Personal Injury and Workers’ Compensation Awards in Equitable Distribution: What Every Lawyer Should Know

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EQUITABLE DISTRIBUTION

The concept of equitable distribution is based on the idea that a marriage represents an economic partnership and that upon divorce each partner should receive a fair and equitable share of the property accumulated during the marriage. See e.g., Roane v. Roane, 12 Va. App. 989, 407 S.E.2d 698 (1991); Dotson v. Dotson, 24 Va. App. 40, 480 S.E.2d 131 (1997); Williams v. Williams, 4 Va. App. 19, 354 S.E.2d 64 (1987). The division is not limited by title of property and is based on the definitions and classifications delineated in the Code of Virginia to thereby provide an equitable split of property with each party being recognized for their contributions, monetary and non-monetary. See e.g., Sawyer v. Sawyer, 1 Va. App. 75, 335 S.E.2d 277 (1985); Rexrode v. Rexrode, 1 Va. App. 385, 339 S.E.2d 544 (1986); Price v. Price, 4 Va. App. 224, 355 S.E.2d 905 (1987). Lawyers who practice in fields other than family law, such as personal injury/tort and worker’s compensation, need to understand how assets may be classified as marital in order to help protect their clients who may separate and divorce.

While other statutes and case law preceded it, Virginia Code section 20-107.3 has been the cornerstone of the current equitable distribution doctrine. At the outset, Section 20-107.3 provided the Court with the authority to decree as to the property of parties upon dissolution of a marriage such that the Court shall determine the title, ownership, and value of all real and

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personal property of the parties and consider which property is separate and which is marital. This article discusses how personal injury and workers’ compensation awards are classified and potentially distributed upon divorce. Family law attorneys need to be aware of the components of such awards as it impacts the marital estate.

CLASSIFICATION

Prior to the 1990 legislative amendments, personal injury and workers’ compensation awards were not specified in the statutes, nor were they addressed in any appellate decisions. Circuit courts in Virginia were divided on how to classify these awards in equitable distribution upon dissolution of the marriage. One argument was that these awards were not marital based on the theory that these awards were not “property” at all since property is something that is marketable, saleable, pledgeable, or assignable. See Link v. Link, Frederick Co. Cir. Ct., Chancery No. C-85-69, 2 VLW 856. Another argument was that these awards were marital because if they were acquired during the marriage, the presumption is that the property was marital and thus there must be evidence sufficient to rebut that presumption. See Seidenberg v. Seidenberg, Henrico Cir. Ct., No. 85-C-257, 9 Va. Cir. Ct. 1 (1987). No significant discussion or decisions detailed treatment of different components of these awards.

Currently, Virginia Code Section 20-107.3(A)(3)(c) and (H) states that personal injury and workers’ compensation awards should be classified as hybrid (part marital/part separate) property. First, the Court is to determine the marital share of the particular award. Marital share is defined in subsection H as “that part of the total personal injury or workers’ compensation recovery attributable to lost wages or medical expenses to the extent not covered by health insurance accruing during the marriage and before the last separation of the parties...” Va. Code Section 20-107.3(H). This subsection of the Code makes it clear that the claim must have arisen
during the marriage and prior to their last separation in order for it to potentially be considered as an asset subject to equitable distribution. Then, upon considering the factors in 20-107.3(E), the Court *may* “direct payment of a percentage of the marital share of any personal injury or workers’ compensation recovery of either party, whether such recovery is payable in a lump sum or over a period of time.” *Id.* The use of the word “may” is significant because it gives the Court discretion in determining whether or not the marital share of the recovery is to be divided at all. Subsection H also states that the court may only direct that “payment be made as such recovery is payable, whether by settlement, jury award, court award, or otherwise.” *Id.* The importance of this section arises in cases where there is an unliquidated personal injury claim at the time of the equitable distribution hearing. This is important because depending on the amount of the award, and the form in which the injured party receives it, it can determine how the court directs part of the award to the other spouse.

Because of the statutory language added in 1990, the Courts now have a statutory scheme for how to classify personal injury and workers’ compensation awards upon divorce. However, case law indicates that Courts have still had issues to decide regarding these awards. Particularly, the Courts are unclear how to divide the personal injury awards when it is not specified what part of the recovery is attributable to lost wages and medical expenses not covered by health insurance and what part of the recovery is attributable to pain and suffering, inconvenience, and mental anguish.

The Virginia Court of Appeals dealt with how to determine the marital and separate parts of a personal injury award in *Steakley v. Steakley*, 2006 Va. App. LEXIS 65. Husband was injured during the course of his employment with the federal government and ultimately was placed on permanent disability. Husband received a personal injury settlement of $500,000
during the course of the marriage for his injury. The U.S. Department of Labor retained
$119,000 for medical expenses and compensation paid to Husband, and Husband received the
remaining $381,000. Husband claimed the $381,000 was separate property because it reflected
his non-economic loss. The Court stated, it assumed without deciding that Husband’s underlying
premise – compensation for non-economic loss arising from a personal injury award constitutes
separate property – is sound. While the statute [20-107.1(H)] implies that the recovery not due to
lost wages or medical expenses would not belong to the “marital share,” the Courts had not
decided the issue whether the non-wages and non-medical expenses would automatically be
classified as separate property. Id. at Note 1. Without accepting Husband’s underlying premise,
the Court determined that he failed to prove that the entire $381,000 was non-economic
compensation because Husband testified the settlement was based on his projected salary for a
seventeen year working career. Furthermore, he failed to offer any evidence suggesting the
settlement was divided into economic and non-economic components. This case makes it clear,
Courts in equitable distribution are going to require evidence that shows the breakdown of the
award into economic and non-economic components if one spouse wants any of it to not be
considered marital.

The Virginia Court of Appeals in Chretien v. Chretien further dealt with how to
determine what part of a personal injury award is marital and what is separate. This case helped
clarify that the non-economic portion, if any, of a personal injury or workers’ compensation
award is separate. 53 Va. App. 200, 205 (2008). The Court stated that in order to divide the
recovery into its separate and marital parts, “the circuit court must first determine what part of
the recovery was attributable to lost wages and medical expenses not covered by health
insurance, and classify this portion as marital property. The remainder of the recovery, if any –
that portion *not* ‘attributable to lost wages or [unreimbursed] medical expenses’– is separate property.”Id.

The *Chretien* Court emphasized that because there is a presumption in favor of classification of property acquired during the marriage as marital, the party seeking to prove the recovery is separate bears the burden of proof. Id. See also *Cunningham v. Cunningham*, 1996 Va. App. LEXIS 524 (when Husband could not remember what was for pain and suffering, the Court held the entire award was marital). The facts of *Chretien* distinguish the result as well. The Husband and Wife were traveling on a motorcycle and Husband negligently caused an accident with another vehicle in which both he and Wife were seriously injured. Wife pursued claims with three insurance companies and ultimately received a total of $149,928.57. *Chretien* 53 Va. App. at 202-03. The Court of Appeals found that the trial court erred in holding that the award was separate as Wife did not overcome the presumption that this entire award was marital because she did not offer enough proof that showed the recovery was attributable to non-economic damages.

Importantly, the Court of Appeals held the trial court’s error was harmless error because the trial court stated in its opinion that even if Wife were able to overcome the presumption of the award being marital, it would have awarded the entire marital portion to Wife after consideration of the factors in 20-107.3(E). Id. at 207. Specifically, it would be inequitable to award Husband any of the personal injury recovery because his negligence caused the injury that led to the recovery. The Court held this was within the discretion of the trial court and was supported by credible evidence. *Chretien*, 53 Va. App. at 208.

In *Olsen v. Mackay*, the Court of Appeals held that there was no meaningful distinction between a civil wrongful termination award and a personal injury or workers’ compensation
award. 2010 Va. App. LEXIS 155. In that case, Husband was terminated from his employment as a Foreign Service officer with the United States Department of State. Id. He challenged the termination and exhausted his administrative remedies before filing suit in federal court pursuing five claims. Two of the five claims were filed under the Administrative Procedure Act and Husband was successful - he was reinstated with back pay. Id. Husband received a settlement whereby he was awarded $250,000 ($50,000 paid to his lawyers) for the remaining claims. Id. Husband claimed the remaining $200,000 was separate because it was non-economic damages as he had already received back pay separately. Id. Wife claimed it was marital and in support of this she offered the settlement agreement which read:

“[I]t is also agreed, by and among the parties, that the payment referenced in Paragraph 2 above [$250,000] represents the entire amount of the settlement, including but not limited to any claims for back pay, front pay, employment benefits (including but not limited to retirement and health care benefits), damages, interest, costs, and attorney’s fees.”

Olsen at 8.

This settlement agreement proved valuable as the Court held it was credible evidence which showed the true nature of the award and rejected Husband’s argument and testimony that the settlement was for non-economic damages.

Where a settlement does not specify what portion of the settlement is for lost wages, medical bills, pain and suffering, and other damages, the evidence used during the negotiations of the award can become useful in an equitable distribution hearing as well. Medical bills, lost wages summaries, and future medical costs analyses would all be important to have when trying to determine what part of an award is economic and what part is non-economic damages. It may also be appropriate to ask the provider of the settlement for a breakdown of the particular award
into what is attributable to medical bills, lost wages, pain and suffering, etc. if the facts of the case indicate the possibility of a divorce.

**CONCLUSION**

Having the background of how a Court in a divorce matter may classify an award in a personal injury, worker’s compensation or similar dispute is important for non-family law attorneys. The knowledge can impact how you negotiate, how you collect and preserve information, and how a settlement or award is worded.

For family law attorneys, knowing the classification schemes can help you tailor discovery requests, prepare for depositions, negotiate and present evidence to a Court.

Remember as well that once classification is done, then the Courts can consider factors to determine how much of the marital share of an award should go to each spouse. Having an understanding as well as evidence about the accident and post-accident circumstances can have an impact such as how one spouse possibly contributed to an accident, how one spouse provided significant care to the injured spouse during recovery, how one spouse had to use savings to fill in where expenses were not being met due to the injuries of the spouse, etc.

Non-family law attorneys need to have a good lay of the land about the family dynamics throughout the process. Family law attorneys may want to include questions in their preliminary discovery about accidents, claims, pending litigation.
Julie M. Cillo is an experienced family law attorney, handling contested and uncontested family law matters throughout the Commonwealth of Virginia. Mrs. Cillo, a partner with Hall & Hall, has focused on family law, including but not limited to equitable distribution, custody, support, property settlement agreements, QDROS, and other domestic relations issues for over 14 years.

In addition to her practice, Mrs. Cillo serves on the Board of Governors for the Virginia Trial Lawyers Association and holds leadership roles in a number of other civic and professional organizations working for the citizens of Virginia. She has been recognized as a Super Lawyer and Legal Elite in family law.

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- Super Lawyers Rising Stars-Family Law (Richmond Mag., 2008 - 2010
- Leadership Metro Richmond Class, 2008 - 2009
- Dartmouth Young Alumni Distinguished Service Award, 2007
- Virginia State Bar Young Lawyers Conf Outstanding Service, 1999
- Keene High School Distinguished Alumni Award, 2011