Circuit Court for Anne Arundel County
Case No. C-02-FM-18-003831

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2567

September Term, 2019

VAN DORA WILLIAMS

V.

CHARLES WILLIAMS

Fader, C.J.
Kehoe,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: December 1, 2021

The parties to this appeal were divorced by judgment of the Circuit Court for Anne Arundel County, entered on February 19, 2020.[1] In her appeal, Van Dora Williams, plaintiff below, contends that the trial court erred in its award of, or in its failure to award, portions of certain benefits earned by appellee, Charles Williams, during his military and post-military federal employment.

Specifically, appellant asserts that the trial court, "erred or abused its discretion" in its disposition of appellee's (1) Concurrent Retirement and Disability Pay; (2) Federal Employee's Retirement System benefits; and (3) a personal injury settlement unrelated to his employment.[2]

Appellee has moved to dismiss the appeal.

[1] The divorce was granted in favor of appellee, cross-complainant below, on the ground of voluntary separation.

[2] In her opening brief, appellant asks:

> I. Did the Trial Court Err as a Matter of Law, or Alternatively Abuse its Discretion, by Not Awarding the Appellant Any Portion of the Appellee's Concurrent Retirement and Disability Pay ("CRDP") Given Said CRDP Was Awarded as Concurrent Pay Pursuant to Section 1414(a)(1)?
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> II. Did the Trial Court Err as a Matter of Law, or Alternatively Abuse its Discretion, by Not Awarding the Appellant Any Portion of the Appellee's Federal Employee Retirement System ("FERS") Given that Said Civilian Federal Retirement Disability Is Not Precluded by Federal Law?
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> III. Did the Trial Court Erred as a Matter of Law, or Alternatively Abuse its Discretion, by Finding that the Appellee's Personal Injury Settlement Was Not Community Property Given that Said Settlement was Acquired During the Marriage.

A Brief Background

The parties were married in 1984, separated in 2017, and divorced in 2020. Three children were born of the marriage, all now emancipated.[3] During the marriage appellee served in the United States military from 1984 until 2004 and thereafter was employed by the Department of Defense as a civilian employee. His federal employment with the Department of Defense ended in 2018 when, as a result of his having suffered serious injuries in an automobile accident, he was found to be 100% disabled.

As result of his military service and subsequent civilian employment, appellee received Federal Employee Retirement System benefits (FERS) and Concurrent Retirement and Disability Pay (CRDP). In addition, during the marriage appellee received a tort claim settlement of $250,000 to which appellant now claims partial entitlement.

In his motion to dismiss, appellee asserts that the issues presented by appellant in this appeal were neither raised, nor ruled on below. Hence, he concludes, he is entitled to dismissal of this appeal, citing Md. Rule 8-131(a), which provides in relevant part "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" For the reasons that follow in this opinion, we shall deny appellee's motion to dismiss.

[3] One child, Dominique, is autistic. She was not found to be a dependent adult and her status is not at issue in this appeal.

Current Retirement and Disability Pay (CRDP)

Appellant argues that "[t]he trial court did not award the Appellant any portion of the Appellee's CRDP because the trial court believed this property was not divisible by federal law." Appellant's conclusion is incorrect.

The record reveals that appellee offered documentary evidence from the Defense Finance and Accounting Service (DFAS) that "based on the compensation you receive from the Department of Veterans Affairs (VA) and your retired pay, your concurrent retirement disability pay (CRDP) amount is $2,025.00 [per month]." (Capitalization omitted.) Relying on that evidence, the trial court ruled from the bench:

> And I will accept [Appellee's] financial statement as to what his income is, and so I find that his income comes from DFAS Army Retirement, $2,025 a month and just so I don't forget I will award half of that to Ms. Williams[.]"[4]

Thus, as appellee concedes, appellant received a portion of his army retirement benefits, to which she was entitled. Her claim to the contrary is without merit.

Federal Employees Retirement System (FERS) Disability

Appellant also claims that the court erred in denying her claimed entitlement to a portion of appellee's disability benefits.

In denying inclusion of appellee's disability benefits as marital property, the trial court relied on *Howell v. Howell*, 137 S.Ct. 1400 (2017), ___U.S.___, in which the

[4] CRDP and DFAS refer to the same benefit. Concurrent Retirement and Disability Pay is the benefit earned as a result of appellee's military service and his subsequent disability. DFAS refers to the administrative/funding agency within the Department of Defense.

Supreme Court interpreted 10 U.S.C. § 1408(c)(1), the Uniformed Services Former Spouse's Protection Act. The Act provides that "disposable retired pay" may be divided between spouses, but the Court noted that although the statute

> provides that a State may treat as community property, and divide at divorce, a military veteran's retirement pay. See 10 U.S.C. § 1408(c)(1). The statute, however, exempts from this grant of permission any amount that the Government deducts "as a result of a waiver" that the veteran must make "in order to receive" disability benefits. § 1408(a)(4)(B). We have held that a State cannot treat as community property, and divide at divorce, this portion (the waived portion) of the veteran's retirement pay.

Id. at 1402.

The Court explained further:

> The Federal Government has long provided retirement pay to those veterans who have retired from the Armed Forces after serving, *e.g.*, 20 years or more. It also provides disabled members of the Armed Forces with disability benefits. In order to prevent double counting, however, federal law typically insists that, to receive disability benefits, a retired veteran must give up an equivalent amount of retirement pay. And, since retirement pay is taxable while disability benefits are not, the veteran often elects to waive retirement pay in order to receive disability benefits.

Id. at 1402-03.

Appellee selected the waiver option.

Here, the trial court found that the evidence of appellee's total disability was unrefuted. Relying on *Howell*, without specific objection or argument to the contrary by appellant's counsel, the court found those benefits to be indivisible and so ruled. However, we conclude that the trial court erred in extending the *Howell* ruling beyond "retirement pay" to include a FERS disability benefit. We interpret those benefits to be divisible in a divorce action. In that conclusion we rely on guidance from the federal Office of Personnel Management which provides, in part, relevant to this case:

> FERS benefits are divisible. A court order following annulment of marriage, legal separation, or divorce can divide or apportion your annuity. The order must expressly direct OPM to pay a portion of your monthly benefit. The spouse's share must be stated as a fixed amount, a percentage or fraction of your annuity, or by a formula with a readily apparent value.

Office of Personnel Management, https://www.opm.gov/retirement-services/retirement-faqs/?page=14 (last visited Nov. 17, 2021).

Appellee argues that this question was not preserved for our review. While appellant made no specific claim for inclusion of the FERS benefits below, it is clear that the question was before the court, was commented on by the court and was subject to the court's decision. Because we have concluded that the court erred in finding the FERS benefit to be indivisible, fairness compels us to return this matter to the trial court for the limited consideration of whether appellee's FERS benefit ought to have been considered as marital property.

The Personal Injury Settlement

In February 2016, during the marriage, appellee was injured in an automobile accident as a result of which, according to appellant, he "was awarded approximately $250,000[.]" Appellant asserts that, at the time of trial, appellee retained $62,000 of the settlement in an account, after attorneys' fees and expenses of litigation. As to the remaining funds, appellee testified that he had retained $56,000, but was facing future treatment and surgeries estimated to cost $80,000. He testified further that he was subject

to a claim from Tricare[5] for reimbursement of medical and surgical payments as a result of his injuries.

Appellant asserts that "the trial court's finding that [she] was not entitled to any portion of the remaining personal injury award valued at approximately $56,000 was inconsistent" with this Court's prior decisions as to whether, and under what circumstances, such funds are to be considered marital property. Appellant seeks a remand for determination of an appropriate marital award to include some portion of the remaining settlement proceeds.

Appellee, in response *via* his motion to dismiss, contends that this issue has not been preserved for our review. He posits:

> Appellant never specifically requested the trial court to award her a portion of Appellee's undifferentiated personal injury settlement. She also put on no evidence to indicate or prove how any portion of personal injury funds could be considered marital property, and she never asked the trial court to divide the funds.

On the merits, appellee argues that

> At trial, Appellant did not argue nor set forth any basis for the court to consider why a portion of Appellee's personal injury settlement was marital property or that it represented lost earnings during the marriage, nor did she refute, as the trial court recognized, the need to reimburse Tricare for Appellee's four future surgeries.

[5] Tricare is the U.S. military's health care program and functions as government-managed health insurance for current and former service members and their families. Tricare is managed by the Pentagon's Defense Health Agency.

While we agree that the question of appellant's rights to a portion of settlement funds is not preserved for appellate review, we believe consideration of the merits to be useful.

Only marital property is subject to the equitable distribution provisions of Md. Code (2019 Repl. Vol.), Family Law Article ("FL") §§ 8-201, *et seq*. Marital property is "the property, however titled, acquired by 1 or both parties during the marriage." FL § 8-201(e)(1). The Family Law article is silent as to whether funds received by one spouse in the form of personal injury, workers compensation, or other such awards or settlements are marital property and subject to marital distribution.

The issue was first presented for appellate consideration in *Queen v. Queen*, 308 Md. 574 (1987), wherein the Court of Appeals held that "only the portion of the husband's award compensating for loss of earning capacity during the marriage is marital property subject to equitable distribution…." *Id.* at 586. The Court remanded for additional fact finding.

The nuance of the issue was next considered by the Court of Appeals in *Blake v. Blake*, 341 Md. 326, 346 (1996), in which the Court adopted what had been described as the "analytical approach" in determining what portion, if any, of such an award was subject to equitable distribution to a divorcing spouse. That determination "turns on the underlying nature of the damages that the recovery is intended to remedy, rather than the mere timing of the underlying claim or settlement/award." *Murray v. Murray*, 190 Md. App. 553, 564 (2010).

We reached similar conclusions in *Lowery v. Lowery*, 113 Md. App. 423 (1997), saying that the analytical approach was "the modern and prevailing rule[,]" *id.* at 433, and in *Newborn v. Newborn*, 133 Md. App. 64 (2000), noting that the approach is a doctrine "in its ascendency." *Id.* at 91. The personal awards in *Lowery* (workers' compensation) and in *Newborn* (personal injury) were determined to be treated similarly. *See Blake*, 341 Md. at 344. In *Murray*, we held that an employment-related discharge or discrimination settlement award would likewise be subject to the analytical approach, as are workers' compensation and personal injury awards. *Murray*, 190 Md. App. at 567.

It is therefore clear that, at trial, the proponent of a claim for inclusion of such an award in the marital property "pot" must offer evidence of the "underlying nature of the damages that the recovery is intended to remedy[.]" *Id*. at 564. Appellee argues that appellant failed to do so at trial and that the trial court having declined to include the balance of the settlement is not error. Having reviewed that aspect of the record and transcripts, we agree.

During the trial, the court was made aware of the tort settlement in several instances only by oblique reference. At no time did appellant's counsel directly address the remaining funds, nor did appellant, in her extensive testimony, make any request that it be considered as marital property. Nor, in the record is any evidence, documentary or otherwise, as to the terms of the settlement or the language of a release, which appellee certainly signed. Thus, the court could not possibly have made findings as to the

underlying nature of the damages that the settlement was intended to remedy. *See id.*, at 564.

The trial court noted only that

> I also do find … that [appellee] does need these five surgeries, the herniated disks in his neck, he needs a fusion, he needs surgery in the thoracic region of his chest, nerves pinched in the chest, … And I accept the fact [that] it hasn't been refuted that TriCare wants reimbursement for monies spent.

The evidence that appellee was facing approximately $80,000 in expense to continue his treatment was not contradicted. Whether the settlement agreement was differentiated in such a way that might have permitted the court to find some aspect of it to be marital property cannot be determined. The court could have found no more than it did, considering the dearth of evidence presented in appellant's case to support her claim. We find the status of her claim to fall squarely within the ambit of Md. Rule 8-131(a).

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED, EXCEPT THAT WE REMAND TO THAT COURT FOR FURTHER CONSIDERATION OF APPELLANT'S CLAIM TO A PORTION OF APPELLEE'S FERS DISABILITY BENEFIT.
COSTS ASSESSED 75% TO APPELLANT; 25% TO APPELLEE.