

Brown, Walter

CUSTODY OF CHILDREN

Determined by court order

A court order granting the worker's wife custody of their children during the pendency of a divorce action determines the custody of the children for purposes of RCW 51.32.010. The wife, not the worker, was therefore entitled to back pension payments on the children's account during a reconciliation period when the worker returned to live with the wife and children. ...*In re Walter Brown*, BIIA Dec., 41,766 (1974)

Scroll down for order.

1 The pertinent facts are as follows:

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3 On September 16, 1968, the claimant's then wife filed suit for a divorce from the claimant in
4 Pierce County Superior Court. At that time they had been separated for a couple of months. On
5 October 25, 1968, the Court entered an order awarding the wife custody of the couple's four minor
6 children. On or about October 15, 1969, the claimant moved back home with his wife and four
7 children. A fifth child was born on February 23, 1970, having been conceived between the parties
8 in May 1969. On December 1, 1970, the wife filed an amended complaint for divorce, and on that
9 same date the claimant again moved out of the home. On April 20, 1971, the claimant's wife was
10 granted a final decree of divorce, wherein she was awarded permanent custody of all five minor
11 children.
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14 While the claimant's claim for his industrial injury of July 10, 1967 was open for treatment, he
15 was directly paid time loss compensation at the full statutory rate of \$329.00 per month, from
16 October 26, 1968 to April 11, 1969. Evidently, on or about the latter date the Department learned of
17 the 1968 custody award by the Court of the children to the claimant's then wife. Thus, from April
18 11, 1969 to December 26, 1969 (when the Department terminated time loss compensation, the
19 claimant's time loss payments sent directly to him were reduced by \$114.00 per month (portion
20 allocable to the four children) and this amount was in turn paid monthly by the Department into the
21 Pierce County Superior Court, for the benefit of said children.
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24 Following the Department's closure of the claim with a permanent partial disability award,
25 and an appeal therefrom to this Board, a final Board decision was entered on August 20, 1971,
26 which found the claimant to be permanently and totally disabled as of December 26, 1969, and
27 ordered payment of a pension commencing as of that date. Accordingly, by order dated September
28 2, 1971, the Department placed the claimant on the pension rolls effective December 26, 1969, and
29 thereafter paid the claimant a lump-sum award for back pension payments accrued for the period
30 from December 26, 1969 to September 15, 1971, less the children's portion of such payments. The
31 Department paid the children's portion in a lump sum to the claimant's ex-wife, pursuant to the
32 proviso of RCW 51.32.010, prescribing:
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36 "That, if an injured workman, or the surviving spouse of an injured
37 workman shall not have the custody of a child for, or on account of
38 whom payments are required to be made under this chapter, such
39 payment or payments shall be made to the person having the lawful
40 custody of such child."
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1 It was from the Department's subsequent order, affirming this apportionment of the retroactive
2 pension payments, that the instant appeal was filed.
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4 At the hearing stage of these proceedings, it was the claimant's contention that he, instead of
5 his ex-wife, was entitled to receive the children's portion of his back pension payments for the
6 period covering December 26, 1969 to December 1, 1970, since he had moved back home prior to
7 December 26, 1969 and continued to reside at home until December 1, 1970, at which time his wife
8 filed the amended divorce complaint and he again moved out. Thus, so the claimant contended, he
9 had custody of his children during that period. The hearing examiner however, went a step further
10 and proposed to grant the children's portion of the back pension payments to the claimant for the
11 entire period from December 26, 1969 to April 20, 1971. On petition for review before the Board by
12 the Department, the claimant, quite naturally, in a reply to the Department's petition, urges the
13 adoption of the hearing examiner's disposition in toto.
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19 Unfortunately, the hearing examiner did not completely spell out the basis for his decision,
20 except to note the last phrase of the above-quoted proviso of RCW 51.32.010, speaking of lawful
21 custody of such child." Presumably, it was his interpretation of this phrase that so long as the
22 thread of a legal marriage existed between the parties, the claimant, as the father, must be deemed
23 to have custody of his children as a matter of law, and that only the final divorce decree of April 20,
24 1971, awarding permanent custody to the mother, could be said to have changed this result. We
25 do not agree.
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30 As previously noted, custody of the children was initially awarded to the mother by an order
31 of the Court dated October 25, 1968. In other words, responsibility for the care, keeping, and
32 control of the four children then existing was legally vested in the mother. Obviously the Court then
33 felt this was in the children's best interests--which, after all, is the overriding primary concern in
34 these matters. No subsequent order of the Court was entered--either in the pending divorce action
35 itself, or in regard to custody of the children--until April 20, 1971, when a final decree of divorce was
36 granted to the wife, along with permanent custody of all five children. The claimant, however, takes
37 the position that the continuity of custody was broken upon his return to the home in October 1969,
38 in that such return vitiated the divorce proceeding and the ancillary custody order of October 25,
39 1968, citing McFerran v. McFerran, 47 Wn. 2d 236, and the earlier case cited therein of Yoder v.
40 Yoder, 105 Wash. 491, for the proposition that "reconciliation incontestably terminates the divorce
41 action".
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1 Quite obviously, the claimant's theory of the case pre-supposes that his return to board and
2 bed in October 1969 constituted a "reconciliation." Maybe it did, and then again, maybe it did not.
3 Or maybe a reconciliation occurred in May 1969, when the fifth child was conceived. Most
4 certainly, there was a return by the claimant--if not to board, at least to bed--at that time also.
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7 However, the important point is: it is not for this tribunal to say either when or if a divorce
8 proceeding pending before a superior court of this state was terminated. We have no quarrel with
9 the general proposition that reconciliation terminates a divorce action. Nor do we question for a
10 moment the claimant's right to have had the pending divorce action against him in Superior Court
11 dismissed, had the matter of a true reconciliation been brought to the Court's attention and been
12 judicially established. The McFerran case, supra, recognizes the propriety of such a procedure.
13 The fact of the matter is, however, that this was not the case here. The divorce proceeding was
14 never dismissed nor terminated, but continued in force (along with the custody order of October 25,
15 1968) from its initial filing, on September 16, 1968, to the entry of a final decree on April 20, 1971.
16 The only intervening factor was the filing of an amended complaint in the original divorce action on
17 December 1, 1970. The amended complaint was entitled "Cause No. 184630", the same cause
18 number as the original complaint. In short, there was but one divorce action. If in fact the parties
19 became reconciled during the pendency of the divorce action, the absence of judicial notarization of
20 such reconciliation through a dismissal of the divorce action precludes its recognition by this Board.
21 To do otherwise would, in effect, permit a lawful and standing order of the Court to be collaterally
22 assaulted and avoided by the claimant through proceedings before the Board. It is a basic tenet of
23 the law that absent fraud, a duly entered order of the court can only be vacated or overturned in the
24 same proceeding and is not subject to collateral attack by a party thereto in a different proceeding.
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27 In summary, we hold that during the period from December 26, 1969 to April 20, 1971, the
28 general welfare and custody of the claimant's first four minor children were matters under the
29 authority and jurisdiction of the Superior Court for Pierce County, and that Court's order of October
30 25, 1968, awarding custody to their mother, was in continuous force and effect, so that the
31 Department had no alternative but to pay such children's portion of the claimant's retroactive
32 pension payments covering the afore-stated time period to the mother for the benefit of the children,
33 under the mandate of the proviso in RCW 51.32.010.
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36 As for the couple's fifth child, born on February 23, 1970, a different result necessarily
37 obtains. The Court's custody order of October 25, 1968 did not, of course, encompass this after
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1 born child. There was no order of the Court governing its custody or otherwise affecting its status
2 until the final divorce decree was entered on April 20, 1971, at which time the custody of the fifth
3 child was awarded to the mother, along with the other four children. Thus, for the period prior to
4 April 20, 1971, the divorce action in court cannot be controlling as to "custody" of this child. Rather,
5 since the facts are that the claimant fathered said child and resided in the home with said child from
6 the time of its birth on February 23, 1970 to the time the claimant left the home on December 1,
7 1970, we think it must be held that he did have actual custody as to this one child for that particular
8 period of time, and is therefore the proper recipient of the compensation payable for such period on
9 account of the fifth child.

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11 The factual matters in this case were not disputed by the parties, and have heretofore been
12 fully recited. Accordingly, formal findings of fact need not be entered. RCW 51.52.106.

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14 In accordance with our decision herein, the order of the Department of Labor and Industries
15 dated November 2, 1972, must be, and hereby is, reversed, solely to the extent that the claim is
16 remanded to the Department with instructions to pay the claimant that portion of the pension
17 allocable to his fifth child, for the period from February 23, 1970 to December 1, 1970. In all other
18 respects, the Department's order of November 2, 1972 is hereby sustained.

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20 It is so ORDERED.

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22 Dated this 15th day of July, 1974.

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24 BOARD OF INDUSTRIAL INSURANCE APPEALS

25
26 /s/
27 PHILLIP T. BORK Chairman

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29 /s/
30 R.H. POWELL Member

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32 /s/
33 R.M. GILMORE Member