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Division III
State of Washington

Court of Appeals No. 328325
Benton County Superior Court Cause No. 13-3-00411-0

WASHINGTON STATE COURT OF APPEALS
DIVISION III

HOLLY PERSINGER,

Respondent,

vs.

MARC PERSINGER,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

COMES NOW, the Appellant, Marc Persinger ("Mr. Persinger"), and hereby files this Brief of Appellant.

II. ASSIGNMENTS OF ERROR

The Trial Court erred in denying Mr. Persinger's CR 60(b)(5) Motion to Vacate Judgment in a dissolution matter where the Decree of Dissolution contained a provision which is void as a matter of law as it assigns state Industrial Insurance compensation benefits to another person in violation of RCW 51.32.040(1).

III. STATEMENT OF THE CASE

A. Substantive and Procedural History

Mr. Persinger married Holly Persinger (nka "Ms. Tatum") on February 9, 1991 in Coeur d'Alene, Idaho. Clerk's Papers page 2, 14 (CP 2; 14). The parties separated on March 12, 2013 and Petition for Dissolution of Marriage was filed on May 3, 2013. (CP 1-2; 14). Mr. Persinger joined in the Petition, affixing his signature thereto on April 24, 2013. (CP 10; 76:18-19). Neither party was represented by, or sought the assistance of counsel, and all of the dissolution documents were entered by the parties as pro se litigants. (CP 1-33; 76:18-19). Ms. Tatum filled out all of the court forms. (CP 1-33; 76:18-20).

The Decree of Dissolution was entered on August 6, 2013. (CP 25). Pursuant to paragraph 3.2 of the Decree, Ms. Tatum was awarded as

her separate property the property in Exhibit "A", which was attached to the Decree. (CP 26). Exhibit "A" of the Decree lists "50% of L&I settlement and or pension" as property to be awarded to her. (CP 32). This is separate from the retirement pension account to which she receives half. (CP 32).

Since entry of the Decree, Mr. Persinger has been determined to be permanently totally disabled by the Board of Industrial Insurance Appeals and receives Title 51 benefits as a single male based upon this rating. (CP 56; 163). Ms. Tatum then began making demands to Mr. Persinger for the Title 51 benefits he receives from the State of Washington. (CP 34-39; 104-12; 159:19-23; 163).

On August 21, 2014, Mr. Persinger obtained an Order to Show Cause from Benton County Superior Court requiring that the parties appear before the trial court to determine whether the Decree's division and assignment of Title 51 benefits should be vacated as void pursuant to Civil Rule 60(b)(5) and RCW 51.32.040(1). (CP 102-03). Mr. Persinger's motion to vacate was supported by a memorandum of authorities and declaration of counsel. (CP 60-75). A hearing was held before the Honorable Commissioner Joseph Schneider on September 9, 2014 and Mr. Persinger's motion to vacate the Decree as void under RCW 51.32.040 was denied. (CP 164-70; Verbatim Report of Proceedings (RP) 19:21-25; 20-21:1-8). The trial court's ruling analogized the Decree's

provision as one similar to a car loan or other household expenses. (CP 20:21-23, 21:22-24).

The trial court's denial of Mr. Persinger's Motion to Vacate is the subject of this appeal.

IV. SUMMARY OF ARGUMENT

The purpose of the Industrial Insurance Act (Title 51, RCW, hereinafter "The Act") is "to ensure against loss of wage-earning capacity" by providing relief in the form of financial benefits to injured workers. *Hubbard v. Dep't of Labor & Indus. of State of Wash.*, 140 Wn.2d 35, 41, 992 P.2d 1002 (2000); *Jackson v. Harvey*, 72 Wn. App. 507, 513, 864 P.2d 975 (1994). The compensation benefits provided pursuant to the statutory scheme "reflect future earning capacity rather than wages earned in past employment" and are intended to replace future wages that can no longer be earned due to an industrial injury. *Kilpatrick v. Dep't of Labor & Indus. of State of Wash.*, 125 Wn.2d 222, 230-31, 883 P.2d 1370 (1994). The Act does not provide for noneconomic damages such as pain and suffering. *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 406-07, 239 P.3d 544 (2010).

To support the Act's purpose of providing benefits in lieu of wages to workers who have been displaced by injury, the legislature enacted RCW 51.32.040 in an effort to protect those benefits payable under the Act. The statute explicitly prohibits legal transfer, garnishment,

attachment, or "any form of voluntary assignment" of monies paid under Title 51. RCW 51.32.040(1). Any such assignment is void as a matter of law. *Id.*

In this matter, Mr. Persinger and Ms. Tatum effectuated the dissolution of their marriage without the assistance of any legal counsel. (CP 1-33; 76:18-19). The Decree of Dissolution was entered on August 6, 2013 and legally divides the parties' assets in paragraphs 3.2 and 3.3 of the document. (CP 26-27). Ms. Tatum was "awarded as separate property" those items listed in Exhibit "A", which included "50% of L&I settlement and or pension" (sic). (CP 26-27, 32). Mr. Persinger sought to vacate the provision under CR 60(b)(5) for being void as a matter of law pursuant to RCW 51.32.040(1) and was denied. (CP 102-03, 164-70). Mr. Persinger has appealed this decision.

V. ARGUMENT

A. Standard of Review.

Interpretation of a dissolution decree is a question of law and is subject to de novo review. *Stokes v. Polley*, 145 Wn.2d 341, 346, 37 P.3d 1211 (2001); *In re Marriage of Thompson*, 97 Wn. App. 873, 877, 988 P.2d 499 (1999).

Issues pertaining to the application of the Act is also a matter of law subject to de novo review. *Doty v. Town of South Prairie*, 122 Wn. App. 333, 336, 93 P.3d 956 (2004). Thus, Mr. Persinger urges this Court

to apply the de novo review standard when considering the appeal because the heart of the issue is whether the Decree's language is prohibited by the Act's plain language. Thus, no deference to the trial court's ruling should be given.

Mr. Persinger recognizes that this appeal addresses the trial court's denial of his CR 60 motion to vacate, and an order granting or denying a motion to vacate is reviewed for abuse of discretion. *Northwest Land and Inv., Inc. v. New West Federal Sav. and Loan Ass'n.*, 64 Wn. App. 938, 942, 827 P.2d 334 (1992). An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court. *Id.* The trial court is without all discretion if a judgment is determined to be void. *Matter of Marriage of Dugan-Gaunt*, 82 Wn. App. 16, 18-19, 915 P.2d 541 (1996). "If a judgment is void, the court must vacate." *Id.*

Thus, if the Court chooses to apply an abuse of discretion standard of review, the Court should find that the trial court abused its discretion in denying Mr. Persinger's motion to vacate as the underlying Decree provision is void as a matter of law.

B. <u>The Trial Court Committed Error in Denying Mr. Persinger's CR 60(b)(5) Motion to Vacate as the Language and Intent of RCW 51.32.040(1) Prohibits All Voluntary Transfers or Assignments of Title 51 Benefits</u>.

A trial court has a nondiscretionary duty to grant a motion to vacate when a judgment is void. *In re Marriage of Maxfield*, 47 Wn. App.

699, 703, 737 P.2d 671 (1987). The court must follow and apply the law's plain meaning. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). A void judgment has no legal force or effect and exists when a decree or order is made without the inherent power to do so. *State ex rel. Turner v. Briggs*, 94 Wn. App. 299, 302-03, 971 P.2d 581 (1999). A trial court must vacate when confronted with a void judgment. *Allied Fidelity Ins. Co. v. Ruth*, 57 Wn. App. 783, 790, 790 P.2d 206 (1990) (emphasis added).

RCW 51.32.040(1) states:

> Except as provided in RCW 43.20B.720, 72.09.111, 74.20A.260, and 51.32.380, no money paid or payable under this title shall, before the issuance and delivery of the payment, be assigned, charged, or taken in execution, attached, garnished, or pass or be paid to any other person by operation of law, any form of voluntary assignment, or power of attorney. Any such assignment or charge is void unless the transfer is to a financial institution at the request of a worker or other beneficiary and made in accordance with RCW 51.32.045.

The statute cited above is the subject of this appeal. When interpreting statutes, the Court's "primary goal" is to "give effect to the legislature's intent and purpose." *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 726, 153 P.3d 846 (2007). To accomplish this goal, the Court first considers the plain language of the statute. *Id.* "This analysis includes examination of the statute as a whole, giving effect to all that the legislature has said, and ... using related statutes to help identify the

legislative intent embodied in the provision in question." *Id.* at 726-27 (internal citations omitted). This "plain reading" approach is the first step of statutory interpretation and the Court only needs to proceed further in statutory analysis if the statute remains subject to more than one reasonable interpretation. *Id.* at 727.

If the statute remains subject to more than one reasonable interpretation, it is then deemed ambiguous. *Id.* The Court may then look beyond the language of the statute and consider the legislative history, as well as consider the construction given to the statute by those officials charged with its enforcement. *Id.*

Here, the plain language of the statute states explicitly that any transfer or assignment of compensation paid pursuant to Title 51, RCW is void unless the transfer is made to a financial institution at the request of the injured worker. RCW 51.32.040(1). The statute specifically addresses "voluntary assignments" and unequivocally states that such voluntary transfers are void. RCW 51.32.040(1). Thus, the plain reading of the statute prohibits any assignment or transfer of Mr. Persinger's Title 51 benefits to his ex-wife. The simple truth is that the Decree of Dissolution was created without the assistance of counsel and included a provision that was in contravention of the law. When given the chance to remedy the situation, the trial court denied Mr. Persinger's requested relief. (CP 164-70).

An almost identical fact pattern to this case was presented in *Matter of Marriage of Dugan-Gaunt*, 82 Wn. App. 16, 915 P.2d 541 (1996). There, the divorcing parties entered into an agreement whereby the husband was to give forty percent (40%) of his future workers compensation benefits to his ex-wife as part of the distribution of property involved in their divorce. *Id.* at 17-18. Sometime after the divorce, the wife sought modification of the Decree of Dissolution so that the agreement to distribute workers compensation benefits to her would be incorporated in the court's order. *Id.* at 18. The trial court then ordered that payment of the benefits be paid to the ex-wife by either the insurer (Crawford & Company) or by the husband's attorney, "if any". *Id.* The husband sought to vacate the order as void pursuant to RCW 51.32.040(1) and the trial court denied his motion. *Id.*

On review, the Court of Appeals dispensed with the issue and succinctly stated that, "Under the Industrial Insurance Act, a worker may not voluntary assign any compensation benefits to another person. <u>Any such transfer is void</u>." *Id.* at 19 (internal citations omitted) (emphasis added). The Court noted that the statutory language of RCW 51.32.040 was clear in prohibiting the transfer of worker's compensation benefits. *Id.* at 20. Even though the language was absolutely clear, the Court offered additional reasons in support of vacating the decree. *Id.* at 19-20. Specifically, the Court noted that a Title 51 beneficiary lacks legal

ownership of the benefits and is thus unable to assign them, as well as the fact that Title 51 benefits are considered "compensation for lost future wages and are not an asset for distribution upon dissolution." *Id.* The Court also cited *In re Marriage of Huteson*, 27 Wn. App. 539, 543, 619 P.2d 991 (1980) for the proposition that disability payments "are designed to compensate solely for loss of future earnings" and that treatment of disability payments as a community asset would "unfairly and permanently burden those future earnings to the same extent as would an award of permanent alimony." *Dugan-Gaunt*, 82 Wn. App. at 19.

Thus, the law is clear that the purpose of disability benefits is to simply compensate for wages unable to be earned. Title 51 benefits are distinct from retirement benefits or pension plans which are earned through labor performed during marriage. Most importantly, the law is clear that a Title 51 beneficiary lacks actual ownership and ability to transfer or assign his benefits, and that any such transfer is prohibited by law.

RCW 51.32.040(1) was also addressed in *Clingan v. Dep't of Labor & Indus.*, 71 Wn. App. 590, 860 P.2d 417 (1993). There, the Appellant moved to have a dissolution decree set aside after the death of her ex-husband so that she could receive the ex-husband's industrial insurance benefits as a surviving spouse under RCW 51.32.050(6). *Clingan*, 71 Wn. App. at 591-92. Her claim was denied by the

Department of Labor & Industries on grounds that the ex-husband left no surviving spouse at the time of his death. *Id.* at 592. The Department's decision was affirmed by the King County Superior Court. *Id.*

On review, the Appellant argued that the Decree of Dissolution and property settlement agreement "failed to distribute a community asset", namely the ex-husband's industrial insurance benefits. *Id.* at 593. The Court of Appeals stated that her argument was flawed for three reasons. *Id.* Importantly, one of the reasons articulated by the Court was that "Mrs. Clingan did not have a right to receive a portion of Mr. Clingan's pension because it was a statutory entitlement personal to him and could not be divided in a property settlement." *Id.* at 594 (emphasis added). The Court stated further, "In fact, had Mr. Clingan's right to receive the pension been apportioned according to community property tenets or by agreement of the parties, that division would have been void." *Id.* (emphasis added). Thus, the case law in Washington has already addressed the issue of this appeal and the law supports Mr. Persinger's position.

Moreover, the Washington State Supreme Court has considered the language of RCW 51.32.040 and stated unequivocally that the statute prohibits assignment. *Johnson v. Dep't of Labor & Indus.*, 114 Wn.2d 479, 481, 788 P.2d 551 (1990).

Both *Dugan-Gaunt* and *Clingan* addressed a voluntary assignment

of the benefits in the context of marital dissolution, and both times the Court held that any such transfer was void as a matter of law and simply could not be effectuated. Case law interpreting the statute requires a finding here that any assignment, including a voluntary assignment, is void as a matter of law.

C. The Trial Court Erred in Determining that the Decree of Dissolution was not an "Assignment" for Purposes of RCW 51.32.040(1).

In denying Mr. Persinger's motion, Commissioner Schneider made clear that his ruling was founded upon the belief that the provision in the Decree of Dissolution entitling Ms. Tatum to "50% of L&I settlement and or pension" was not a legal assignment that falls within the purview of RCW 51.32.040(1). (CP 32; RP 20:8-14, 21:2-4, 19-22). The trial court believed that the Decree's provision was not an assignment because Ms. Tatum could not demand payments from the Department of Labor & Industries and because the money was delivered to Mr. Persinger before he was required to turn the funds over to Ms. Tatum pursuant to the Decree of Dissolution. (RP 20:16-19, 21:2-4, 19-23). This reasoning is illogical and contrary to the law.

In addition to Mr. Persinger's contention that the precedential case law and clear language of the statute require that the Decree's provision at issue in this matter be vacated as void, the trial court's reasoning is erroneous.

An "assignment" is the transfer of rights or property. Black's Law Dictionary (9th ed. 2009). Here, it is clear that the Decree assigns Ms. Tatum a property interest in the Title 51 benefits. Again, paragraph 3.2 of the Decree of Dissolution legally awards Ms. Tatum the property set forth in Exhibit "A". (CP 26). Exhibit "A" identifies "50% of L&I settlement and or pension" as the legal property of Ms. Tatum pursuant to the Decree of Dissolution entered by Benton County Superior Court. (CP 32). The trial court's oral ruling recognizes that the assignment is a legal agreement enforceable by law but hangs its hat on the fact that the Decree allows Mr. Persinger to receive the money first. (CP 20:8-14, 21:4-6). However, after Mr. Persinger receives the funds, the trial court believed that the Decree's order to pay those funds to Ms. Tatum was not a violation of RCW 51.32.040(1). (CP 20:10-14). The trial court's statement that the Title 51 benefits addressed in the parties' legally enforceable Decree of Dissolution is analogous to a car loan or other household expenses is simply incorrect. (CP 20:21-23, 21:22-24).

The crux of the matter is that Ms. Tatum's property award in the Decree is intimately and explicitly related to the Title 51 benefits. No matter the amount of the benefits received, or if any benefits are received at all, Ms. Tatum is entitled to fifty percent (50%) per the Decree of Dissolution.

If Mr. Persinger returns to work, the Title 51 benefits he is entitled

to receive will cease. RCW 51.32.160(2) (Stating that benefits will terminate if worker with total disability return to employment). Thus, if such a scenario took place, there would be no benefits paid to Ms. Tatum and Mr. Persinger would not be violating the Decree of Dissolution in any manner. The same cannot be said for a car loan or any other financial obligation incurred by Mr. Persinger. Stated differently, Mr. Persinger is liable to all other creditors in his life whether or not he receives his Title 51 benefits. However, he is only liable to Ms. Tatum so long as he receives those benefits. He is not required to pay her any set amount in the manner that he would be required to pay for any other financial obligations, such as a car loan.

Thus, it is legal fiction to assert that Ms. Tatum's legal interest is not solely vested in the Title 51 benefits at issue. The trial court's ruling does not make logical sense. The Decree's provision is a specific assignment of the Title 51 benefits and Ms. Tatum has a recognized legal interest solely in those Title 51 funds, in whatever amount they may or may not be, and for whatever duration those benefits may or may not continue.

D. Application of RCW 51.32.040(1) is not Limited to Only Those Scenarios Where the Title 51 Benefits are Directly Payable to a Creditor or Other Party.

The holding in *Dugan-Gaunt* cannot be read to apply only to a scenario wherein a third party, such as an insurer or attorney, is ordered to

pay the Title 51 benefits to another person prior to reaching the intended beneficiary. Nor can the statute's prohibition on assignment only be applied where the Title 51 benefits are paid directly to a creditor.

The *Dugan-Gaunt* Court stated, "Because the trial court lacked jurisdiction over [husband's attorney], <u>and had no authority to order [husband] to pay a portion of his benefits to [ex-wife], we reverse</u>" the trial court's denial of the husband's motion to vacate. 82 Wn. App. at 17 (emphasis added). The Court intentionally chose not to address jurisdictional arguments as to whether the trial court could order the insurer or attorney to disburse the funds because its holding made that issue moot. *Id.* at 20 (stating "Because we hold that the trial court's order awarding [ex-wife] a portion of [husband's] compensation was void and must be vacated, we need not discuss this issue."). Thus, argument that RCW 51.32.040(1) only applies to those situations where the Title 51 benefits are transferred to an intermediary prior to the beneficiary simply does not comport with the opinions expressed in both *Dugan-Gaunt* and *Clingen*.

Moreover, it is simply erroneous to assert that the contested Decree of Dissolution in this matter is valid based upon the language "before the issuance and delivery of the payment" contained in RCW 51.32.040(1). Again, the statute states:

> no money paid or payable under this title shall, before the

> issuance and delivery of the payment, be assigned, charged, or taken in execution, attached, garnished, or pass or be paid to any other person by operation of law, any form of voluntary assignment, or power of attorney. Any such assignment or charge is void ...

RCW 51.32.040(1). As addressed above, the Decree's provision ties Ms. Tatum's interest specifically to the Title 51 benefits before they are issued and delivered to Mr. Persinger. The only reason that the money passes to Mr. Persinger first is because there is no court order requiring otherwise. It makes little sense that the statute be construed in a manner whereby such a loophole would be allowed to exist. If this interpretation were allowed, then there would be nothing to stop creditors, for example, from entering into binding agreements with Title 51 beneficiaries requiring that those specific Title 51 funds be turned over to those creditors as soon as the funds are delivered to the beneficiary. This simply does not make sense and is not what the applicable case law holds.

The plain reading of the statute along with the applicable case law clearly prohibits the assignment contained in Mr. Persigner's Decree of Dissolution. The court's order gives Ms. Tatum a legal interest in the Title 51 benefits before they are issued and delivered to Mr. Persinger.

E. The Law Recognizes that Title 51 Benefits Cannot be Garnished, Thus Prohibiting any Attachment to the Funds by Another Party.

Creditors are simply unable to garnish funds obtained from certain sources. (Chapter 6.15, RCW; RCW 6.27.150; RCW 51.32.040(1); 28

Wash. Prac., Creditor's Remedies – Debtor's Relief § 8.12). Full garnishment exemptions are allowed for benefits from industrial insurance (Title 51), unemployment compensation, public assistance programs, and public retirement programs. (28 Wash. Prac., Creditor's Remedies – Debtor's Relief § 8.12; RCW 51.32.040; RCW 50.40.020; RCW 74.08.210).

Here, the trial court recognized that Ms. Tatum's only recourse under the current Decree of Dissolution is to seek judgment against Mr. Persinger or alternatively have him held in contempt. (RP 21:4-6). Even if she obtains judgments against Mr. Persinger, it is absolutely unclear how she intends to enforce such a judgment given that the law clearly prohibits garnishment of Title 51 benefits. This further highlights the impracticability of the trial court's interpretation of RCW 51.32.040(1). The statutory framework surrounding Title 51 benefits makes any third party's court-ordered legal interest in those benefits uncollectable. The fact that Ms. Tatum could never actually garnish the funds she seeks is indicative that the Decree's provision is void as a matter of law.

F. Upholding the Provision Addressing Title 51 Benefits in the Decree of Dissolution Amounts to an Award of Lifetime Maintenance to Ms. Tatum, Which is a Strongly Disfavored Policy in Washington State.

It is not the policy of the State of Washington to place a permanent responsibility upon a divorcing spouse to support a former spouse.

Cleaver v. Cleaver, 10 Wn. App. 14, 20, 516 P.2d 508 (1973); *In re Marriage of Coyle*, 61 Wn. App. 653, 657, 811 P.2d 244 (1991); *In re Marriage of Mathews*, 70 Wn. App. 116, 124, 853 P.2d 462 (1993). Stated differently, "it is not the policy of the law of this state to giver [an ex-wife] a perpetual lien on her divorced husband's future income." *Hogberg v. Hogberg*, 64 Wn.2d 617, 619, 393 P.2d 291 (1964).

The *Dugan-Gaunt* Court recognized that a perpetual interest in an ex-spouse's Title 51 benefits was akin to permanent maintenance when it cited *Huteson*. 82 Wn. App. at 19.

Here, Mr. Persinger receives Title 51 benefits based upon his rating as suffering a permanent and total disability. His benefits are wage replacements and any sums he has received are for wages unable to be earned during the pendency of his Industrial Insurance claim and for wages unable to be earned in the future. To construe the Decree of Dissolution in the manner urged by Ms. Tatum, this Court must not only disregard the language of RCW 51.32.040(1) and applicable case law, but must also disregard Washington's firm policy disfavoring permanent maintenance.

VI. CONCLUSION

Based on the foregoing analysis, the Trial Court erred when it denied Mr. Persinger's CR 60(b)(5) motion to vacate as the Decree's provision giving Ms. Tatum a legally recognized interest in Mr.

Persinger's Title 51 benefits is contrary to law. As such, the provision is void ab initio and must be vacated.

SUBMITTED THIS 9 day of January, 2015.

TELQUIST ZIOBRO McMILLEN CLARE, PLLC

By: _____

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Attorneys for Appellant, Marc Persinger

I, Amber Peters, am over the age of eighteen and am competent to testify as to the facts contained in this Declaration.

1. On January 9th, 2015, I electronically filed with the Washington State Court of Appeals, Division III a Table of Contents, Table of Authorities, Brief of Appellant, and this Declaration of Filing and Mailing.

2. On January 9th, 2015, I sent via email and deposited in the mail to Elizabeth Jennings, Beresford Booth, PLLC, 145 3rd Avenue South, Suite 200, Edmonds, Washington, 98020, containing a true and correct copy of the Brief of Appellant, Table of Contents, Table of Authorities, and this Declaration of Filing and Mailing.

Respectfully submitted this 9th day of January, 2015.

TELQUIST ZIOBRO McMILLEN CLARE, PLLC

By: Amber Peters

AMBER PETERS,
Legal Assistant to Benjamin H. Rascoff