

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

IN RE: THE MARRIAGE/CHILDREN OF:

**BROOKANNE SELLARO,
Petitioner Below, Appellant**

v.) No. 35733 (Monongalia County 07-D-83)

**EUGENE JOSEPH SELLARO,
Respondent Below, Appellee**

FILED

June 14, 2011

released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the March 31, 2010, order of the Circuit Court of Monongalia County which affirmed in part and reversed in part the Family Court of Monongalia County's December 31, 2008, order. The appellant sought review of the circuit court's order on two grounds; first, that the circuit court erred when it reversed the family court's award of spousal support and second, that both the circuit court and family court erred in categorizing certain shares of Mylan Pharmaceutical stock as the sole and separate property of the appellee. After carefully reviewing the records provided, the briefs and the oral arguments of the parties, the Court determines the circuit court appropriately reversed the family court's award of spousal support, but erred when it affirmed the family court's classification of the Mylan stock as the appellee's sole and separate property. Based on our decision that this case does not present a new question of law, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The appellant, Brookanne Sellaro (hereinafter referred to as Appellant), and the appellee, Eugene Joseph Sellaro (hereinafter referred to as Appellee), were married to each other on June 8, 1968, in Monongalia County. They separated on March 22, 2007. At the time of the marriage the appellant was a licensed practical nurse (LPN) who was working while the appellee had just earned his undergraduate degree. He then attended law school while the appellant worked as a nurse. Two children were born of the marriage, both of whom are now emancipated. During the course of the parties' marriage, the appellant continued to work at least part-time as a nurse after the children were born, while the appellee practiced law in Morgantown. Mr. Sellaro also served as municipal judge for several cities in Monongalia County.

At the time of the filing of the divorce complaint on February 21, 2008, both the appellant and appellee were retired. The appellee had ceased working as a nurse. The appellant had retired from his law practice, but continued to serve as a part-time municipal

judge. The appellee contends that prior to the marital difficulties that led to this divorce the parties had planned to retire from the work force and live off their savings and investments.

During the course of the parties' marriage, the parties acquired real property, including a marital home in Morgantown, a vacation home in Florida and commercial real estate in Morgantown. The appellee also acquired by gifts from his family various rental properties that were not commingled into the marital property. These assets were not contested during the proceeding. What was disputed was the nature of 2,812 shares of Mylan Pharmaceutical stock purchased during the parties' marriage. This stock was solely titled in the appellee's name. The appellant contested the separate nature of this property, arguing that the stock was acquired during the course of the marriage and paid for by marital funds, that being income from the appellee's law practice. The appellee presented several theories in contravention of the appellant's assertion that stock was marital property. The appellee's first contention was that while there was Mylan stock purchased during the marriage with marital funds, that "marital" stock was sold to finance the building of the parties' investment property (later liquidated by agreement prior to the divorce filing). The appellee's second contention was that the stock at issue herein was separately purchased by the appellee using funds given to him alone by his mother. No documentation of either assertion was presented to the family court. The family court found that the Mylan stock was in fact the sole and separate property of Mr. Sellaro and that the appellant had no claim on it.

After lengthy hearings, the family court entered an order on December 31, 2008, that granted a divorce, divided the contested portions of the marital property and awarded spousal support to the appellant in the monthly amount of \$2,500.00. The family court found that Mr. Sellaro was capable of paying spousal support based in part on the testimony of C. Page Hamrick, III, CPA, who opined that Mr. Sellaro's would have sufficient income to pay "substantial spousal support" to Mrs. Sellaro, based upon reasonable investments and his future income. Other factors considered by the family court were the length of the parties' active marriage of 39 years; the educational and employment opportunities foregone by Mrs. Sellaro while she supported her husband through law school and the appellant's economic need. In addition, the family court based its award of spousal support on the misconduct of the parties "as it relates to the deteriorating factors of the marriage," pursuant to W. Va. Code § 48-8-104 (2009).¹ The family court found that Mr. Sellaro engaged in substantial

¹W. Va. Code § 48-8-104 states:

In determining whether spousal support is to be awarded, or in determining the amount of spousal support, if any, to be

(continued...)

inequitable conduct, to-wit: physical and mental abuse of his wife. Monthly spousal support in the amount of \$2,500.00 per month payable by the appellee to the appellant was awarded.

The appellee filed an appeal to the Circuit Court of Monongalia County, alleging error in the awarding of spousal support. The appellant responded, making cross-assignments of error, including the classification of the Mylan stock as sole and separate property.² The circuit court heard the parties' oral arguments, and on March 31, 2010, entered an order reversing the family court's award of spousal support and affirming the separate nature of the Mylan stock.

In its order, the circuit court took issue with the family court's reliance upon the testimony of Mr. Hamrick to establish Mr. Sellaro's ability to pay spousal support. The lower court found Mr. Hamrick's testimony to be unreliable and to be given no weight because of his lack of knowledge of the retirement plans of the parties, the ages of the parties, the appellant's income and the sale of commercial properties that previously generated income to the parties. The circuit court found that the parties were approximately the same age and had both decided not to work again. Although both parties had professions, neither had kept his or her professional licenses. The circuit court further determined that there were no minor children in the home and that each party had shared equally in the distribution of the marital estate. The circuit court reasoned that "both parties are similarly situated, financially speaking, post-divorce."

The circuit court found that the family court erred when it concluded that the appellant had sacrificed educational or vocational opportunities, finding that the appellant had completed her nursing training prior to marrying the appellee, and that the record was devoid of any specific educational or vocational opportunities lost or forfeited by the appellant. The circuit court found that the family court relied upon an outdated standard when it found that the appellee had engaged in substantial inequitable conduct during the marriage as further justification of an award of spousal support to the appellant. The circuit court found that the

¹(...continued)

awarded, the court shall consider and compare the fault or misconduct of either or both of the parties and the effect of the fault or misconduct as a contributing factor to the deterioration of the marital relationship.

²The appellant also alleged it was error for the family court to deny her motion for a new trial. Inasmuch as that error was not argued before this Court, no further analysis of that ruling is necessary.

finding of substantial inequitable conduct does not entitle the other party to an award of spousal support, but requires a finding that this conduct caused the deterioration of the marriage. While the family court found that the appellee engaged in substantial inequitable conduct, it did not find that this conduct caused the deterioration of the marriage.

The appellant then presented this appeal to this Court.

Our standard of review of the circuit court's order is well settled:

In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of the law to the facts under an abuse of discretion standard. We review questions of law de novo.

Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004). With this standard in mind, we now address the Appellant's contentions that the circuit court committed error in reviewing the family court's order.

The appellant first contends that the circuit court erred when it reversed the family court's award of spousal support. The circuit court's standard of review is similar to this Court's standard of review and is defined in W. Va. Code § 51-2A-14(c)(2008). This section states:

The circuit court shall review the findings of fact made by the family court judge under the clearly erroneous standard and shall review the application of law to the facts under an abuse of discretion standard.

In its order, the circuit court appropriately applied this standard of review in regard to reversing the family court's award of spousal support. The circuit court found clear error in the family court's determination of the appellee's ability to pay spousal support and made specific detailed findings regarding this error. It also found that the family court applied the incorrect legal standard when it made fault a basis for the granting of spousal support. Under our similar standard of review, we find no error in the circuit court's reversal of the family court's spousal support award.

In regard to the classification of the 2,812 shares of Mylan Pharmaceutical

stock, we find that the circuit court committed error when it affirmed the family court's order.

We begin with the premise that there is a preference toward declaring property acquired during the marriage, as is the case with the Mylan stock, to be marital as opposed to separate property. “W. Va. Code 48-2-1(e)(1) (1986) [W. Va. Code §48-1-233 (2001) (Repl. Vol. 2004)], defining all property acquired during the marriage as marital property except for certain limited categories of property which are considered separate or nonmarital, expresses a marked preference for characterizing the property of the parties to a divorce action as marital property.” Syllabus Point 3, *Whiting v. Whiting*, 183 W. Va. 451, 396 S.E.2d. 413 (1990).

It is incumbent upon the person who is trying to assert the separate non-marital nature of property to prove that it is a sole and separate holding. In the case at bar, however, the only testimony was that of the appellee, who asserted alternate theories in support of his contention that the Mylan stock was his alone. The appellee cited non-binding out-of-state precedent in support of his contention that his testimony alone was a sufficient basis for the family court's findings. We find, however, that this testimony was insufficient to transform this property, clearly acquired during the course of the parties' marriage, into sole and separate property not subject to equitable division.

For the foregoing reasons, we therefore affirm the ruling of the Circuit Court of Monongalia County insofar as it reversed the order of the Family Court granting spousal support to the appellant. We reverse the order of the circuit court insofar as it affirmed the family court's classification of the Mylan stock as the separate property of the appellee, and remand this matter for equitable distribution of this marital asset.

Chief Justice Margaret L. Workman, deeming herself disqualified, did not participate in the decision of this matter.

Affirmed in part; reversed and part; and remanded.

ISSUED: June 14, 2011

CONCURRED IN BY:

**Justice Menis E. Ketchum
Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh**

DISQUALIFIED:

Chief Justice Margaret L. Workman