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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 RESPONDENT

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A. INTRODUCTION & ISSUE FOR REVIEW

COMES NOW, the Respondent, Ms. Holly Tatum (f/k/a Ms. Persinger), and hereby respectfully submits this Brief of Respondent in response to the opening Brief of Appellant.

Appellant, Mr. Persinger, argues that the trial court erred in denying Mr. Persinger's *Motion to Vacate* in light of RCW 51.32.040(1). However, no error was committed as the property division in the divorce Decree of the parties does not violate RCW 51.32.040(1)'s prohibition of certain transfers, nor was there any evidence on the record suggesting payments received by Mr. Persinger are solely compensation for lost future earnings.

B. COUNTER-STATEMENT OF THE CASE

Appellant Marc Persinger and Respondent Holly Tatum were married in 1991 and divorced 22 years later, in 2013. CP 1, 25. In their dissolution action, Ms. Tatum utilized the assistance of the Benton County facilitator's office in drafting the language of the Petition and Decree, but otherwise neither was represented by counsel. CP 172, 187.

Mr. Persinger joined in the Petition for Dissolution, filed May 3, 2013 in Benton County. CP 1-12. The parties also agreed to the final Decree of Dissolution, entered August 6, 2013, which was consistent with the terms of the Petition for Dissolution, including the division of assets and liabilities. CP 1-12; 25-33. Exhibit A to the Decree included the

property to be awarded to the respective party, including an award of “50% of L&I settlement and/or pension,” which is the assets and provision at issue in this appeal. CP 32.

At the time of the parties’ separation and divorce, the couple was in the midst of a dispute with the Washington State Department of Labor and Industries (“L&I”) regarding Mr. Persinger’s worker’s compensation benefits and settlement award related to an injury he sustained in 2007 while he was married to Ms. Tatum. CP 108; 187. The L&I case, which began in 2011, was still pending at the time the final Decree of Dissolution was entered by the court. CP 187. At the time of dissolution, it was uncertain what the value, nature, and duration of any potential payments or awards that would be issued by L&I would actually be, or even if there would actually be an award. CP 108; 187. However, the couple incorporated the division of those particular potential assets through reference to their expected source, the “L&I settlement and/or pension.” CP 187-88.

The 50/50 division of these funds is consistent with the division of the other assets and liabilities of the parties. *See e.g.*, CP 32.

It was only after the dissolution was finalized that the lawsuit with L&I was resolved. CP 108. Ms. Tatum then learned that Mr. Persinger had received several lump sum payments from L&I as well as would be

receiving monthly payments in the future. CP 108-09. Despite requests for information about the nature and amount of these payments, Mr. Persinger refused to provide any documentation about the extent or the basis for the funds he was receiving. CP 36; 108. Based on information and belief at the time of the trial court hearing, Mr. Persinger had received several payments from L&I, including payments representing back interest and time-loss compensation for the period of March 2, 2012 through November 26, 2012 – a period during which the parties were still married. CP 108-10, 142, 144. Mr. Persinger also apparently received a lump sum payment for his back L&I pension settlement. CP 108-09; 142. Additionally, Mr. Persinger also had begun receiving monthly payments in an unknown amount (at the time). CP 108. Ms. Tatum was not provided any information as to the nature or basis for those payments, but assumed they were “pension” payments to which she was entitled. CP 108-09.

Mr. Persinger’s lack of payment of Ms. Tatum’s 50% share of funds in the amount of the “L&I settlement and/or pension” which he had received was (one of) the bases for Ms. Tatum’s *Motion/Declaration for an Order to Show Cause re: Contempt and Other Post-Decree Relief*, filed August 28, 2014, and which was heard at the same time as Mr. Persinger’s *Motion to Vacate*. CP 104-48; 102, 149. In relation to the trial court hearing, Mr. Persinger did not present any evidence as to the nature and

basis for the settlement and/or other payments he had received from L&I to either Ms. Tatum or the trial court.

As a result of the hearing, the trial court entered an order denying Mr. Persinger's Motion and granting Mr. Tatum's Motion in part, including entry of a judgment for 50% of Mr. Persinger's lump sum payments from L&I that were known to Ms. Tatum at the time of the hearing. CP 164-701.

Mr. Persinger then filed this appeal seeking review of the trial Court's order denying his *Motion to Vacate*.

C. SUMMARY OF ARGUMENT

The divorce Decree's award of 50% of the "L&I settlement and/or pension" is not a prohibited assignment pursuant to RCW 51.32.040(1), but is a permissible property division agreed to by the parties. Because the actual dollar amount of any such award was unknown at the time of dissolution, the only option left to the parties in order to make a just and equitable division of their separate and community property was to refer to the *source* of the asset in the Decree and agree to a division of its value once known.

The distribution in the Decree is not an assignment or impermissible transfer under RCW 51.32.040(1) since payment is to be made to Ms. Tatum only after payment is made and issued to Mr.

Persinger personally. Ms. Tatum may enforce the Decree against Mr. Persinger, but there is no court order which allows Ms. Tatum to receive funds directly from L&I. It is only in that later instance that an impermissible assignment would occur. This argument is further advanced by looking at the types of transfers specifically prohibited in the statute: all prohibit instances where the funds never pass through the hands of the beneficiary.

Even disregarding the above, the payments Mr. Persinger has been issued from L&I are not solely funds to replace future wages, as is the purpose of the statute, according to Mr. Persinger. *Appellant's Brief*, pg. 3. Instead, these payments are (at least in part) compensation for past wages and retirement benefits which should have been paid during the parties' marriage. CP 108-10, 142, 144. Mr. Persinger failed to present any contradictory evidence regarding the bases of the payments so the trial court was well within its discretion to deny Mr. Persinger's request to vacate the entire L&I property division in the Decree. *See e.g. Marriage of Geigle*, 83 Wn. App. 23, 33, 920 P.2d 251 (1996).

Lastly, granting Mr. Persinger's *Motion to Vacate* would significantly disrupt the just and equitable nature of the Decree. Should the Court find a basis to grant Mr. Persinger's request, it must also remand

this case to the trial court for a modification of the Decree such that an equitable division of the assets and liabilities can be restored.

D. ARGUMENT

1. Standard of Review

This appeal addresses the trial court's denial of Mr. Persinger's *Motion to Vacate Judgment Pursuant to CR 60(b)(5) and Enforce Decree*. CP 164-170. Such 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.* A court abuses its discretion when it exercises "its discretion on untenable grounds or for untenable reasons, or [its] discretionary act was manifestly unreasonable." *Hardesty v. Stenchever*, 82 Wn. App. 253, 263, 917 P.2d 577 (1996). Given the evidence presented to the trial court (or lack thereof by Mr. Persinger), the trial court was well within its discretion to deny the CR 60(b)(5) *Motion to Vacate*.

Mr. Persinger bases his *Motion to Vacate* on the application of RCW 51.32.040(1) to the property division provided for in the Decree of Dissolution. CP 62, 67. Should the Court determine that RCW 51.32.040(1) conceivably applies to the property division, then this appeal

is subject to de novo review. *Doty v. Town of South Prairie*, 122 Wn. App. 333, 336, 93 P.3d 956 (2004). Regardless of the standard of review, there remains no basis to disturb the trial court's ruling and Mr. Persinger's appeal should be denied and the trial court's order should be affirmed.

2. The Trial Court Did Not Err in Determining RCW 51.32.040(1) Only Restricts Transfers to Third Parties *Before* Issuance or Payment is Made to the Beneficiary.

The plain language reading of RCW 51.32.040(1) advocated by Mr. Persinger does not warrant the court vacating that property division in the Decree. The express language of the statute provides that such money received as benefits under Title 51 are only protected from assignment, attachment, garnishment or other actions *before* the money is actually issued and delivered to the beneficiary. RCW 51.32.040(1).

Expressly, RCW 51.32.040(1) provides:

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.

(emphasis added). Mr. Persinger remains the individual to whom issuance and delivery of the payment is made. There is no court order in place that

requires L&I or Mr. Persinger's L&I attorney to pay Ms. Tatum 50% of any funds received from L&I directly to Ms. Tatum. *Compare with Matter of Marriage of Dugan-Gaunt*, 82 Wn. App. 16, 17, 915 P.2d 541 (1996) (review of modification of decree ordering worker's compensation attorney and insurer to pay percentage of husband's benefits directly to wife). Instead, the divorce Decree provides that 50% of the value of any payments from that source is to go to Ms. Tatum and she must rely on Mr. Persinger, or court involvement, to effectuate the property division in the Decree. *See* CP 32.

The timing and process for distributing payment is a significant consideration regarding application of the statute. Examining at the types of transfers prohibited by RCW 51.32.040(1) all would occur when the funds pass *directly* from the source (L&I) to a third party recipient, such as a creditor or an assignee. *See e.g.*, RCW 6.27.090 (prohibiting a garnishee from releasing funds to the defendant after service of writ of garnishment); RCW 7.08.030 (assignment giving assignee full right of possession and control, including power to demand and recover from all persons all property of the estate). For example, if funds are garnished, the garnishee is required to hold the amount covered by the writ, excluding the judgment debtor from any control or actual possession over the funds. RCW 6.27.090; RCW 6.27.120 (providing that it shall be unlawful for the

garnishee to pay or release any debt owing to the defendant after service of the writ). The funds never pass through the hands of the beneficiary.

Yet, that is not the requirement or practical reality of the Decree. Mr. Persinger is still receiving the payments directly. As Commissioner Schneider observed, once Mr. Persinger receives those funds, he is free to do with them what he pleases and to spend them as he wishes – he can pay his bills, he can buy groceries, he can purchase a new truck and RV (as Mr. Persinger did after receipt of the lump sum payments.) RP 20: 16-19, 21-23; 21: 2-4, 19-24; CP 110. He can also use those funds to pay his obligation under the Decree of Dissolution. Mr. Persinger is the one with control over the funds. Yet after they are delivered to him and he treats them as cash in hand, they lose their protection. *See e.g.*, RCW 50.40.020 (providing that benefits received by an individual must not be commingled with other funds of the recipient to maintain exempt status). It is only when he receives the payments and fails or refuses to distribute 50% of their value to Ms. Tatum that he is in violation of the Decree and Ms. Tatum can seek to enforce it against him.

3. The Trial Court Did Not Err in Finding the Decree’s Award of Property is Was Not an Impermissible “Assignment.”

Mr. Persinger argues that the property division is an impermissible assignment of Title 51 benefits. Yet Ms. Tatum would only be an assignee

if she were the one “to whom property rights or powers are transferred.” Black’s Law Dictionary (9th ed. 2009). If the Decree itself was indeed an “assignment,” it would give Ms. Tatum the right and power to receive 50% of the actual L&I payment directly from the payor (L&I). *See Amende v. Morton*, 40 Wn.2d 104, 107, 241 P.2d 445 (1952) (“[A]n agreement to pay out of a particular fund, however definite, is not an equitable assignment.” and “[A]n assignment must be absolute in its terms and vest in the assignee and apparent legal title, although the basic purpose is collection.”) The parties and the trial court agree that the Decree does not give Ms. Tatum a property interest in the actual Title 51 benefits such that it can be exercised and enforced against L&I. RP 20: 16-19. Rather, Ms. Tatum has an interest in the dollar amount value of those payments actually paid to Mr. Persinger and Ms. Tatum’s right of enforcement is against Mr. Persinger only, not L&I. The trial court correctly opined at the hearing that a restricted “assignment” under the statute would only occur if Ms. Tatum were legally able to seek payment of the Decree distribution directly from the payor. RP 20: 16-19, 21: 2-4, 18-23. Here, Mr. Persinger has the option, and has exercised that option, not to pay Ms. Tatum, necessitating reducing the obligation to judgment. The Decree itself is therefore not an impermissible “assignment.”

Certainly the parties could have benefited from more expert drafting and/or knowledge of the actual amounts and extent of any settlement or benefits Mr. Persinger would eventually receive through L&I. If, in the Decree, Ms. Tatum was awarded an actual money judgment equivalent to the amount of funds Mr. Persinger would be receiving in settlement from L&I, in order to reach a just and equitable division of assets, the parties would not be arguing in this appeal. However, the reality of the situation and timing of the dissolution proceeding made such a calculation and consideration of the actual dollar amounts impossible. All that could be included in the Decree at the time of dissolution was a reference to the *source* of funds to be paid to Mr. Persinger to indicate the amount of property award should be paid to Ms. Tatum. This does not amount to a prohibited assignment.

4. Viewing Title 51 Benefits Through the Lens of Garnishment Actually Supports the Conclusion that Such Benefits are Only Protected Prior to Payment to Beneficiary.

Mr. Persinger further argues that the fact Title 51 benefits cannot be garnished supports his argument. However, that very concept reinforces the plain language of RCW 51.32.040(1), providing that the restrictions are only in place “before the issuance and delivery of the payment.” RCW 51.32.040(1). The statute does prohibit a creditor from treating L&I as a garnishee such that funds owed to Mr. Persinger can be garnished and paid

directly to Ms. Tatum. However, once Mr. Persinger cashes his checks from L&I or uses those funds to purchase items of personal property, neither a creditor nor Ms. Tatum would be prevented from executing on that property. *See e.g.*, RCW 50.40.020 (providing that benefits received by an individual must not be commingled with other funds of the recipient to maintain exempt status). For example, the truck and RV that Mr. Persinger purchased with his L&I settlement award (instead of paying Ms. Tatum her 50%) can be executed upon in a personal property execution. *See* CP 110; RCW 6.17.090 (“All property, real and personal, of the judgment debtor that is not exempted by law is liable to execution.”). If Mr. Persinger failed to distribute the money Ms. Tatum is entitled to, any judgment Ms. Tatum is forced to obtain against him can be satisfied by any non-exempt property he owns. *Id.* Again, once the funds are issued and paid to Mr. Persinger, there are no restrictions on what happens to that money.

5. The Property Division in the Decree is Not Equivalent to an Award of Lifetime Maintenance Given the Nature and Collectivity of the Award.

Mr. Persinger’s argument that the Decree’s property division amounts to “an award of lifetime maintenance to Ms. Tatum” is further without merit. *Appellant’s Brief*, pgs. 16-17. Firstly, the fact that a property division is paid monthly is not the same as an award of “lifetime

maintenance.” A division of property is a completely different concept than an award of maintenance or alimony --- Alimony is an obligation which is *paid out of the earnings or estate* of the party responsible for it; A property division, on the other hand, simply disposes of the property of the parties, both community and separate, on an equitable basis. *Carstens v. Carstens*, 10 Wn. App. 964, 967, 521 P.2d 241, 243 (1974) (“Future payments provided for by an agreement in writing can either be alimony and support money or a property settlement depending on the circumstances and intent of the parties.”) Just because a portion of Mr. Persinger’s award is being paid monthly does not convert the division to a maintenance payment. It is not uncommon for a property division to be paid in installments. For example, if the parties had known the amount and present value of funds Mr. Persinger would be receiving from L&I at the time of dissolution, Ms. Tatum could have been awarded a money judgment as part of the property division, which could be paid in monthly installments by Mr. Persinger, yet it would not be considered maintenance.

Secondly, Mr. Persinger cannot have it both ways by characterizing the property division as a kind of “lifetime maintenance,” while also arguing the funds are not subject to any collection remedies. If Mr. Persinger truly considers the L&I award as maintenance, such amount actually would be subject to collection (including garnishment and actual

assignment) directly from L&I. RCW 74.20A.260 (Title 51 disability payments subject to collection by the office for support enforcement); RCW 74.20A.020(9) (including spouse support, alimony, maintenance, and “any other such moneys intended to satisfy an obligation for support of any person or satisfaction in whole or in part of arrears or delinquency on such an obligation” as “support moneys” which the department may recover from any person); RCW 74.20A.270 (department may take efforts to recover payment to any person in possession of support moneys). Further, at the trial court hearing, Mr. Persinger argued that he could not be found in contempt for failing to pay the monthly L&I payments because they were not part of his “duty to support ... his wife.” CP. 156. Instead, as Mr. Persinger admitted, they are part of a property distribution between the parties. CP. 157. If Mr. Persinger truly does want to consider the L&I payments as maintenance, then his arguments about lack of collectability and enforceability lose even more weight.

6. In the Alternative, Mr. Persinger’s Interpretation of RCW 51.32.040(1) Does Not Actually Apply to All the Property Falling Under the Decree’s Award Regarding L&I Payments.

Further, Mr. Persinger’s argument and interpretation of RCW 51.32.040(1) rests on the idea that the property division in the Decree of “L&I settlement and/or pension” that he seeks to void is strictly comprised

of payments as replacement of lost future wages. *Appellate's Brief*, pgs. 9 *et seq.* Mr. Persinger's arguments focus solely on payments he supposedly receives for "compensation for lost future wages" as the basis for vacating the entire property division at issue. *Appellant's Brief*, pg. 3. However, the funds Mr. Persinger has received from L&I are not (or are not limited to) payments as compensation for lost future wages. CP 108-09, 110, 142-44. In fact, Mr. Persinger failed to provide any documentation or testimony to the trial court regarding the actual nature of payments he has been receiving to justify application of RCW 51.32.040(1) to those funds. Instead, based on the evidence actually before the trial court, such settlement payments from L&I were not for compensation for future lost wages, but rather as replacement for time loss wages during the parties' marriage. *See* CP 108-09, 110, 142-44.

In Mr. Persinger's reading of RCW 51.32.040(1) he relies on the proposition that that the purpose of the Industrial Insurance Act is "to ensure against loss of wage-earning capacity" through benefits which "reflect future earning capacity rather than wages earned in past employment," 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, 230-32, 883 P.2d 1002 (1994); *Jackson v. Harvey*, 72 Wn. App. 507, 513, 864 P.2d 975 (1994); *see also Appellant's*

Brief, pg. 3. However, it was not just a division of benefits for lost future wages that Mr. Persinger was attempting to vacate in his *Motion to Vacate Judgment Pursuant to CR 60(b)(5) and Enforce Decree*, but rather any and all funds Mr. Persinger has received from L&I.

Based on information Ms. Tatum was able to obtain and offer to the trial court, the payments Mr. Persinger had received were not compensation for lost future wages, but instead included compensation for wages time loss during the parties' marriage, plus interest which accrued on the unpaid wages. CP 108-09, 110, 142-44. Wages earned during marriage are clearly community property subject to consideration and distribution in a divorce proceeding. *Lindemann v. Lindemann*, 92 Wn. App. 64, 73, 960 P.2d 966 (1998) (“[L]abor performed during a marital or quasi-marital relationship has a community character from its inception.”); RCW 26.09.080 (“[T]he court shall ... make such disposition of property and liabilities of the parties, either community or separate, as shall appear just and equitable ...”). The only practical issue in the present case is that Mr. Persingers “wages” were not known or actually received at the time of divorce due to the L&I claim appeals process. CP 108. Instead, the only way that the couple’s property and Mr. Persinger’s income during the marriage could be incorporated into the Decree was by reference to the eventual source of those funds.

In addition to the time loss compensation for wages that would have been earned during the marriage, retirement or pension benefits were also a contemplated component of the Decree by inclusion of “L&I settlement and/or pension” in the property division. CP 32. Retirement benefits that Mr. Persinger was unable to accrue during his marriage due to his injury were also incorporated into the Decree. *See* CP 32. An award related to these benefits was supposedly paid out to Mr. Persinger at resolution of his L&I case. CP 108-09.

Again, this type of payment varies in characterization from “compensation for lost future earnings” that Mr. Persinger argues is protected. “[R]etirement income is properly characterized as deferred compensation for past services and, thus, any portion of retirement income that was earned during the existence of the community is divisible upon dissolution.” *Marriage of Kollmer*, 73 Wn. App. 373, 375, 870 P.2d 978 (1994) (finding the trial court did not err in awarding wife an interest in disability pay where husband’s entitlement had characteristics of compensation for past services). “If [...] a party would be receiving retirement benefits but for a disability, so that disability benefits are effectively supplanting retirements benefits, the disability payments are a divisible asset to the extent they are replacing retirement benefits.” *Marriage of Geigle*, 83 Wn. App. 23, 31, 920 P.2d 251 (1996); *In re*

Marriage of Nuss, 65 Wn. App. 343, 828 P.2d 627 (1992), citing *In re Marriage of Kittleson*, 21 Wn. App. 344, 354, 585 P.2d 167 (1978) (explaining that some disability pensions may substitute for regular retirement pensions or contain elements attributable to retirements pensions). Again, Mr. Persinger did not offer the trial court any evidence regarding the composition or nature of Mr. Persinger's "settlement" and/or "pension" payments contemplated by the Decree.

The pension payments that Mr. Persinger receives or has received from L&I are presumably supplanting his retirement, at least part of which would have accrued during his marriage to Ms. Tatum, but for his injury. Therefore, consideration of Mr. Persinger's retirement or pension benefits was properly an asset for consideration and distribution at time of divorce. See *In re Marriage of Kittleson*, 21 Wn. App. at 348; *In re Marriage of Hutson*, 27 Wn. App. 539, 542, 619 P.2d 991 (1980). Again, given the uncertainty as to the amount of such a pension award, the only way the amount and extent of this asset could be equitably handled at the time of divorce was through reference to the source. As such, the Decree's award of 50% of Mr. Persinger's pension from L&I was properly before the court and divisible at time of divorce.

A consideration of the *bases* for the varying types of worker's compensation benefits and *when* the beneficiary became entitled to such

benefits are material facts when determining how such benefits should be categorized in a divorce proceeding. *See e.g., In re Marriage of Brewer*, 137 Wn.2d 756, 976 P.2d 102, 111 (1999) (“Monthly payments under the policy which compensate for expenses incurred during the marriage, or earnings lost during the marriage or payments which are in fact deferred compensation, should be characterized as community property in proportion to the community’s contribution...”). All of the cases offered by Mr. Persinger are distinguishable in this regard.

For example, the Division II case of *Dugan-Gaunt* dealt with review of an order which modified the parties’ Decree of Dissolution such that it directed the husband’s workers’ compensation attorney and insurer to disburse wife’s award under the Decree directly to wife. *Marriage of Dugan-Gaunt*, 82 Wn. App. 16, 17, 915 P.2d 541 (1996). The husband was receiving benefits from an on-the-job injury he suffered before marriage. *Id.* at 18. Such benefits were solely an award for his permanent partial disability and were “in the nature of compensation for lost future wages.” *Id.* at 18.

Additionally, the Division I case of *Clingan v. Dep’t of Labor & Indus.*, 71 Wn. App. 590, 860 P.2d 417 (1993), dealt with judicial review of the administrative denial of a claim for industrial insurance surviving spouse benefits. *Id.* at 591. The injury occurred before marriage and the

beneficiary and his wife were divorced at the time the beneficiary died and his benefits ended. *Id.* The dispositive issue on appeal was whether the trial court had jurisdiction to set aside the dissolution on the basis of correcting the record evidenced in the decree. *Id.* at 592-93. A determination of what portion of benefits were community property was not at issue.

Yet in the present case, Mr. Persinger's injury occurred *during* the marriage of the parties, affected Mr. Persinger's receipt of wages *during* their marriage, and the L&I settlement payments (at least in part) essentially stand in the place of actual wages and retirement benefits earned during the marriage. Mr. Persinger should have been receiving these payments prior to dissolution, but for a delay in the resolution of the L&I claim.

7. Appellant Failed to Present Any Evidence to the Trial Court to Determine the Bases For and Possible Segregation of Funds from L&I so the Trial Court Was Proper in Denying the Motion to Vacate.

Most importantly to the above argument and explanation is the fact that Mr. Persinger failed to present any information or documentation to the trial court at the hearing on his *Motion to Vacate Pursuant to CR 60(b)(5)* regarding the nature and bases for the payments he had received from L&I. If Mr. Persinger did not believe all the funds he received from L&I were subject to the property division, Mr. Persinger had the

opportunity to seek segregation of the funds he had received. *See e.g. Marriage of Geigle*, 83 Wn. App. 23, 33, 920 P.2d 251 (1996). However, he has since waived this right to segregate portions of his L&I payments, instead choosing to withhold all payments to Ms. Tatum without justification. *Id.* (Recipient spouse failed to provide trial court with information needed to segregate deferred compensation from future income, nor did he request any segregation, so court found he waived his right to have segregation of worker's compensation benefits and could not complain the court treated his benefits as a divisible asset).

To the extent Mr. Persinger does not believe Ms. Tatum is entitled to certain benefits pursuant to the Decree, he bears the burden of proving so. *Marriage of Geigle*, 83 Wn. App. at 32-33. “[I]f part of a stream of income is divisible between spouses as deferred compensation earned during marriage, and part is not divisible between spouses because it replaces future income, the recipient spouse has the burden of providing the documents or other information needed to segregate.” *Id.* The recipient spouse has the burden of asking the trial court to make a segregation and such a burden is appropriate because the recipient spouse, not the other spouse, is the one with ready access to the needed information. *Id.* Yet this is not what Mr. Persinger asked the trial court to do, nor what he is asking this Court to do on appeal. He is instead asking the Court to vacate the

entire property division without any consideration of the actual nature and basis of the “L&I settlement and/or pension” he has been awarded. Doing such would effectively result in a modification of the Decree where the property division between the parties is unjust and inequitable – frustrating the very role of the court in a divorce proceeding.

8. If the Court Vacates the Property Award, the Decree Must Then be Modified to Retain its Just and Equitable Nature.

Even if the Court accepts Mr. Persinger’s argument and decides that the trial court should have granted his motion to vacate the decree, the Court must necessarily remand this matter to the trial court for a modification of the Decree of Dissolution. Loss of the award of the “L&I settlement and pension” which Mr. Persinger receives would result in a division of assets and liabilities which are not just and equitable. The Court is afforded broad discretion in dividing assets and liabilities in a dissolution and is charged with making a “just and equitable” distribution of all property, taking into consideration both the separate and community assets of each party. *Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985); RCW 26.09.080. Eliminating a substantial component of the property division in the Decree would absolutely negate the just and equitable division originally contemplated by the parties.

Even if the court finds that Mr. Persinger's L&I settlement and/or pension were not *distributable* at dissolution, those payments to Mr. Persinger must be *taken into consideration* in reaching a just and equitable division of the sum of assets. *In re Marriage of Roarck*, 34 Wn. App. 252, 255, 659 P.2d 1133 (1983) (providing that party's railroad retirement benefits were not divisible at dissolution, but could be considered by the court as an economic circumstance of the parties in order to make a just and equitable distribution of other community assets.) Thus, if the Court decides Mr. Persinger's disability income cannot be divided, it should still be considered and should be the basis to award Ms. Tatum a greater interest in another asset, or maintenance payments to offset the loss, and modify the Decree in order to preserve the just and equitable nature of the property division in this case. *See e.g., In re Marriage of Cristel*, 101 Wn. App. 13, 22, 1 P.3d 600 (2000) ("A modification ... occurs when a party's rights are either extended beyond or reduced from those originally intended in the decree."). If Ms. Tatum does not receive her 50% share of this asset, her rights have been reduced and a modification of the Decree would be necessary to achieve a just and equitable division of assets. If this court grants Mr. Persinger's appeal, it must then also remand such that the Decree can be justly modified.

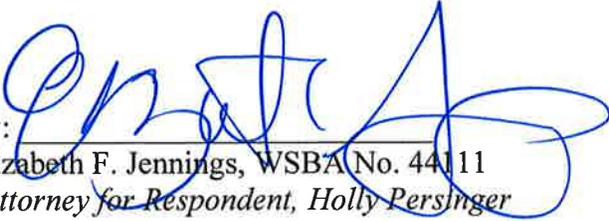
E. CONCLUSION

Given a plain language reading of the statute advanced by Mr. Persinger, as well as the language in the Decree, and the lack of evidence offered by Mr. Persinger regarding the nature of any settlement funds he has received from L&I, the trial court did not abuse its discretion in denying Mr. Persinger's Motion to Vacate nor does a review de novo require Mr. Persinger's appeal be granted. The decision of the trial court should be affirmed. Should the Court instead decide Mr. Persinger's *Motion to Vacate* should have been granted, this Court must remand this matter to the trial court for modification of the Decree.

SUBMITTED THIS 9th day of February, 2015.

Respectfully submitted,

BERESFORD BOOTH PLLC

By: 
Elizabeth F. Jennings, WSBA No. 44111
Attorney for Respondent, Holly Persinger

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

1. On February 9th 2015, I electronically filed with the Washington State Court of Appeals, Division III a Table of Contents, Table of Authorities, Brief of Respondent, and this Declaration of Filing and Mailing.
2. On February 9th 2015, I sent via email (ben@tzmlaw.com) and regular U.S. Mail to Telquist Ziobro McMillen Clare, PLLC, Benjamin H. Rascoff, 1321 Columbia Park Trail, Richland, WA 99352, containing a true and correct copy of the Table of Contents, Table of Authorities, Brief of Respondent, and this Declaration of Filing and Mailing.

Respectfully submitted this 9th day of February, 2015.

BERESFORD BOOTH PLLC

By: 

Tiffany Hansen
Paralegal to Elizabeth F. Jennings