliance Upon Commingling of Funds Is A State Court-Made Doctrine Which Cannot Alter Federal Law

The Respondent, Brief p. 10, relies entirely upon the fact that Mr. Bowe's VA disability payment went directly into an account which, although in Mr. Bowe's name solely, also contained funds from Mr. Bowe's work activities. There is no argument that income made from work during the marriage constitutes a marital asset. Nor is the argument here made that these funds were commingled, therefore reasons the Respondent, as did the Court below, under state court precedent these separate funds transmuted into marital property when mixed with other funds. This reasoning represents the error which requires reversal of the decision reached below.

Transmutation by commingling is a doctrine created entirely by state laws and for the most part created in decisions rendered by state courts in divorce cases, see Brett R. Turner,

Equitable Distribution of Property, (2d ed. 1994) §5.24 pp. 274-286. *Whiting v. Whiting, 396 S.E. 2d 413 (W.Va. 1990)* which is relied upon by this Respondent and which was relied upon by the Court below is an example by a state court on a court-created doctrine, see also Krauskopf, Classifying Marital and Separate Property-Combinations and Increase in Value of Separate Property, 89 W.Va. L. Rev. 997 (1987).

What the Respondent argues in the Brief p. 11-14, and the Court missed below, is that a federal law-protected benefit such as Ms. Bowe's VA disability here is protected from redesignation under the U.S. Constitution Supremacy Clause Article VI, Clause 2. These benefits are also protected from seizure and assignment by federal statute, 38 U.S.C. §5301 (a)(1). It cannot be identified as anything other than a separate asset belonging to the designated recipient. This is not a case involving difficult tracing in order to separate those funds in that the uncontested record shows exactly what amount was deposited during coverture. Our judicial branch can no more than our State legislature adopt rules or doctrine which rename these "protected" funds as marital property when they are statutorily identified as separate property. Under the facts presented here the Petitioner is entitled to their full credit as contribution to the martial estate from such separate property.

The authority which Respondent cites overwhelmingly supports the Petitioner. When the decisions involving VA disability benefits are separated from those which address commingling other types of funds the Petitioner finds support as follows. The decision in *Stacy v. Stacy, 144 N.E. 3d 899 (Mass. 2020)* addressed federal preemption, the anti-attachment statute, 38 U.S.C. §5301 (a)(1), and decisions of the United States Supreme Court on federal retirement benefits including and particularly VA disability benefits. The Court holds:

> "Because §5301(a)(1) preempts the judges authority to assign the veterans' disability funds in question, those funds must be excluded from the redistribution of the marital estate," N.E. 3d 906.

The funds in *Stacy* were ordered by the lower court to be halved with the spouse retroactively from Mr. Stacy's personal bank account. That decision was reversed.

In *Ex parte Johnson, 591 S.W. 2d 453 (TX 1979)* the Court refused to uphold Johnson's incarceration for contempt because the funds at the center of the controversy were veterans disability payments. The grounds for release was under the Supremacy Clause as those funds were by law separate property.

In Strong v. Strong, *8 P. 3d 763 (MT. 2020)* the Court relying on decisions from the United States Supreme Court and six(6) other States holds:

> ". . . . the general proposition that awarding VA disability pay upon dissolution amounts to a 'seizure' of those benefits in violation of 38 U.S.C. §5301," 8 P. 3d at 768.

In the case of *In re Marriage of Wojcik, 838 N.E. 2d 282 (Ill. 2005)* the appellant claimed error when the trial court considered veterans disability benefits when dividing the marital estate. It was agreed that VA disability benefits were not only to be considered not to be marital assets, but also they could not be used as a basis for an offset when awarding marital property. The reasoning was that using these assets as an offset is contrary to the anti-attachment provision in section 5301 (a)(1), N.E. 2d at 295.

The decision in Pfeil v. Pfeil, *341 N.W. 2d 699 (Wis. 1983)* which is also cited by Respondent involves military disability payments. The Court there agreed that the disability payments could not be used as an offset stating, at p. 702, that:

"***This [offset] cannot be done, directly or indirectly, by state court or by state legislation****."* (Emphasis added).

Conclusion

In the decision reached below the Family Court has committed reversible error in failing to rely upon the federal law and decisions of the United States Supreme Court governing these types of benefits and by failing to employ the full provisions of W.Va. Code §48-7-103.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned, counsel for the Petitioner, Bradley L. Bowe, does hereby certify that a true and correct copy of the ***Petitioner's Reply Brief***, was served via e-filing, email to R. Brandon Johnson, Esq., on this the 13th day of October, 2023.

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