
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
At Charleston

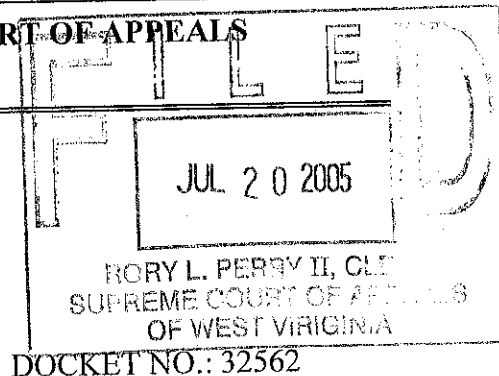
IN RE: THE MARRIAGE OF
MARTHA CAROL STATON,

Petitioner/Appellant,

AND

STEVEN EDWARD STATON,

Respondent/Appellee



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

REPLY BRIEF OF THE APPELLANT MARTHA CAROL STATON

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

IN RE: THE MARRIAGE OF

MARTHA CAROL STATON,

Petitioner/Appellant,

AND

DOCKET NO.: 32562

STEVEN EDWARD STATON,

Respondent/Appellee

REPLY 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 Reply Brief of the Appellant with this Honorable Court. In support of her Appeal, the Appellant states as follows:

I. Factual and Procedural History

For judicial economy, the Appellant hereby reasserts each and every Factual and Procedural History assertion set forth in the Appellant's Brief filed with this Honorable Court on or about the 7th day of June 2005 except for the assertion that the parties were married in Raleigh County, West Virginia. The Appellant hereby affirmatively asserts that she and the Appellee were married on November 8, 1986 in Pearisburg, Giles County, Virginia.

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

In his Brief, the Appellee asserts that the Appellee's pension is a "disability pension" and is also akin to a personal injury award, which is simply not the 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 pension received by Mr. Staton does in fact replace income which Mr. Staton would have earned during the marriage as required by *Holman v. Holman*, 84 S.W.3d 903 (KY 2002), which was relied upon by Judge Robert A. Burnside, Jr. in his June 30, 2004 Order. 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.

Further, 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.


Finally, in his Brief, the Appellee does not dispute the fact that during the Remand Hearing before the Honorable H. Suzanne McGraw, the Appellee and his counsel *agreed* and *stipulated* that his disability pension "*was marital property*" as shown more fully in the Brief of the Appellant. This is an important stipulation which was completely disregarded by Judge Burnside during the Appeal Hearing. This stipulation shows clearly and concisely that Judge Burnside's ruling was incorrect and that by his own words, the Appellee's pension *is* marital property.

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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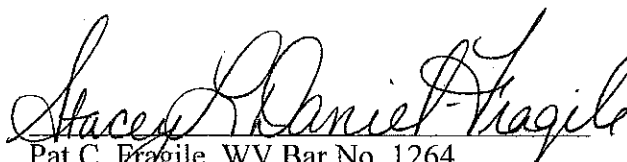
CERTIFICATE OF SERVICE

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 18th day of July, 2005.

Carl W. Roop, Esquire
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Janice Davis, Clerk
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215 Main Street
Beckley, WV 25801

Rory Perry, Clerk
Supreme Court of Appeals
State Capitol Building Complex, Rm. E-317
1900 Kanawha Blvd., E.
Charleston, WV 25305


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VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF RALEIGH, TO-WIT:

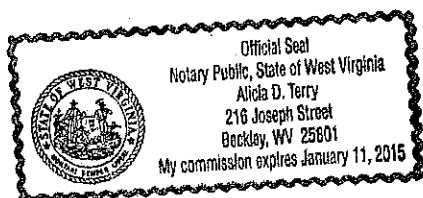
Martha Carol Staton, having been first duly sworn, upon oath deposes and says that she is a party in the foregoing styled civil action, and that the statements and allegations contained in the foregoing Reply Brief of the Appellant herein are true, except insofar as they are therein stated to be upon 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 18th day of

July, 2005.

My commission expires: January 11, 2015



Alicia D. Terry
NOTARY PUBLIC