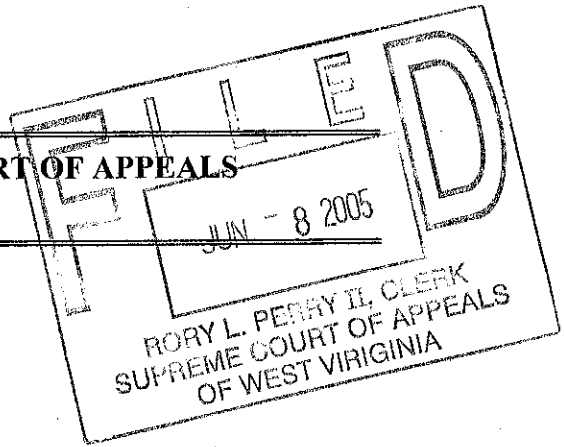

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
At Charleston



IN RE: THE MARRIAGE OF
MARTHA CAROL STATON,

Petitioner/Appellant,

AND

DOCKET NO.: 32562

STEVEN EDWARD STATON,

Respondent/Appellee

FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA
Robert A. Burnside, Jr., Circuit Court Judge

BRIEF OF THE APPELLANT MARTHA CAROL STATON

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BRIEF OF THE APPELLANT MARTHA CAROL STATON

COMES NOW the Appellant, Martha Carol Staton, by Counsel Pat C. Fragile and Stacey Lynn Daniel-Fragile pursuant to the Rules of Appellate Procedure for the State of West Virginia and files this Brief of the Appellant with this Honorable Court. In support of her Appeal, the Appellant states as follows:

I. Factual and Procedural History

1. The Appellee, Steven Edward Staton was hired by the City of Beckley Police Department on August 28, 1974. The parties were married on November 8, 1986 in Raleigh County, West Virginia; approximately twelve (12) years after Steven Edward Staton (hereinafter sometimes referred to as “Husband”, “Appellee” or “Mr. Staton”) began working for the City of Beckley Police Department.
2. The Appellee, Steven Edward Staton was deemed disabled due to a knee injury by the City of Beckley Police Department on or about March 12, 1996 pursuant to an April 29, 1996 letter from his employer. On or about March 15, 1996, Mr. Staton began employment with the State of West Virginia as an investigator – a position which he holds to this day.

3. The parties herein separated on or about April 26, 2000, some four (4) years after the Appellee was deemed disabled due to a knee injury by the City of Beckley Police Department.
4. During the first 10 years of the parties' marriage, the Appellee contributed seven percent (7%) of each paycheck to the City of Beckley Police Department Retirement and Disability Fund.
5. Based upon Mr. Staton's years of service with the City of Beckley Police Department and the length of the parties' marriage, Mr. Staton earned approximately sixty three percent (63%) of his pension during the parties' marriage.
6. During the parties' marriage, Mr. Staton contributed Thirty Three Thousand Two Hundred Eighty Dollars (\$33,280.00) to the City of Beckley Retirement Fund from his monthly salary.
7. During the parties' marriage, Mr. Staton's contributions to the Retirement Fund earned approximately Twenty Seven Thousand Nine Hundred Fifty Five Dollars (\$27,955.00) in interest.
8. Combining the principal and interest earned, Mr. Staton's approximate total pension plan for the period of marriage to the Appellant, Martha Carol Staton, equaled Sixty One Thousand Two Hundred Thirty Five Dollars (\$61,235.00).
9. This matter was first heard by the Honorable H. Suzanne McGraw of the Family Court of Raleigh County on or about July 12, 2001, July 13, 2001 and September 20, 2001.
10. Following the Final Hearing in this matter, Judge McGraw issued her Final Order on May 3, 2002. In said Order, Judge McGraw found *inter alia* "[T]hat the Petitioner

[Ms. Staton] shall be awarded a portion of the Respondent's [Mr. Staton] pension account in relation to the years of marriage and that the Respondent [Mr. Staton] shall cooperate in all respects to cause a Qualified Domestic Relations Order to be entered. See ¶ 17 at page 7 of May 3, 2002 Final Order of the Family Court of Raleigh County.

11. Following the entry of the May 3, 2002 Order, Mr. Staton appealed the Family Court's ruling regarding his City of Beckley pension to the Circuit Court of Raleigh County.
12. On or about August 14, 2002, the Honorable Robert A. Burnside Jr., of the Circuit Court of Raleigh County issued his ruling regarding Mr. Staton's first appeal of this matter. In said ruling, Judge Burnside ruled *inter alia*:

If the disability pension is not marital property, it is not subject to a QDRO or to any further attention. If it is partly marital property and partly nonmarital property, it is subject to a QDRO only as to the portion that is marital property, if the administration of the disability pension is such that only a part of it can be subjected to a QDRO. If the family court finds that it is partly marital and partly nonmarital, and that the fund from which payments are made cannot be segregated for QDRO purposes, the family court may calculate a portion of each future payment that constitutes marital property, and the remainder of each payment will be deemed the Husband's income for the purposes of the calculation of child support and spousal support. Under that arrangement, Husband will pay a portion of each future disability payment as marital distribution, and a portion as child and/or spousal support. See Judge Robert A. Burnside's August 14, 2002 Memorandum Order at page 9.

Further, Judge Burnside also ruled *inter alia*:

Upon remand of this issue, the family court will take such evidence as it deems necessary to ascertain whether the Husband's pension is a disability pension or a retirement pension. If it is found to be a disability pension, the payments received during marriage will be deemed to have been distributed with the parties's (sic) marital assets as determined at the time of separation. With respect to future payments, the family court will determine whether those payments compensate Husband for lost future

income. If so, the payments are separate property and the value of the disability pension is not subject to marital distribution. *If however, the family court finds that any portion of the future payments are intended to restore a lost or damaged marital asset, such portion would be a marital asset subject to distribution. Id., at page 9.*

13. During the Remand Hearing of this matter – which was held on or about April 11, 2003 before the Honorable H. Suzanne McGraw – the parties presented further evidence regarding the pension of Mr. Staton. Mr. Staton called Gary R. Sutphin, City Treasurer and Recorder of Beckley, West Virginia, as an expert witness to testify as to the conditions surrounding his City of Beckley pension.
14. Pursuant to the testimony of Mr. Sutphin, there is *no difference* between the money used to pay a former employee a retirement pension or a disability pension. A former officer receiving a “retirement” pension is paid from the same “pot of money” as a former officer who is receiving a “disability” pension. Further, Mr. Sutphin testified that the only difference between a disability pension and a retirement pension is merely one of semantics. If a person upon leaving the force due to a disability has not yet reached the age needed to qualify for his “retirement” pension he can elect to receive his money (which would have been paid out in a “retirement” pension had he been old enough) immediately as a “disability” pension.
15. Further, Mr. Sutphin also testified that when a police officer receives a “disability pension” it is paid out of the same funds as those funds which are used to pay a “retirement pension” to another officer. This is due to the fact that the money is collected as a general pension collection from the employee during his employment *without regard* as to whether or not it is disability money or retirement money.

16. Mr. Sutphin also testified that the City of Beckley Police Department considers the pension received by Mr. Staton to be a *retirement* pension because it is paid out of the City of Beckley Policemen's Pension Fund due to the fact that a special disability pension fund does not exist.
17. Mr. Staton chose to receive a "disability" pension upon his departure from the force because by electing the "disability" pension route he could have access to his pension money immediately whereas if he had chosen to receive a "retirement" pension he would have had to wait to receive his money.
18. Additionally, on the date that the Appellee was deemed "disabled" by the City of Beckley Police Department, he was fully vested in his retirement pension having worked for the City of Beckley Police Department for over twenty (20) years.
19. During the remand hearing before the Family Court Mr. Staton *agreed* and *stipulated* that his disability pension "*was marital property.*" Specifically, at approximately 44 minutes into the hearing, the following exchange occurred during the direct examination of Mr. Staton by his attorney, Mr. Carl W. Roop:

Mr. Roop: Now, after 1996, March 12, 1996, or April 1996 you began receiving a disability check?

Mr. Staton: Yes I did.

Mr. Roop: And, did you and Ms. Staton benefit from this check?

Mr. Staton: Yes we did.

Mr. Roop: And, tell me how. How did you benefit from it?

Mr. Staton: The household expenditures

Mr. Fragile: Your Honor, that is not relevant to the issue before this court

Mr. Roop: Well your Honor, Mr. Fragile was introducing evidence as to the percent that my client paid out of marital funds into a pension plan. What I am also introducing is Ms. Staton received benefits from 1996 from this disability check also.

Mr. Fragile: We don't dispute that from the time it came in it was marital funds and they both used it.

Mr. Roop: Ok we going to stipulate...it was marital when it came out.

The Court: It was used as marital funds.

Mr. Fragile: Do we have that stipulation your Honor?

The Court: Yes it is stipulated.

20. Following the testimony of Mr. Sutphin and the presentation of evidence by the parties, the Family Court again deemed the disability pension to be marital property and awarded Martha Carol Staton, (hereinafter sometimes referred to as "Wife" or "Appellee") her equitable distribution share of said pension. *See Final Order dated the 5th day of May, 2004 of the Family Court of Raleigh County.*
21. Mr. Staton then re-appealed the Family Court's decision to the Circuit Court of Raleigh County arguing that the Family Court had again erred in ruling that his wife was entitled to an equitable share of his City of Beckley Pension.
22. In his June 30, 2004 Memorandum Order – which was issued without oral arguments – Judge Robert A. Burnside ruled *inter alia*:

For the reasons discussed herein, it is this Court's opinion that the Family Court was correct in its classification of the [husband's] pension as a disability pension, but that it erred in its legal conclusion that the pension is a marital asset subject to equitable distribution. *See June 30, 2004 Memorandum Order of the Circuit Court of Raleigh County.*

23. The Appellant herein, Martha Carol Staton, now appeals the Circuit Court's June 30, 2004 Order.

II. Standard of Review

In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, the applicable standard of review is for this Court to review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. Further, the applicable standard of review for questions of law is to review said question under a *de novo* standard. Syl., *Carr v. Hancock*, --- W. Va. ----, --- S.E.2d ---- (No. 31752 Dec. 3, 2004). See also Syl. pt. 2, *Lucas v. Lucas*, 215 W.Va. 1, 592 S.E.2d 646 (2003) ("In reviewing challenges to findings made by a family court judge that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review.").

III. Summary of Legal Argument

- A. The Circuit Court of Raleigh County erred in ruling that Appellee's pension was not a marital asset subject to equitable distribution.

IV. Legal Argument

The Honorable Robert A. Burnside, Jr., Judge of the Circuit Court of Raleigh County erred in ruling that the Appellee, Steven Edward Staton's pension from the Beckley City Police Department was not a marital asset subject to equitable distribution. More particularly, Judge Burnside erred in overturning the Honorable H. Suzanne McGraw, Judge of the Family Court of Raleigh County's ruling that the Appellee, Steven Edward Staton's pension from the Beckley

City Police Department was a marital asset subject to equitable distribution after Judge McGraw heard all of the evidence presented by the parties.

In its June 30, 2004 Order, the Circuit Court of Raleigh County held *inter alia*:

The determinative factor when classifying a disability pension as marital or separate is the nature of the property that the pension benefits replace rather than the source of funds used to acquire the pension. Hence, the fact that [Mr. Staton] had contributed a portion of his income acquired during the marriage to the disability pension fund is not determinative of the question whether [Mr. Staton's] post-separation income from the disability pension should be classified as marital property. *See Judge Burnside's June 30, 2004 Order, at page 8.*

This conclusion by the Circuit Court is in error. In support of this ruling, the Circuit Court relied on the case of *Holman v. Holman*, 84 S.W.3d 903 (KY 2002). In that ruling the Kentucky Supreme Court ruled that disability pension benefits are classified as marital property to the extent they replace income or benefits the recipient would have earned during the marriage. That is **EXACTLY** the situation in this case.

During the Staton's marriage, seven percent (7%) of each of Mr. Staton's paychecks were contributed to the City of Beckley Police Department Retirement and Disability Fund. Further, pursuant to the testimony of the Appellant's own expert – Gary R. Sutphin, City Treasurer and Recorder of Beckley, West Virginia – there is *no difference* between a retirement pension and a disability pension. Seven percent (7%) of each employee's paycheck is withheld each pay period and placed into a general City of Beckley Policemen's Pension Fund out of which both retirement pensions and disability pensions are paid.

During his testimony, Mr. Sutphin, testified that the Beckley City Police Department considers the pension received by Mr. Staton to be a "*retirement pension*" because even though it is due to a disability, it is paid out of the only fund which is the department's retirement fund. Further, during his testimony, Mr. Sutphin testified that during Mr. Staton's employment (and

consequently during the marriage of the parties herein) seven percent (7%) of Mr. Staton's annual earned income was contributed into a state run retirement fund; and that but-for the mandatory withholding of this money, it would have been in Mr. Staton's paycheck.

Mr. Sutphin also testified that a "disability pension" is based upon sixty percent (60%) of a person's base pay at the time of the disability determination plus annual cost-of-living-adjustments. Further, Mr. Sutphin testified that at the time Mr. Staton was deemed disabled he would have been eligible to collect sixty-three percent (63%) of his retirement pension based upon his years of service and that at the time of the disability determination, Mr. Staton *was vested* in the pension program. Finally, Mr. Sutphin testified that *both* a disability pension and a retirement pension provided by the City of Beckley Police Department are based on an employee's former earnings and *both* are designed to "replace lost wages."

Thus, the disability pension received by Mr. Staton does in fact replacing income which Mr. Staton would have earned during the marriage as required by *Holman*. Consequently, the Circuit Court of Raleigh County erred in ruling that the Appellant herein, Martha Carol Staton was not entitled to twenty-one and eighty-five hundredths of a percentage (21.85%) of Mr. Staton's monthly City of Beckley disability pension.

In his June 30, 2004 Order Judge Burnside held:

The clear purpose of a disability pension, however, is to replace past and future income that was lost due to that person's injury or illness. It is not a fund or an asset created by the work done by the spouse during the marriage to be drawn from upon meeting an age or service qualification, but it is rather an award to compensate the spouse for an injury or illness. *See Circuit Court of Raleigh County's June 30, 2004 Order, at page 12.*

While Judge Burnside's ruling might apply to other disability pensions in the world, it does not apply to the disability pension received by Mr. Staton. As recited above, Mr. Staton's own expert testified that the disability pension received by Mr. Staton is paid from funds which Mr.

Staton paid into a fund during the marriage; thus this fund is an asset created by the work performed by Mr. Staton during the marriage to be drawn from upon meeting an age or service requirement. Thus, Judge Burnside's conclusion does not apply to this case and should be overturned.

While there are no cases in West Virginia which deal precisely with the issue of how a disability pension should be divided in a divorce case, other states have addressed this issue. The New York Supreme Court held in *Mylett v. Mylett*, 558 N.Y.2d 160, 163 A.D.2d 463 (1990):

Disability payments received by an injured police officer before the vesting of his pension, are, to the extent that the payments represents deferred compensation, marital property subject to equitable distribution upon divorce. *Mylett*, 558 N.Y.2d at 161, 163 A.D.2d at 464.

Further, the *Mylett* Court went on to hold:

This court has previously held that pension benefits, whether vested or non-vested, whether contributory or non-contributory, whether termed disability, retirement, or ordinary retirement, constitute marital property subject to equitable distribution upon divorce. *Mylett*, 558 N.Y.2d at 161, 163 A.D.2d at 464.¹

The *Mylett* case is strikingly similar to the case at bar. In *Mylett*, the husband was a New York City Police officer and was deemed disabled on January 11, 1982 after working for 12 years, three years short of vesting in his retirement pension. The parties in *Mylett* were married on January 30, 1970 and separated in 1984; two years after Mr. Mylett began receiving his disability pension.

In the current matter before the Court, Mr. Staton was a City of Beckley Police Officer and was deemed disabled on March 12, 1996 after working for 21 years, 7 months and 17 days²

¹ See also, *DeMarco v. DeMarco*, 143 A.D.2d 328, 330-331, 532 N.Y.S.2d 293; *West v. West*, 101 A.D.2d 834, 475 N.Y.S.2d 493, on remand 115 A.D.2d 601, 496 N.Y.S.2d 263; *Damiano v. Damiano*, 94 A.D.2d 132, 139, 463 N.Y.S.2d 477.

² Counsel for Ms. Staton's notes that this calculation as to days may be off by 1 to 2 days given the fact that 1996 was a leap year on the calendar.

and was therefore fully vested in his retirement pension.³ The parties herein were married on November 8, 1986 and separated on or about April 26, 2000 some four years after Mr. Staton began receiving his disability pension. Further, as previously stated herein, Mr. Staton contributed seven percent (7%) of his annual income into the fund from which his current disability pension is paid from, income which would have otherwise been in his annual pay from the police department and thus his "disability pension" represents deferred compensation.

In its May 5, 2004 Order, the Family Court of Raleigh County found:

11. The Court finds from the evidence adduced herein that on the date of being awarded the disability pension the Respondent [Steven Edward Staton] was eligible for retirement with the City of Beckley and would have earned approximately sixty three percent (63%) of his pension and he became vested in such pension program in August of 1994.

12. The Court finds from the evidence adduced herein that during the marriage of the parties the Respondent [Steven Edward Staton] contributed approximately Thirty Three Thousand Two Hundred Eighty Dollars (\$33,280.00) to the City of Beckley Retirement Fund.

13. The Court finds from the evidence adduced herein that during the marriage of the parties the contributions would have earned approximately Twenty Seven Thousand Nine Hundred Fifty Five Dollars (\$27,955.00) in interest making the approximate total pension plan for the Respondent [Steven Edward Staton] for the period of marriage to the Petitioner [Martha Carol Staton] Sixty One Thousand Two Hundred Thirty Five Dollars (\$61,235.00).

14. The Court finds from the evidence adduced herein and more particularly the testimony of Gary R. Sutphin, City Treasurer and Recorder of Beckley, West Virginia that the disability pension was a replacement of lost wages and future lost wages on behalf of the Respondent [Steven Edward Staton].

15. The Court finds from the evidence adduced herein the coverature factor that the Petitioner [Martha Carol Staton] should receive is twenty one and eighty five percent (21.85%) of the Respondent's pension. . . . *See the Family Court of Raleigh County's Order of May 5, 2004.*

These findings of fact were in-line with the Circuit Court of Raleigh County's August 14, 2002 ruling wherein it directed the Family Court as follows:

³ Mr. Staton actually vested in his pension in August 1994.

Upon remand of this issue, the family court will take such evidence as it deems necessary to ascertain whether the Husband's pension is a disability pension or a retirement pension. If it is found to be a disability pension, the payments received during marriage will be deemed to have been distributed with the parties's (sic) marital assets as determined at the time of separation. With respect to future payments, the family court will determine whether those payments compensate Husband for lost future income. If so, the payments are separate property and the value of the disability pension is not subject to marital distribution. *If however, the family court finds that any portion of the future payments are intended to restore a lost or damaged marital asset, such portion would be a marital asset subject to distribution.* See August 14, 2002 Order of the Circuit Court of Raleigh County, at page 9.

This is exactly what the Family Court did after hearing the testimony of the Husband's own expert and reviewing both the oral and written arguments of counsel during the remand hearing. Thus, the Family Court did not err in its May 5, 2004 Order when after considering all the evidence presented and especially the testimony of Mr. Staton's own expert, it characterized the Husband's disability pension as a marital asset subject to equitable distribution and therefore, the Circuit Court of Raleigh County erred in its June 30, 2004 Order in which it overturned the May 5, 2004 Order of the Family Court of Raleigh County.

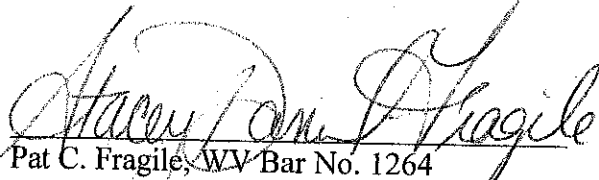
Finally, it should be noted that if Judge Burnside's June 30, 2004 Order is allowed to stand, Mr. Staton will become the sole and separate owner of Sixty One Thousand Two Hundred Thirty-Five Dollars (\$61,235.00) all to the detriment of Ms. Staton. This amount is clearly money from Mr. Staton's earnings and the interest thereon which was income Mr. Staton would have received during the parties' marriage but-for the automatic withholding of the same by the City of Beckley Police Department.

V. Conclusion

WHEREFORE, based upon all of the foregoing, the Appellant, Martha Carol Staton, would respectfully ask this Court to:

1. Reverse the June 30, 2004 Memorandum Order of the Circuit Court of Raleigh County;
2. Affirm the May 5, 2004 Order of the Family Court of Raleigh County;
3. Award the Appellant her attorney fees and Court costs;
4. Award the Appellant such other further and general relief as this Court would deem mete and proper.

**MARTHA CAROL STATON
BY COUNSEL**


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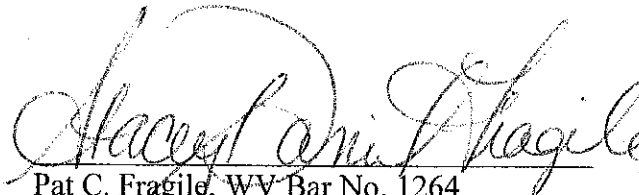
CERTIFICATE OF SERVICE

The undersigned, Counsel for the Petitioner/Appellant, does hereby certify that I have served the foregoing, "**BRIEF OF THE APPELLANT MARTHA CAROL STATON**" by United States Mail, postage prepaid, first class, addressed as follows, this 7th day of June, 2005.

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VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF RALEIGH, TO-WIT:

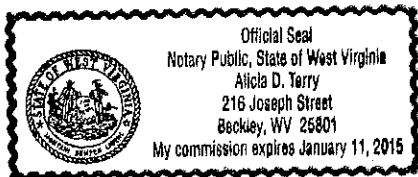
Martha Carol Staton, having been first duly sworn, upon oath deposes and says that she is a party in the foregoing styled civil action, and that the statements and allegations contained in the foregoing Brief of the Appellant herein are true, except insofar as they are therein stated to be upon information and belief, and insofar as they are therein stated to be upon information and belief, she believes them to be true.

Martha Carol Staton

Taken, subscribed and sworn to before me this the th6 day of

June, 2000.

My commission expires: January 11, 2015.



Alicia D. Terry
NOTARY PUBLIC