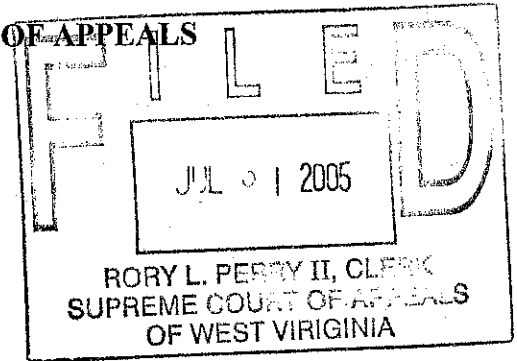


**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
At Charleston**



**IN RE: THE MARRIAGE OF  
MARTHA CAROL STATON,  
Petitioner/Appellant**

**vs**

**DOCKET NO: 32562**

**STEVEN EDWARD STATON,  
Respondent/Appellee**

---

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

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**BRIEF OF THE APPELLEE STEVEN EDWARD STATON**

Pat C. Fragile, (WV Bar # 1264)  
Stacey L. Daniel-Fragile, (WV Bar # 8532)  
412 South Kanawha Street  
Beckley, WV 25801  
Phone: (304) 253-1000  
Fax: (304) 253-4078  
COUNSEL FOR APPELLANT

Carl W. Roop (WV Bar # 4823)  
ROOP, SMITH & ROOP  
109 E. Main Street  
Beckley, WV 25801  
Phone: (304) 255-7667  
Fax: (304) 256-5984  
COUNSEL FOR APPELLEE

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

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**BRIEF OF THE APPELLEE STEVEN EDWARD STATON**

COMES NOW the Appellee, Steven Edward Staton, by Counsel Carl W. Roop pursuant to the Rules of Appellate Procedure for the State of West Virginia and files this Brief of the Appellee with this Honorable Court. In support of his response to the appeal filed herein, the Appellee 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 Rick Creek, 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 permanently disabled due to a work related knee injury by the City of Beckley Police Department pursuant to West Virginia Law on or about March 12, 1996. The Appellee was notified by letter dated April 29, 1996 from his employer. The disability was based upon medical opinion that he was unable to perform his duties as a sworn law enforcement officer. On or

about March 15, 1996, Mr. Staton began employment with the State of West Virginia as a civilian 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 work related knee injury by the City of Beckley Police Department.
4. During the first 9 years and 6 months 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. During the marriage, the Appellee contributed \$20,618.74 of his pay to the City of Beckley Police Department Retirement and Disability Funds.
6. However, during the marriage the parties received \$77,879.06 from the Appellee's disability award.
7. 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.
8. Following the entry of the May 3, 2002 Order, Mr. Staton appealed the Family Court's ruling regarding his City of Beckley Disability Benefit to the Circuit Court of Raleigh County.
9. 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*:

Pension and retirement benefits compensate individuals who live past retirement age. Such benefits constitute deferred compensation for services rendered and function as a substitute for life savings. Like any joint savings

accumulated during the marriage, pension and retirement benefits are subject to distribution as marital property upon divorce. On the other hand, disability benefits do not substitute for savings but instead 'protect against the inability of an individual to earn the salary or wages to which he or she was accustomed in the immediate past.' Generally, therefore, disability benefits replace income which is lost before retirement. Logic dictates that disability benefits and income should be treated in the same manner since disability benefits are income replacement. Since the future income of each spouse is not classified as marital property, disability benefits which replace future income should not be classified as marital property. *Holman*, 2002 WL 1307435 at 3. See Judge Robert A. Burnside's August 14, 2002 Memorandum Order at page 8.

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 subject to distribution. Id, at page 9.*

8. 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 disability benefits of Mr. Staton. Mr. Staton called Gary R. Sutphin, City Treasurer and Recorder for the City of Beckley, as an expert witness to testify as to the conditions surrounding his City of Beckley disability benefit.
9. Pursuant to the testimony of Mr. Sutphin, there is a difference between the money used to pay a former employee a retirement pension and a disability pension.

10. Mr. Sutphin also testified that the City of Beckley Police Department considers the pension received by Mr. Staton to be a disability benefit because it is paid out of the City of Beckley Policemen's Disability Fund due to the fact Appellee had a disability.
11. Additionally, on the date that the Appellee was deemed "disabled" by the City of Beckley Police Department, he was not fully vested in his retirement pension having worked for the City of Beckley Police Department for over twenty one (21) years but not eligible. In fact, Mr. Staton never applied for nor received a retirement from the City of Beckley.
12. Following the testimony of Mr. Sutphin and the presentation of evidence by the parties, the Family Court again improperly deemed the disability award to be marital property and awarded Martha Carol Staton, (hereinafter sometimes referred to as "Wife" or "Appellee") her equitable distribution share of said award. *See Final Order dated the 5<sup>th</sup> day of May, 2004 of the Family Court of Raleigh County.*
13. 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 Disability Award.
14. In his June 30, 2004 Memorandum Order 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.*
16. The Appellant herein, Martha Carol Staton, now appeals the Circuit Court's June 30, 2004 Order.

## II. SUMMARY OF LEGAL ARGUMENT

Whether the Circuit Court properly characterized the Appellee's disability award as separate property not subject to equitable distribution?

## III. LEGAL ARGUMENT

The State of West Virginia does not include a disability award in the statutory definition of marital property, however the West Virginia Supreme Court has held that the statute does include retirement pensions. Thus, the issue presented before this Court is whether the Appellee's disability award is subject to marital distribution in the same way as a retirement pension.

The Appellee asserts the Court should use an analogy of the disability award to that of a personal injury. In *Hardy v. Hardy I*, 186 W. Va. 496, 413 S. E.2d 151 (1991) and *Hardy v. Hardy II*, 197 W. Va. 243, 475 S. E.2d 335 (1996) the Court addressed the question whether a personal injury award to one spouse is marital property. The Supreme Court recognized the "distinction between the economic loss suffered by the marital partnership and the economic and personal loss suffered by each individual spouse." *Hardy II*, at 249, citing *Hardy v. Hardy I*, 186 W. Va. 496, 413 S. E.2d 151 (1991). The principle that applies to the distribution of a personal injury award is set forth in *Hardy II*:

"In *Hardy I* we recognized that there was no equitable reason for that [the uninjured] spouse to profit from his or her ex-mate's recompense for suffering....**The only damages truly shared are...the diminution of the marital estate by loss of past wages or expenditure of money for medical expense. Any other apportionment is unfair distribution.** (Emphasis added)".

*Hardy II*, at 243, quoting from *Hardy I*, at 500. Also, cited in Opinion of Honorable Robert A Burnside, Judge of the Circuit Court of Raleigh County, dated August 14, 2002.

The *Hardy I and II* analysis is clear and applicable to the case at hand. To the extent that a personal injury award replaces past lost wages and compensates for past medical expenses, a

personal injury award is marital property. To the extent that a personal injury award compensates the injured spouse for future post-separation lost income and other losses, it is separate property.

The same Hardy analysis should be applied to the Staton case regarding his disability award. The Petitioner presented Gary Sutphin, City Recorder and Treasurer to testify regarding the disability award. Mr. Sutphin explained the purpose and calculation of the disability benefit.

Sutphin: Well the huh the Police Officer contributes 7% of their pay and all the way up through the time the Police Officer if they become disabled they get 60% of their pay at the time. If they leave they take their contributions with them. If they just volunteer and quit and if they make it to age of retirement there's a vesting schedule in 20 years on up to 30 years and you start drawing your Pension when you retire.

Roop: O.K. now lets talk about the Retirement Pension O.K. The retirement pension is based upon what?

Sutphin: Years of service.

Roop: O.K. huh.

Sutphin: Well I'm sorry years of service and salary, I'm sorry.

Roop: O.K. now how many years of service and how much, how do you figure that?

Sutphin: Well you have to have at least 20 years of service.

Roop: O.K.

Sutphin: And you have to be age 50 to draw it but, you can retire earlier than that if you want and it's based on the three highest years.

Roop: Of anytime during that 20 years?

Sutphin: I think so, I don't think it's three to five but I can't tell you that 100%.

Roop: O.K. now is there a difference between the City Police Pension the Retirement portion and the Disability Pension?

Sutphin: Huh I'm not sure I understand the question.

Roop: O.K. how do you calculate a Disability Pension?

Sutphin: O.K. you calculate a Disability Pension, it's 60% of what there making right then.

Roop: O.K. and that is based on strictly what your making at the time of the termination of the Disability?

Sutphin: That's true.

Roop: Is that correct, huh now as far as your Disability Pension do you receive any increases over the years?

Sutphin: If you're eligible for it and most people are the disability is job related as determined by the Doctors and you're eligible for a cost of living allowance.

Roop: And.

Sutphin: Based on the C.P.I.

Roop: O.K. does your Disability Pension have any bearing or is that based on anything dealing with sick leave?

Sutphin: No.

Roop: Vacation Days?

Sutphin: No.

Roop: And I believe the City of Beckley also will buy back a persons sick leave and vacation days, is that correct?

Sutphin: When they leave.

Roop: Yes.

Sutphin: Yeah a percentage of the sick leave hours and then the vacation hours, yes.

Roop: And so the Disability has nothing to do with that?

Sutphin: No it doesn't.

Roop: O.K. does the City of Beckley buy back anything else besides sick days and vacation?

Sutphin: Huh not unless they were to have Comp days built up.

Roop: Comp days they will buy back, does the Disability or is it based does it have anything to do with the Disability?

Sutphin: No.

Roop: O.K. so Disability is strictly the percentage times your base pay?

Sutphin: To current.

Roop: Current pay?

Sutphin: Right.

Roop: O.K. has nothing to do with overtime?

Sutphin: No.

Roop: Sick days, overtime, comp time, nothing else right?

Sutphin: Base pay.

Roop: Base pay, now a Pension or a Retirement Pension with the City how is it calculated?

Sutphin: It's calculated with as I mentioned earlier it's based on your three high years earnings, which would include the items you just recently mentioned huh buying back sick hours, vacation hours what have you, and you just take your three highest years and there's a formula you go to and based on the number of years your employed there is to what (inaudible)

Roop: O.K. so a Retirement Pension or benefit would be considered or would consider sick leave, overtime, vacation days comp days all bought back by the City?

Sutphin: The one's that are bought back, that's correct.

Roop: O.K. and it is also based on years of service?

Sutphin: Yes it is.

Roop: O.K. now particularly with my client Mr. Staton what does he receive or do you have personal knowledge of whether Mr. Staton receives a Disability Pension or a Retirement Pension?

Sutphin: **Huh he receives a Disability Pension. (Emphasis added)  
Hearing before Family Court Judge H. Suzanne McGraw on April 11, 2003.**

In applying the standard set forth in Hardy, to the case at hand, the testimony of Gary Sutphin clearly places the disability award in the same status as a personal injury award. The award is based upon (60%) a percentage multiplied by base pay. Further, the purpose of the award is to compensate the Appellee for lost wages due to his inability to work in his current position as a sworn law enforcement officer (post-separation).

While the West Virginia Supreme Court and State Legislators have not specifically set forth a distinction between a disability award and a retirement pension, the Appellee asserts the Court should consider a personal injury award similar to that of a disability award. A disability benefit awarded to an individual is an immediate benefit to the marital unit. Further, the award would be a future benefit to the parties. The eligibility of the individual to receive that income is based solely upon a physical disability due to an injury or illness regardless of the number of years worked. In direct contrast is a retirement pension, the retirement pension is a future asset and certain criteria must be met to qualify. The employee qualifies by age and years of service, as distinguished from an injury or illness.

In addition, another distinction for the purpose of determining between a retirement pension and a disability award is that a retirement pension does not replace income that was lost due to accident or illness. The specific purpose of a disability award is to replace past and future income that was lost due to that person's injury or illness. The qualifications do not include age or time of service, but it is rather an award to compensate the injured employee. This reasoning is explained by the City Treasurer, Gary Sutphin. Mr. Sutphin stated the Disability Pension awarded to the Appellee was based strictly upon 60 % of his pay regardless of his time in service or age.

Sutphin: Well the huh the Police Officer contributes 7% of their pay and all the way up through the time there Police Officer if they become disabled they get 60% of their pay at the time. If they leave they take their contributions with them. If they just

volunteer and quit and if they make it to age of retirement there's a vesting schedule in 20 years on up to 30 years and you start drawing your Pension when you retire.

Roop: O.K. now lets talk about the Retirement Pension O.K. the retirement pension is based upon what?

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Sutphin: Right.

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Sutphin: Base pay.

Roop: Base pay, now a Pension or a Retirement Pension with the City how is it calculated?

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Roop: O.K. so a Retirement Pension or benefit would be considered or would consider sick leave, overtime, vacation days comp days all bought back by the City?

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Roop: O.K. and it is also based on years of service?

Sutphin: Yes it is.

Roop: O.K. now particularly with my client Mr. Staton what does he receive or do you have personal knowledge of whether Mr. Staton receives a Disability Pension or a Retirement Pension?

Sutphin: **Huh he receives a Disability Pension. (Emphasis added)  
Hearing before Family Court Judge H. Suzanne McGraw on April 11, 2003.**

From the testimony of Gary Sutphin the Court can clearly identify the distinction of the disability award of the Appellee from that of a retirement pension. Therefore, the disability award is not a marital asset and not subject to equitable distribution.

Further, the Court's prior analysis of the *Hardy* opinion apply with equal force to a disability award. "To the extent that payments were received from the disability pension during the marriage, that constituted replacement of past wages and is a marital asset. If those payments were received and then spent or saved during the marriage, the payments were thereby transformed into marital

assets or contributions to the marital household. The distribution of the parties' other marital assets constitutes the distribution of the past disability payments or the proceeds thereof."

But, the future benefits received by Mr. Staton and attributed to his disability award are simply replacement of future income, and thus those payments are the separate property of the Appellee.

In the case at hand, Mr and Mrs Staton received \$77,879.06 of disability benefits during their marriage, all of which is marital property. However, in applying the accepted standard the future payments would be considered separate property of the Appellee, not subject to a QDRO.

In looking at other persuasive authorities, the Supreme Court of Kentucky in *Holman v. Holman*, 2002 WL 1307435,-- S.W.3d--, --Ky.-- (June 3, 2002) set forth a standard to determine the distinction between a disability award and a retirement pension. The *Holman* case provides that a disability award is not subject to marital distribution as a retirement pension.

**"However the majority of courts considering the proper classification of disability benefits have adopted the analytical approach which focuses on the nature and purpose of the specific disability benefits at issue. Under this approach, benefits which actually compensate for disability are not classified as marital property because such benefits are personal to the spouse who receives them and compensate for loss of good health and replace lost earning capacity."** (emphasis added). *Holman*, 2002 WL 1307435 at 2. Also, cited in Opinion of Honorable Robert A Burnside, Judge of the Circuit Court of Raleigh County, dated August 14, 2002.

According to the *Holman* opinion, this is the approach recommended by the American Law

Institute:

"In addition to the approaches noted by the Tennessee Supreme Court is an approach recommended by the American Law Institute which, similar to the "analytical approach" or "purpose analysis," classifies such benefits according to the nature of the property they replace rather than by the source of the funds used to acquire the benefit: "Disability pay and workers' compensation benefits are marital property to

the extent they replace income or benefits the recipient would have earned during the marriage but for the qualifying disability or injury." Such benefits are therefore classified "as marital property to the extent they replace earnings during the marriage, and as separate property to the extent they replace earnings before or after the marriage without regard to how or when the benefit was acquired." *Holman*, 2002 WL 1307435 at 3.

As in West Virginia, the requirement that a retirement pension be distributed as marital property was the result of the Kentucky Supreme Court's interpretation of the statute. The Kentucky court carefully distinguished between a retirement pension and a disability award. *See Holman*, 2002 WL 1307435 at 3.

"Retirement benefits are classified as marital property not because the General Assembly failed to include them within the exclusions, but rather because they are a form of deferred compensation or savings earned during the marriage similar to income earned or savings accumulated during the marriage. In contrast, disability benefits are not a form of deferred compensation or savings. Post-dissolution disability benefits replace wages or income loss after the marriage, and accordingly disability benefits should be treated differently from retirement benefits:

Pension and retirement benefits compensate individuals who live past retirement age. Such benefits constitute deferred compensation for services rendered and function as substitute for life savings. Like any joint savings accumulated during the marriage, pension and retirement benefits are subject to distribution as marital property upon divorce. On the other hand, disability benefits do not substitute for savings but instead 'protect against the inability of an individual to earn the salary or wages to which he or she was accustomed in the immediate past.' Generally, therefore, disability benefits replace income which is lost before retirement. Logic dictates that disability benefits and income should be treated in the same manner since disability benefits are income replacement. Since the future income of each spouse is not classified as marital property, disability benefits which replace future income should not be classified as marital property." *Holman*, 2002 WL 1307435 at 3.

The only issue, according to *Holman*, is whether the disability payments restore a lost marital asset or constitute the pensioner's future income. *Holman*, 2002 WL 1307435 at 2. At this point in its analysis, the Kentucky court cited to Kentucky law that dealt with the distribution of a personal injury award in the same way as West Virginia. *See Holman*, 2002 WL 1307435 at 4. **Also, cited**

**in Opinion of Honorable Robert A Burnside, Judge of the Circuit Court of Raleigh County,  
dated August 14, 2002.**

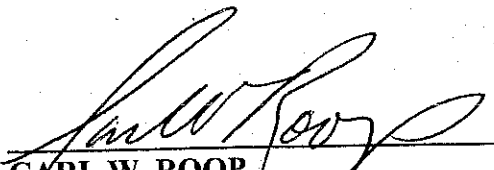
Although Appellant attempted to adversely influence the Court, the parties agree Appellee began work for the State of West Virginia upon being disabled by the City of Beckley. The difference of duties of a sworn law enforcement officer and a civil investigator have been ignored. The physical demands are immeasurable, and the daily regimen are not comparable. Training requirements are not comparable. Thus, to compare the two employments and job regimen are inaccurate. The Appellee's current employment as a civilian investigator only requires reviewing documents and communication with others. However, the Appellant's argument lends no weight to the classification of the disability award.

#### **IV. Conclusion**

**WHEREFORE**, based upon all of the foregoing, the Appellee, Steven Edward Staton, would respectfully ask this Court to:

1. Dismiss the Appeal filed herein
2. Affirm the ruling of the Circuit Court of Raleigh County
3. Award the Appellee Attorney Fees
4. Award the Appellee his costs

**STEVEN EDWARD STATON**  
**By Counsel**

  
**CARL W. ROOP**  
**ROOP, SMITH & ROOP, P.L.L.C.**  
109 E. Main Street  
Beckley, West Virginia 25801  
(304) 255-7667  
West Virginia State Bar ID # 4823

VERIFICATION

STATE OF WEST VIRGINIA,  
COUNTY OF RALEIGH, TO-WIT:

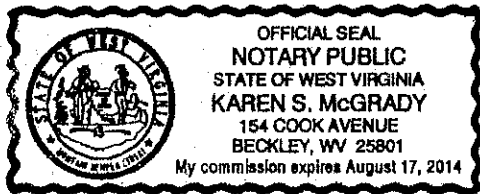
KAREN S. McGRADY, a credible person having knowledge of the facts set out in the foregoing Brief of the Appellee Steven Edward Stator, and whose name is signed thereto, being first duly sworn, says the facts and allegations contained herein are true, except insofar as they are therein stated to be upon information and belief, and insofar as they are therein stated to be upon information and belief, he believes them to be true.

Steven Edward Stator

Taken, subscribed and sworn before me this 30<sup>th</sup> day of June, 2005.

My commission expires:

August 17, 2014



Karen S. McGrady  
Notary Public

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
At Charleston

IN RE: THE MARRIAGE OF  
MARTHA CAROL STATON,  
Petitioner/Appellant

vs

DOCKET NO: 32562

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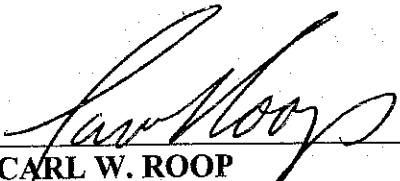
FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA  
Robert A. Burnside, Jr., Circuit Court Judge.

CERTIFICATE OF SERVICE

I, Carl W. Roop, Counsel for the Respondent/Appellee, do hereby certify that I have served the foregoing **BRIEF OF THE APPELLEE STEVEN EDWARD STATON** upon the following by mailing a true and exact copy thereof by United States mail, First Class, postage paid, on this the <sup>30<sup>th</sup></sup> 15<sup>th</sup> day of June, 2005.

Janice Davis, Clerk  
Raleigh County Courthouse  
215 Main Street  
Beckley, WV 25801

Pat C. Fragile  
412 S. Kanawha Street  
Beckley, WV 25801

  
\_\_\_\_\_  
CARL W. ROOP

Roop, Smith & Roop, PLLC  
109 E. Main Street  
Beckley, West Virginia 25801  
(304) 255-7667  
West Virginia State Bar ID # 4823