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Court of Appeals
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.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

1. **Respondent's Statement of the Case and Summary Argument misrepresents facts and misconstrues Mr. Persinger's burden at the trial court's motion hearing** 1

2. **Ms. Tatum relies on an overly narrow interpretation of *Dugan-Gaunt* for the proposition that RCW 51.32.040 only prohibits transfers of Title 51 benefits to third parties when the benefits physically hit the hands of the transferee before the intended recipient** 2

3. **Respondent's argument on assignment is not consistent with the applicable case law** 4

4. **Respondent appears to admit that she would be unable to garnish Mr. Persinger's Title 51 benefits** 7

5. **Ms. Tatum seeks a perpetual share of Mr. Persinger's Title 51 wage replacement benefits, thus the analogy to maintenance is appropriate** 8

6. **It is disingenuous for Ms. Tatum to argue that Mr. Persinger's award of Title 51 benefits is limited to payment of time loss which accrued during the marriage and does not constitute future payments for wages unable to be earned** 9

7. **Modification of the Decree, if any, should be an issue left to the trial court** 12

8. **Conclusion** 12

TABLE OF AUTHORITIES

WASHINGTON COURT CASES:

Carstens v. Carstens,

82 Wn. App. 16, 915 P.2d 541 (1996).....9

In re Marriage of Geigle,

83 Wn. App. 23, 920 P.2d 251 (1996).....10, 12

In re Marriage of Kollmer,

73 Wn. App. 373, 870 P.2d 978 (1994).....10

Matter of Marriage of Dugan-Gaunt,

82 Wn. App. 16, 915 P.2d 541 (1996)..... 2-4, 6, 7, 9

Nuss v. Nuss,

65 Wn. App. 334, 828 P.2d 627 (1992)..... 11

Robert Wise Plumbing & Heating, Inc. v. Alpine Development Co.,

72 Wn.2d 172, 432 P.2d 547 (1967)..... 5

State v. Tongate,

93 Wn.2d 751, 613 P.2d 121 (1980)..... 8

Sundstrom v. Sundstrom,

15 Wn.2d 103, 129 P.2d 783 (1942)..... 4, 5

REVISED CODE OF WASHINGTON:

RCW 51.32.040.....2, 3, 11, 12

RCW 50.40.020 7

WASHINGTON STATE CIVIL RULES

Civil Rule 60 12

OTHER SOURCES

"Pension and Survivor Benefits" published by the Washington State Department of Labor and Industries, No. F242-352-909 (March 2012) 11

This brief is filed in reply to the Brief of Respondent Holly Persinger (n/k/a Tatum).

1. Respondent's Statement of the Case and Summary Argument misrepresents facts and misconstrues Mr. Persinger's burden at the trial court's motion hearing.

Ms. Tatum concedes that the Decree of Dissolution in this matter assigns "50% of L&I settlement and or pension" to her. *Brief of Respondent*, 2:1-3; CP 32. However, Ms. Tatum raises for the first time the argument that the provision is only designed as a sort of benchmark reference to an otherwise unidentifiable sum of money. *Brief of Respondent*, 2:14-16; 4:13-18. This is simply a transparent attempt to distance herself from the Decree's plain language assigning her an interest in the Title 51 benefits. CP 32. Mr. Persinger is not obligated to pay any amount of fungible monies to Ms. Tatum. Rather, he is solely obligated under the Decree to pay 50% of the Title 51 benefits, a provision which Appellant asserts is void as a matter of law. Ms. Tatum's assertion that the provision is merely a benchmark reference to an agreed future value to be divided is revisionist history designed to mislead the Court and distance herself from her actual interest in the Title 51 funds.

Furthermore, Ms. Tatum asserts that Mr. Persinger bore the burden of presenting evidence as to whether the funds paid to him under Title 51 were for time loss or future wage replacement. *Brief of Respondent*, 5:13-16. First, the Court's ruling was not based on such an analysis as

indicated in hearing transcript. *See* VROP. Second, the case relied upon by Ms. Tatum for this assertion is clearly distinguishable from the present facts and will be discussed below. Finally, Ms. Tatum does not seek only half of the benefits paid for time loss accrued during the time of marriage. Ms. Tatum seeks half of all benefits paid to Mr. Persinger by the Department of Labor & Industries ("The Department") for so long as he is able to receive those benefits (which will presumably be the remainder of his life unless he is able to return to work, in which case the benefits would cease). Judicial notice should be taken regarding the fact that the Department can easily provide an accounting as to the amount of benefits paid for time loss accrued during the time of marriage and distinguishable from other benefits payable to Mr. Persinger. Ms. Tatum seeks to conflate the payments solely for the purpose of maximizing the monetary amount she believes she is entitled to.

Irrespective of the above, Appellant continues to assert that the Decree's language is impermissible under Washington State law.

2. Ms. Tatum relies on an overly narrow interpretation of *Dugan-Gaunt* for the proposition that RCW 51.32.040 only prohibits transfers of Title 51 benefits to third parties when the benefits physically hit the hands of the transferee before the intended recipient.

The statute at issue on this appeal states that no assignment of Title 51 benefits may be had before the issuance and delivery of the payment. RCW 51.32.040(1). As stated in Appellant's opening brief, the Decree

clearly assigns Ms. Tatum a legal interest in the Title 51 benefits. Specifically, Ms. Tatum is apportioned 50% of "L&I settlement and or pension". CP 32. Despite what Ms. Tatum may assert, the Decree does not assign her an amount of fungible funds or "value" that is equal to the amount of benefits Mr. Persinger receives. Rather, it assigns her an interest in 50% of those specific funds and the assignment of those specific funds has been made before the issuance and delivery of those specific funds.

The Court in *Dugan-Gaunt* stated unequivocally that the trial court had no authority to order the ex-husband to pay a portion of his L&I benefits to his ex-wife even where he had agreed to do so in a property settlement agreement. *Matter of Marriage of Dugan-Gaunt*, 82 Wn. App. 16, 17, 915 P.2d 541 (1996) (stating, "Because the trial court ... had no authority to order [ex-husband] to pay a portion of his benefits to [ex-wife], we reverse."). Thus, while the appeal in *Dugan-Gaunt* may have specifically overturned a trial court order which required the ex-husband's L&I attorney to pay the funds to the ex-wife, the Court's holding is not limited only to that exact scenario. *Id.*

Ms. Tatum makes no attempt to explain her narrow reading of *Dugan-Gaunt* and instead relies on an assertion that RCW 51.32.040(1) only prohibits those assignments where the benefits fail to hit the hands of the beneficiary before they are then taken. As stated in Appellant's

opening brief, such a reading does not make sense. For example, the benefits payable by the Department may be directly deposited into Mr. Persinger's bank account at which time an assignee of his benefits could then attempt to execute on those funds through the legal process. Such a scenario would be permissible under Ms. Tatum's application of the statute, but would be clearly in opposition to the statute's purpose and in violation of garnishment laws.

The crux of Ms. Tatum's argument is that she wants this Court to disregard the fact she has been voluntarily transferred a 50% share of Mr. Persinger's Title 51 benefits and instead hold that she is entitled to fungible monies in an amount equal to a 50% share of Mr. Persinger's Title 51 benefits. In advancing this argument, she relies on an assertion that Mr. Persinger's Title 51 benefits have been commingled with other funds (to which there is no evidence of this currently before the Court), and a citation to Title 50, RCW (which has no relation to this case). This is not the reality of the case though. The Decree is a court order awarding Ms. Tatum 50% of Mr. Persinger's Title 51 benefits and should be struck void as a matter of law consistent with the holding in *Dugan-Gaunt*.

3. Respondent's argument on assignment is not consistent with the applicable case law.

This state's Supreme Court has stated:

> [i]n order to work an equitable assignment the assignor must have intended to transfer a present interest in the debt

> or fund or subject matter and, pursuant to such intention, must have made an absolute appropriation of the thing assigned, relinquishing all control or power of revocation over it, to the use of the assignee. What amounts to a present appropriation constituting an equitable assignment is thus a question of intention to be gathered from a consideration of the language used, in the light of all the attendant facts and circumstances.

Sundstrom v. Sundstrom, 15 Wn.2d 103, 108, 129 P.2d 783 (1942) (internal citations omitted). Stated differently,

> To establish an equitable assignment it is sufficient if the language utilized, coupled with the surrounding circumstances, plainly reveals an intent on the part of the assignor to make an actual or constructive transfer to the assignee of a present interest in the debt, fund, or subject matter of the assignment, even though the circumstances do not permit the assignee's immediate exercise of the interest, and, in pursuit of such intent, the assignor unequivocally relinquishes his control **or** power of revocation of the debt, fund, or subject matter of the assignment to the use or benefit of the assignee.

Robert Wise Plumbing & Heating, Inc. v. Alpine Development Co., 72 Wn.2d 172, 178, 432 P.2d 547 (1967) (emphasis added).

Here, Ms. Tatum is the one "to whom the property rights or powers are transferred." *Brief of Respondent*, 10:1-2. The Decree speaks for itself and awards Ms. Tatum a legally binding "50% of L&I settlement and or pension." CP 23. Again, Ms. Tatum seeks to distance herself from the Decree's actual language to advance her argument and argues that she does not have an actual interest in the Title 51 benefits but rather has "an interest in the dollar amount value of those payments." *Brief of*

Respondent, 10:10-13. As asserted in Petitioner's opening brief, such an assertion is a legal fiction. *Brief of Appellant*, 12-13. Ms. Tatum has a legal interest in the specific Title 51 funds pursuant to the Decree of Dissolution.

Additionally, Ms. Tatum's assertion that her argument is validated by the fact that the Department pays the Title 51 benefits to Mr. Persinger rather than her is without merit. Specifically, Respondent asserts 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." *Brief of Respondent*, 10:15-17. First, Appellant is without any knowledge that she has attempted to seek payment directly from the Department and she has never sought a court order to do so. The mere fact that she has not attempted to realize on her funds directly from the Department does not support her argument that the Decree is not an assignment. Rather, it simply shows that she chooses to engage in collection directly from Mr. Persinger.

Second, Ms. Tatum's preferred collection method of the Title 51 benefits evidences that she and the trial court recognize *Dugan-Gaunt's* prohibition of court-ordered direct payments of Title 51 benefits to an ex-spouse pursuant to a property settlement agreement. However, as asserted in Petitioner's opening brief and above, *Dugan-Gaunt's* holding is not only limited to that exact situation. The trial court is without any power to

order a Title 51 beneficiary to pay a portion of his benefits. 82 Wn. App. at 17.

Thus, a clear legal assignment has occurred despite the fact that Ms. Tatum has not chosen to seek direct payment from the Department. The Decree assigns "apparent legal title" of 50% of the Title 51 benefits to Ms. Tatum, which she argues is the standard for assignment. *Brief of Respondent*, 10:7-8. Alternatively, the Decree's language evidences an equitable assignment of the benefits as (1) there is intent to make an actual transfer of the interest in the subject matter, and (2) Mr. Persinger has relinquished his power of revocation over assignment of the subject matter.

Again, Ms. Tatum's interest is solely in the Title 51 benefits. If Mr. Persinger were able to return to work, he would do so and the benefits would cease. If such a scenario took place, Ms. Tatum would have no legal entitlement to any of the income he earned. This alone evidences that she has been assigned a legal interest in the Title 51 benefits and can enforce that interest in the courts of this state.

4. Respondent appears to admit that she would be unable to garnish Mr. Persinger's Title 51 benefits.

Ms. Tatum's responsive brief admits that Title 51 benefits cannot be garnished unless the funds are commingled with other funds, thus effectuating a loss of the exempt status. *Brief of Respondent*, 11:21-22;

12:1-6. It is unclear why Ms. Tatum relies on RCW 50.40.020, a statute applicable to unemployment compensation, for this assertion. Nevertheless, her argument implicitly recognizes that should Mr. Persinger simply deposit his benefits in an account devoted solely to that purpose (thus preventing any commingling), then she is without any ability to legally garnish those funds. As asserted in Petitioner's opening brief, this comports with the State's policy of protecting Title 51 benefits so that they are used for the intended purpose of serving the beneficiary entitled to the benefits as a result of suffering an industrial injury.

5. Ms. Tatum seeks a perpetual share of Mr. Persinger's Title 51 wage replacement benefits, thus the analogy to maintenance is appropriate.

Petitioner's opening brief asserted an alternative argument that the disputed provision underlying this appeal is akin to an award of lifetime maintenance. *Brief of Appellant*, 16-17. Presenting an argument in the alternative, whether in the Petitioner's brief or at the trial court, is permissible advocacy and does not render differing arguments meritless. *See State v. Tongate*, 93 Wn.2d 751, 756, 613 P.2d 121 (1980) (allowing argument in the alternative).

Here, it is undisputed that Mr. Persinger receives a monthly Title 51 entitlement as wage replacement based upon the Department's determination that he suffered a permanent and total disability. An award of time loss benefits for a period of time which occurred during the

marriage has also been awarded by the Department. It makes little sense, and is opposite to the case cited by Ms. Tatum, to treat future earnings (wage replacements) as property subject to division. *See Carstens v. Carstens*, 10 Wn. App. 964, 967, 521 P.2d 241 (1974) (stating that maintenance obligations are paid out of the earnings of the party). Any payments made to Ms. Tatum from Mr. Persinger's Title 51 benefits are analogous to maintenance payments and, in this particular circumstance, the payments are perpetual.

Moreover, this argument has been accepted by published case law in this state. *Dugan-Gaunt*, 82 Wn. App. 16, 19, 915 P.2d 541 (1996).

6. It is disingenuous for Ms. Tatum to argue that Mr. Persinger's award of Title 51 benefits is limited to payment of time loss which accrued during the marriage and does not constitute future payments for wages unable to be earned.

Ms. Tatum's own trial court pleadings assert that Mr. Persinger was to receive a back payment and future monthly payments as a result of his industrial injury. CP 34, 36, 56, 108. Argument before the trial court stated this much regarding the types of Title 51 benefits and was unrefuted by Ms. Tatum. RP 9:16-24; 16:22-25. The Decree provision which was subject to the motion to vacate included all Title 51 benefits. CP 32. Simply put, no one in the courtroom that day believed that Mr. Persinger's Title 51 benefits were solely comprised of time loss which occurred during the marriage and the trial court's ruling (which is the subject of this

appeal) was not based at all upon such reasoning. RP 19:21-25; 20; 21:1-8. Again, Petitioner asks that judicial notice be taken regarding the ease with which payments for future wage replacements can be distinguished from an award of back time loss for the period of time prior to the date of separation. If Ms. Tatum were only seeking a 50% share of the time loss benefits payable for the period prior to separation, then there would be no need for this appeal. However, she is not seeking that limited amount but instead wants 50% of all Mr. Persinger's Title 51 benefits, regardless of the benefits' characterization.

Moreover, Ms. Tatum asserts that the Title 51 benefits are akin to retirement income and should be treated as such. No authority cited by Ms. Tatum is on point in this regard. It is true that retirement income is considered to be deferred compensation for past services, but it is also true that "[d]isability payments which are solely meant to compensate an individual for lost post-dissolution wages are not considered an asset divisible upon dissolution." *In re Marriage of Kollmer*, 73 Wn. App. 373, 375, 870 P.2d 978 (1994).

The cases cited by Ms. Tatum all deal with individuals who were enrolled in specific retirement plans and either received retirement benefits pursuant to those plans or elected to receive disability payments in lieu of receiving retirement plan benefits. *See Kollmer*, 73 Wn. App. at 377; *In re Marriage of Geigle*, 83 Wn. App. 23, 31, 920 P.2d 251 (1996);

Nuss v. Nuss, 65 Wn. App. 334, 342-43, 828 P.2d 627 (1992). A retirement plan is something one receives when they retire. Title 51 benefits are a social safety net that one only receives when they have suffered an industrial injury. The analogy that Title 51 benefits are akin to a retirement plan earned through work performed fails. Additionally, any actual retirement benefits received by Mr. Persinger for work performed during the marriage are already included in the Decree. CP 32. Specifically, Mr. Persinger's pension from the sheet metal worker's union. None of the cases cited by Ms. Tatum in this regard discuss Title 51 benefits, or disability benefits that are not expressly accepted in lieu of retirement benefits.

The Department's own literature makes clear that the benefits are solely payable to those who have suffered a permanent and total disability, and that those benefits will cease or terminate if the beneficiary returns to work. Pension and Survivor Benefits, Washington State Department of Labor and Industries No. F242-352-909; 2, 6 (March 2012). Retirement benefits earned during marriage do not require an injury or cease upon employment.

Again, the trial court's ruling was not based upon any consideration of whether the benefits were or were not considered community property subject to division. The court's inquiry was on the application of RCW 51.32.040. Ms. Tatum's attempt to amalgamate the

Title 51 benefits into an undistinguishable sum is a red herring designed to divert the Court's attention from the subject of this appeal – Is the Decree is contravention to RCW 51.32.040 and the applicable case law?

Moreover, the Court should not lose sight of the underlying facts. No trial was had in this matter. Mr. Persinger moved pursuant to CR 60(b)(5) to vacate the decree as void for containing the broad provision "50% of L&I settlement and or pension". Procedurally, Mr. Persinger is not contesting the trial court's division of property, as was the subject of *Geigle*. 83 Wn. App. at 25. Mr. Persinger is contesting the legal validity of that provision within the Decree of Dissolution. As such, the burdens Ms. Tatum attempts to impose upon him are not applicable to this proceeding.

7. Modification of the Decree, if any, should be an issue left to the trial court.

If Mr. Persinger succeeds on appeal, Ms. Tatum requests that this Court require the trial court to modify the decree. Authority cited by Ms. Tatum does not illustrate a situation where such a broad "re-opening" has occurred. Given the subject of this appeal and ancillary issue regarding modification of the Decree, Petitioner requests that the issue of modification remain one for the trial court rather than the instant appeal.

8. Conclusion.

Mr. Persinger urges this Court to rule consistent with the case law,

applicable statute, and purpose of the statute. Respondent's opposition merely asserts that this Court should recognize a purported loophole in the statute which allows her a legal interest in Mr. Persinger's Title 51 benefits for the duration of his life. Such an interpretation is not in adherence with the statute, applicable case law, or the purpose and spirit of Title 51.

SUBMITTED THIS 4 day of March, 2015.

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By: _____

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DECLARATION OF FILING AND SERVICE

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

1. On March 3, 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 March 3, 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 and to elizabethj@beresfordlaw.com, containing a true and correct copy of the Reply Brief of Appellant, Table of Contents, Table of Authorities, and this Declaration of Filing and Service.

Respectfully submitted this 3rd day of March, 2015.

TELQUIST ZIOBRO McMILLEN CLARE, PLLC

By: Amber Peters

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Legal Assistant to Benjamin H. Rascoff