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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE

West Virginia Supreme Court of Appeals

BROOKANNE SELLARO,

Petitioner,

v.

EUGENE JOSEPH SELLARO,

Respondent.

No. 35733

APPEAL FROM THE FINAL ORDER OF THE CIRCUIT COURT OF MONONGALIA COUNTY (07-D-83)

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. Circuit Court abused its discretion in reversing Family Court's order awarding Petitioner permanent alimony of $2,500.00 per month.

2. Circuit Court abused its discretion in failing to reverse Family Court's order in finding that Mylan Stock was Respondent's sole and separate property, not subject to equitable distribution.

STATEMENT OF THE CASE

Mrs. Brookanne Sellaro (Petitioner) filed a petition for divorce from Mr. Eugene Joseph Sellaro (Respondent) on February 21, 2007. A final trial was held by the Family Court of Monongalia County, West Virginia on January 23, 2008. A final decree of divorce was issued by Family Court Judge Jeffrey Culpepper on December 31, 2008. Both sides subsequently appealed to the Circuit Court of Monongalia County. Judge James P. Mazzone, of the First Judicial Circuit, was designated to hear the appeal. On March 31, 2010, an order was entered reversing the Family Court's order awarding $2,500 in permanent alimony to Petitioner and affirming the Family Court's finding that Mylan stock was Respondent's sole and separate property. It is from this order that Petitioner appeals.

Petitioner, age sixty two (62) years, and Respondent, age sixty four (64) years, were married on June 8, 1968, in Monongalia County, West Virginia. Two (2) children were born of this thirty-nine (39) year marriage, both of whom are now over the age of eighteen (18) years and emancipated.

At the time of the marriage, Petitioner was a trained LPN who worked at West Virginia University Hospital in the Pediatrics Department. Respondent was a student at West Virginia University from which he had obtained a degree in secondary education in 1968 (Tr. 353, Family Court January 23, 2008 hearing transcript). He then attended law school at the West Virginia

University College of Law from which he obtained his doctor of jurisprudence in 1973. (Tr. 194) While Respondent attended law school, Petitioner worked full time up until their second child was born on June 29, 1972. Petitioner's earnings were used to support the family while Respondent attended law school. The remaining funds necessary for the parties' ongoing living expenses were acquired from student loans which were paid back during the marriage. Respondent agreed, in the proceeding below, that Petitioner provided at least fifty percent (50%) of the families' support, while he acquired his legal degree, from her employment as a licensed practical nurse. (Tr. 355)

Thereafter, from 1995 until 1999 Petitioner worked as a licensed practical nurse in a part time capacity for approximately 25-30 hours a week. (Tr. 196) From 1999 through 2006, Petitioner only worked six (6) months of the year on a full time basis. (Tr. 197) During the years 2003, 2004, and 2005, she received an approximate income of $12,000.00, per year. From 2006 until entry of the Circuit Court's order, Petitioner did not work as a licensed practical nurse or in any other capacity. During her employment, Petitioner acquired no retirement or pension (other than IRA's and marital investments). Petitioner relied solely on Respondent's income, investments, and estate planning to support in her retirement. (Tr. 199) Respondent's income far exceeded Petitioner's. For example, in 2006, Respondent received income of $82,800.00 from his legal practice, not including investment income.

At the time of the trial before the Family Court, Respondent was a licensed attorney in the state of West Virginia and a municipal judge for the town of Granville and the city of Westover. Both parties have substantial ties to West Virginia, having been born and raised in the area. Respondent was and had always been the primary financial supporter for the family.

During the course of the marriage, Respondent shared little about the family's personal finances with Petitioner. (Tr. 221) Instead, Respondent would draw up, or have drawn up, papers

regarding real estate financial obligations and estate planning documents. Respondent would then instruct Petitioner to sign the documents. (Tr. 221) Petitioner relied on Respondent's legal background and business sense to invest marital assets and income, and do whatever was necessary to maintain the family's standard of living. (Tr. 318) Petitioner was responsible for homemaking and was the primary caregiver of the children throughout the marriage.

The parties began to experience marital problems. In the winter of 2007, Mrs. Sellaro informed Mr. Sellaro that she intended on filing for divorce and the parties separated on February 9, 2007. However, after the date of separation, Respondent invited Petitioner to visit Washington, D.C. for one weekend, during which he contends that the parties engaged in sexual relations.

In November 2006, the parties sold their jointly owned commercial rentals, known as Bitonti Street apartments and storage buildings. The sale of this real estate generated proceeds in excess of one million and eighty-five thousand dollars ($1,085,000.00). It was not until the final hearing of January 23, 2008, that Petitioner first became aware that Respondent was contending that a substantial portion of the proceeds from the sale of the Bitonti property was used to pay "marital debt." It is undisputed that during the course of the marriage, Respondent handled the party's finances.

SUMMARY OF ARGUMENT

The Circuit Court erred in reversing the Family Court's order awarding Petitioner permanent alimony of $2,500.00 per month and by affirming Family Court's finding that Mylan Stock was Respondent's sole and separate property, not subject to Equitable Distribution.

Petitioner was married to Respondent for thirty-nine (39) years. After thirteen (13) hours of testimony in the divorce proceeding, the Family Court awarded Petitioner $2,500.00 per month in permanent alimony. The Circuit Court reversed this award, based on the record alone, and

declared that the expert witness in the Family Court proceeding should not have been given any weight. Deference is given to the findings of the family law master because he or she hears the evidence directly. Any changes to an alimony award are justified only when there clearly appears to have been an abuse of discretion. The decision by the Family Court in awarding $2,500.00 should stand.

The Family Court erred in finding that the Mylan stock in question was not marital property. Respondent failed to produce any documentary evidence that the Mylan stock was not purchased with marital funds or funds which he earned during the marriage. The determination that the Mylan stock is not marital property must be accompanied with evidence, other than the bare assertions by an interested party. Absent evidence to the contrary, the stock is marital property and is subject to equitable distribution. Accordingly, the Family Court's finding, that the 2,812 shares of Mylan stock were the Respondent's sole and separate property was clearly erroneous.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that Rule 19 oral argument is appropriate in this case given Petitioner's assignments of error. It is Petitioner's position that the Circuit Court failed to apply settled law to the facts of the case and exercised unsustainable discretion. It is also Petitioner's position on the issue of marital property that the Family Court's position was not supported by sufficient evidence. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

I. Circuit Court abused its discretion in reversing Family Court's order awarding Petitioner permanent alimony of $2,500.00 per month.

An award of alimony is a legitimate component of a divorce decree when is bears a reasonable relationship to the history of the marriage and the financial needs of the parties' and their respective earning abilities. It ensures that the divorcing parties are not left destitute and become burdens on their families or ultimately society as a whole. In this case, the award to the Petitioner of $2,500.00 per month permanent alimony allows her to maintain a portion of the lifestyle and standard that she had become accustomed to during the marriage. This was not a brief marriage. To the contrary, this was a marriage of over thirty nine (39) years during which Respondent pursued his legal career and the parties acted as partners striving toward a common family goal. During the marriage, Petitioner assisted, promoted, and encouraged her husband in his legal career. In addition, Petitioner contributed economically to the family's wellbeing as well as supported Respondent while gaining his legal education by working as a licensed practical nurse. The Family Court heard over thirteen hours of testimony in this divorce proceeding, and based its decision on the testimony and evidence presented. In his petition for appeal to the Circuit Court, Respondent requested that the Circuit Court replace the judgment of the Family Court.

At the time of the trial of this matter, Petitioner was sixty (60) years of age. She was not currently employed, and had not worked on a full time basis for the previous eleven (11) years. Petitioner does not have a college degree. Petitioner obtained her associate degree as a licensed practical nurse prior to the marriage. She had not received any advanced degrees.

The Family Court Judge found that Petitioner should not be compelled to use her share of the marital estate following equitable distribution for her future support. (See Final Divorce

Decree 5d, page 13). On the other hand, Respondent had recurring income from his separate property known as Crockett's Lodge in the current amount of $3,000.00 per month. Further, he was at the time of the trial of this matter, earning income in the approximate amount of $1,000.00 per month as a municipal judge for both the City of Westover and the Town of Granville. Respondent terminated his employment as municipal judge following the trial of this matter. Respondent also had additional income from separate rental property located at Springdale Avenue which earned $800.00 per month, but from which he contended that he only received one-third (1/3). Respondent had an estimated future net cash of income over $12,500.00 per month; however, after including Petitioner's income and allowing for the sale of the rental properties, C. Page Hamrick, Petitioner's expert witness, testified that the future net cash income would be somewhere in the $7,000.00 to $8,000.00 per month range. (See Final Divorce Decree 5k, page 14)

The Family Court Judge found that Respondent would draw substantial income from these separate property resources, while still maintaining his law license in the state of West Virginia. However, Petitioner would not draw any income, other than the one-half (1/2) interest from the Bitonti Promissory note.

The Family Court also found that there was corroborative testimony that Respondent engaged in substantial inequitable conduct; i.e., physical and mental abuse of Petitioner. The Family Court Judge also found, based on the testimony of Petitioner's expert witness, C. Paige Hamrick, that Respondent had an ability to pay upwards of $5,000.00 per month in spousal support based on Respondent's historical income from the last five years, and further found that Respondent has the ability to pay substantial support to Petitioner.

The Family Court Judge further found that this was a near forty-year marriage, with the party's cohabitating for thirty nine (39) of those forty (40) years. The Family Court correctly

found that Respondent had ample recurring monthly income and additional financial ability and resources from his separate property to meet not only his ordinary and necessary monthly expenses, but also to pay spousal support to Petitioner. Failure to consider Respondent's income generated from allocated marital property or separate property in determining an award of spousal support would result in a substantial inequity and harm to Petitioner. The evidence shows that Petitioner was a good wife and mother and that she assisted Respondent in furthering his career.

The Family Court clearly set forth its findings and rationale for its award of spousal support. Therefore, Respondent can hardly claim that the Family Court's decision was arbitrary and capricious. This Court has held that a "circuit court should review findings of fact made by a family law master only under a clearly erroneous standard, and it should review the application of law to the facts under an abuse of discretion standard. *Syl. Pt. 1, Stephen L.H. v. Sherry L.H.*, 195 W.Va. 384, 465 S.E.2d 841 (1995). The Court further held that:

> [u]nder the clearly erroneous standard, if the findings of fact and the inferences drawn by a family law master are supported by substantial evidence, such findings and inferences may not be overturned even if a circuit court may be inclined to make different findings or draw contrary inferences.

Id. at Syl. Pt. 3. Furthermore:

> If it is of the view that the findings of fact of a family law master were 'clearly erroneous,' the circuit court may set those findings aside on that basis. If it believes the findings of fact of the family law master are unassailable, but the proper rule of law was misapplied to those findings, the circuit court may reverse. However, a circuit court may not substitute its own findings of fact for those of a family law master merely because it disagrees with those findings.

Id. at 396-97.

Granting a spouse alimony based upon length of the marriage, and parties' contributions during the marriage is well settled in West Virginia law. See, *Robert H. Butcher v. Opal I. Butcher*, 178 W.Va. 33, 357 S.E.2d 226 (1987), 30 year marriage, spouse aged 50, high

school education, permanent more appropriate; *Frederick Paul Queen v. Betty Lou Queen*, 180 W.Va. 121, 375 S.E.2d 592 (1988) (*per curiam*), 33 year marriage, spouse aged 51, high school education, remand to consider permanent alimony; *Nancy Lee Gorby v. Clark Vincent Gorby*, 180 W.Va. 60, 375 S.E.2d 424 (1988) (*per curiam*), 28 year marriage, spouse aged 48, high school education, remand inclined to give permanent; *Robert Bettinger v. Marie Militzer Bettinger*, 183 W.Va. 528, 396 S.E.2d 709 (1990), 10 year marriage, spouse age 45, education college, remand because record insufficient on alimony; *Kapfer v. Kapfer*, 187 W. Va. 396, 419 S.E. 2d 464 (1992) (*per curiam*), 23 year marriage, spouse aged 51, high school education, remand to reconsider rehabilitative alimony; *David E. Hinerman v. Mary Alice Hinerman*, 194 W.Va. 256, 460 S.E.2d 71 (1995) (*per curiam*), (20+ year marriage, 50+ aged spouse, college education, remand to consider permanent alimony); *Magaha v. Magaha*, 196 W. Va. 187, 469 1d 123 (1996) (*per curiam*), 24 year marriage, spouse aged 41, high school education, ambiguous agreement held to create permanent alimony; *Sharon L. Ward v. Richard L. Ward*, 504 S.E.2d 917, 202 W.Va. 454 (1998) (*per curiam*), 28 year marriage, spouse aged 49, education unknown, permanent alimony; For an example in which long term alimony was not required see, *Petruska v. Petruska*, 200 W. Va. 79, 488 S.E. 2d 354 (1997), a spouse aged 42 was held to be an appropriate candidate for rehabilitative alimony after an eleven year marriage when it appeared that she had significant job skills. Similarly, *Bosworth v. Bosworth*, 199 W. Va. 278, 483 S.E. 2d 861 (1997) (*per curiam*), twelve year marriage, no showing that marriage had impact on the earning capacity of the recipient spouse, reasons for general alimony must be set forth in the opinion.

On appeal, the Circuit Court incorrectly stripped Petitioner of her awarded permanent alimony of $2,500 per month. The Circuit Court made this drastic change based upon its opinion that Mr. Hamrick's testimony was "unreliable and should not have been given any

weight." This is clear abuse of discretion by the Circuit Court. Justice Starcher, in writing a concurrent opinion in *Stewart v. Stewart*, articulates, "This Court gives deference to the findings of fact made by a family law master because he or she heard the evidence directly, and was best positioned to consider the bias and credibility of the witnesses." *Stewart v. Stewart*, 550 S.E.2d 86, 209 W. Va. 550 (W. Va. 2001). See Syllabus Point 1, *Burnside v. Burnside*, 194 W. Va. 263, 460 S.E.2d 264 (1995). Furthermore, questions relating to alimony are within the sound discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it *clearly appears* that such discretion has been abused. (emphasis added). *Nichols v. Nichols*, 160 W. Va. 514, 236 S.E.2d 36 (1977).

The Family Court's decision to grant permanent alimony was a result of the facts and testimony as directly presented to the Court. It does not give rise to a situation to where it clearly appears that its discretion was abusive in nature. The Family Court's decision should be upheld.

II. Circuit Court abused its discretion in failing to reverse Family Court's order in finding that Mylan Stock was Respondent's sole and separate property, not subject to equitable distribution.

At the time of the separation of the parties, Respondent owned 2,812 shares of Mylan stock. Petitioner asserted during the trial of this matter that this stock was marital property because Respondent often bragged after settling a case in his law practice that he was going to buy Mylan stock with the proceeds. (Tr. 229) Nevertheless, during the trial of this matter, Respondent contended that the Mylan stock was his separate property which he received as a gift from his mother. Although Respondent conceded during the trial of this matter that the Mylan stock was purchased during the marriage with marital funds, he claimed that this stock was cashed in and the proceeds were used to purchase lots upon which the Bitonti Street storage buildings were constructed. (Tr. 446) However, he produced no documentary evidence in support of this

assertion. The Family Court Judge found based on the totality of the circumstances and all the testimony relating thereto that the 2,812 shares of Mylan stock were the sole and separate property of Respondent. This finding is erroneous and not supported by the evidence presented.

Although the origins of separately titled property may be traced to establish what is the separate property of one spouse, acquired by one of the means listed in W. Va. Code § 48-2-1(f), Respondent failed to produce any documentary evidence that the Mylan stock was not purchased with marital funds or funds which he earned during the marriage. Nor did he produce any evidence that he had sold or transferred, prior to separation, any Mylan stock which was part of the marital estate, and retained only that which he claims "his mother had purchased for him." In fact, during his testimony on cross-examination during trial, Respondent changed his testimony from his earlier direct testimony that his mother had purchased the stock for him to "[w]ell, the certificates were purchased with her money." (Tr. 445) Having purchased the stock with her money does not make it a gift to him. In fact, the question arises if his mother was even aware that he was using her funds to buy stock or if, perhaps, the money which was used to purchase the stock was a loan for which his mother received repayment during the marriage. Finally, on cross examination, Respondent was asked if he had evidence that she wrote a check for the stock to be purchased and he answered, "no not that far back." (Tr. 446)

Absent from the trial record and transcript is any evidence whatsoever that Respondent produced documentary proof that the Mylan stock, which remained at the time of the separation of the parties, was gifted to him from his mother in 1992 and is, therefore, his separate property. The only evidence of this fact was merely Respondent's uncorroborated testimony. This testimony was insufficient for the Family Court Judge to find and declare the Mylan stock was the Respondent's separate, non-marital property. Absent evidence to the contrary, the stock is marital property and is subject to equitable distribution.

The Court has previously stated that bare assertions without documentary evidence are insufficient to prove facts from an evidentiary standpoint:

> We indicated in *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 61 n. 14, 459 S.E.2d 329, 338 n. 14 (1995) that 'self-serving assertions without factual support in the record' have no force or effect. In *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 707, 474 S.E.2d 872, 887 (1996) we categorized such self-serving averments as 'nothing more than an attorney's argument lacking evidentiary support.' (Citation omitted.) Evidence presented in a divorce case must be consistent with our Rules of Civil Procedure, Rules of Evidence and Rules of Practice and Procedure for Family Law. A divorce proceeding is not an opportunity for lawyers to circumvent our procedural and evidentiary rules. Those rules are applicable in divorce actions with the same force and vibrancy as in any other civil proceeding.

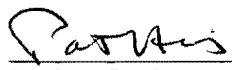
Pearson v. Pearson, 200 W.Va. 139, 488 S.E.2d 414, 421 (1997). Here, the family court found that the shares of Mylan stock were a gift to Respondent from Respondent's mother even though there was no documentary evidence to support this finding. Accordingly, the Family Court's finding that the 2,812 shares of Mylan stock were the Respondent's sole and separate property was clearly erroneous.

CONCLUSION

For reasons set forth above, the Petitioner asks this Honorable Court to overturn the circuit court's reversal of the Family Court's award of spousal support to Appellant for the sum of $2,500 a month and to reverse the Family Court's decision that the Mylan shares of stock are separate property.

Dated this 31st day of December 2010.

Petitioner,
by counsel,



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CERTIFICATE OF SERVICE

I hereby certify a true and exact copy of *Petitioner's Brief* was served via U.S. Mail, postage prepaid this 31st day of December, 2010 as follows:

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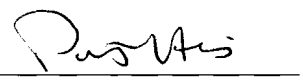

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