

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

BROOKEANNE SELLARO,

Petitioner,

v.

CASE NO. 07-D-83

EUGENE JOSEPH SELLARO,

Respondent.

ORDER

On a previous day, came Eugene Sellaro (hereinafter "Eugene") pursuant to his appeal of the Family Court Order entered December 31, 2008 to contest the award of alimony to Petitioner, Brookeanne Sellaro (hereinafter "Brookeanne").¹ Also, on a previous day, came Brookeanne pursuant to her appeal of the Family Court Order entered December 31, 2008 to contest the Family Court's finding that 2812 shares of Mylan stock constituted Respondent's separate property.

After having reviewed Eugene's Petition for Appeal, Brookeanne's Response thereto and Cross-Petition, the Family Court Order of December 31, 2008, all applicable authority, and after having considered the oral argument of both parties, as well as their proposed findings of fact and conclusions of law, the Court is ready to issue its decision.

¹Though the Court does not normally refer to parties by their first names, the Court has chosen to do so here for ease of identification in light of the fact that both parties have the same last name and both parties have filed a Petition for Appeal from the Family Court's December 31, 2008 Order.

I.
FACTUAL/PROCEDURAL HISTORY

Eugene and Brookeanne Sellaro were married on June 8, 1968 in Morgantown, WV. Two children were born of the marriage, both of whom are now over the age of eighteen and emancipated. At the time of the marriage, Brookeanne was working as a licensed practical nurse, having already earned her degree in this field. Eugene obtained a degree in secondary education from West Virginia University in 1968. In 1970, Eugene began law school at West Virginia University's College of Law, graduating with a Doctor of Jurisprudence in 1973. Their first child was born on March 28, 1970 and their second child was born on June 29, 1972. Brookeanne did not work during her first pregnancy. She returned to work briefly after the birth of her first child, but did not return for some time after the birth of her second child. It appears from her testimony that Brookeanne did not return to work until approximately 1977. During the marriage, Eugene maintained a law practice. Eugene also worked as a Municipal Judge in Monongalia County. Both Eugene and Brookeanne are now retired. Eugene has dissolved his legal practice and does not maintain his law license. Brookeanne does not maintain her practical nurse's license.

During trial, Brookeanne testified regarding an incident in Florida wherein, because of an apparent argument over a cell phone, Eugene struck Brookeanne leaving Brookeanne with a bruised eye. A witness, Donna Wheeler, was able to

corroborate this story. Eugene disputes Brookeanne's version of the incident. Brookeanne also testified that during an argument in the marital home, Eugene forcibly grabbed her arm and pulled her off their bed, resulting in her landing on their floor. No independent witness was able to corroborate this story. Both incidents allegedly took place in the later part of their marriage, 2005 and 2006, respectively. Neither incident was reported to the police or prosecuted, nor was any Domestic Violence Protective Order sought. No other incidents of physical or mental abuse are noted by the Family Court in its December 31, 2008 Order.

At the time of trial, Brookeanne called C. Paige Hamrick, a lawyer and accountant, to testify as to Eugene's ability to pay alimony in this matter. Mr. Hamrick first testified that, based on historical income over the previous five (5) years, Eugene would have a net monthly income of over \$12,500, and therefore had the ability to pay "substantial" spousal support to Brookeanne. Mr. Hamrick acknowledged during his testimony, however, that he had not interviewed Brookeanne Sellaro prior to his testimony in trial, he did not know the ages of the parties, he did not know the retirement status of either party, he did not know the life plan of either party, he did not know the work history or the earnings of Brookeanne and what part they constituted of the tax returns he reviewed in preparation for his testimony, he did not know the vocation of Brookeanne, he did not know the status of either party's professional license, and he did not know that the money generated from the Bitonti Street Rentals had been used to pay off

marital debt and thus could no longer be reinvested. He also admitted during his testimony that he did not obtain enough information to come up with a bottom line figure for Eugene's ability to pay alimony.

Notwithstanding the above testimony, upon further questioning, including questioning from the Family Court, Mr. Hamrick testified that, after taking numerous necessary factors into account, Eugene would have the ability to pay Brookeanne \$5,000 per month in spousal support. The Family Court relied upon this testimony when it found that Eugene had the ability to pay Brookeanne \$5,000 per month in spousal support, and ordered Eugene to pay Brookeanne permanent spousal support at \$2,500 per month.²

Also at issue during the divorce proceedings were 2812 shares of Mylan stock. Specifically, Brookeanne claims that this stock is marital property. In support of this claim, Brookeanne testified that Eugene purchased the contested shares (in multiple, separate purchases) with proceeds generated by his legal practice, thereby making them marital property. Eugene, on the other hand, claims that this stock was separate property and in support of this contention,

²The Court notes that, in an attempt to seek clarification of Mr. Hamrick's testimony, the Family Court unintentionally injected itself into the proceedings in that the Family Court's questioning of Mr. Hamrick about his testimony seems to have inadvertently served to focus Mr. Hamrick's testimony where prior to said questioning, there was no focus. In fact, it is unclear to this Court, even in light of the Family Court's efforts to clarify Mr. Hamrick's testimony, what his opinion actually is. He begins his testimony with one opinion, i.e. that Eugene has a net cash income of over \$12,500 per month, and, as a result, has the ability to pay a "substantial" amount of spousal support; but ends his testimony with a completely different opinion, i.e. that Eugene has a net cash income of between \$7,000 and \$8,000 and has the ability to pay \$5,000 per month in spousal support.

Eugene testified that the initial block of shares were either a gift from his mother, or that he used money given to him by his mother to purchase an initial block of shares, with the remainder being the result of subsequent stock splits. There is no other evidence in the record regarding whether the Mylan stock is marital or separate property. The Family Court relied upon Eugene's testimony and found that all 2812 shares of Mylan stock were separate property.

At the conclusion of the divorce proceedings, each party received exactly fifty-percent (50%) of the marital estate, or \$401,543.96.

II. ARGUMENT OF THE PARTIES

Eugene has filed a Petition for Appeal from the Family Court's Order of December 31, 2008, and is requesting that the Family Court's award of permanent spousal support to Brookeanne be vacated, or, in the alternative, reduced. In support of this request, Eugene argues that the expert upon whose testimony the Family Court relied to support its award of permanent spousal support was not credible and that the Family Court erred in relying on same. Eugene also argues that Brookeanne did not forego educational and vocational opportunities during the marriage. Finally, Eugene argues that the two incidents of domestic strife about which the Family Court heard testimony does not justify an award of monthly spousal support for Brookeanne of \$2,500.

Brookeanne filed her own Petition for Appeal from the Family Court's Order

of December 31, 2008 and is requesting that the Family Court's determination of the 2812 shares of Mylan stock as Eugene's separate property be reversed and declared marital property. In support of this request, Brookeanne argues that it is Eugene's burden to demonstrate that the Mylan stock is his separate property, as the law assumes everything is marital property, and that Eugene did not meet his burden. Brookeanne is also opposing Eugene's request for vacation or reduction of the permanent spousal support the Family Court ordered be paid to her by Eugene on a monthly basis. Finally, Brookeanne is requesting reconsideration of the Family Court's refusal to grant Brookeanne a new trial based on the alleged inadequacies of her trial counsel.

III. STANDARD OF REVIEW

In determining whether to accept an appeal from the Family Court, this 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." W.Va. Code § 51-2A-14(c) (Supp. 2006).

IV. DISCUSSION

After careful review of the Family Court's findings and conclusions in light of the asserted assignments of error and all applicable authority, this Court finds

that the Family Court erred when it concluded that Brookeanne forfeited educational and vocational opportunities during the marriage, and the Family Court erred when it found that Eugene engaged in substantial inequitable conduct. The Family Court also erred when it used the above to justify an award of spousal support to Brookeanne. Further, the Family Court erred when it relied upon the testimony of C. Paige Hamrick regarding the amount of alimony Eugene could pay to Brookeanne after the dissolution of their marriage. Conversely, this Court can find no error or abuse of discretion in the Family Court's conclusion that the disputed 2812 shares of Mylan stock constituted Eugene's separate property. Finally, the Family Court did not err when it refused to grant Brookeanne's request for a new trial. For the reasons that follow, this Court reverses and vacates the Family Court's award of permanent alimony to Brookeanne Sellaro, and affirms the Family Court's finding that the 2812 shares of Mylan stock constituted the separate property of Eugene Sellaro. Finally, the Court denies Brookeanne's request for a new trial.

A. Alimony

West Virginia Code § 48-6-301(b) provides, in relevant part, the following guidelines as to how to determine the amount of alimony to award one party or the other in a divorce proceeding:

The court shall consider the following factors in determining the amount of spousal support, child support or separate maintenance, if any, to be ordered...as a supplement or in lieu of the separation agreement:

- (1) The length of time the parties were married;
- (2) The period of time during the marriage when the parties actually lived together as husband and wife;
- (3) The present employment income and other recurring earnings of each party from any source;
- (4) The income-earning abilities of each of the parties, based upon such factors as educational background, training, employment skills, work experience, length of absence from the job market, and custodial responsibilities for children;
- (5) the distribution of marital property to be made under the terms of a separation agreement of by the court...insofar as the distribution affects or will affect the earnings of the parties and their ability to pay or their need to receive spousal support...Provided, That for the purposes of determining a spouse's ability to pay spousal support, the court may not consider the income generated by the property allocated to the payor spouse in connection with the division of marital property unless the court makes specific findings that a failure to consider income from the allocated property would result in substantial inequity;
- (6) The ages and the physical, mental and emotional condition of each party;
- (7) The educational qualifications of each party;
- (8) Whether either party has foregone or postponed economic, education or employment opportunities during the course of the marriage;
- (9) The standard of living established during the marriage;
- (10) The likelihood that the party seeking spousal support...can substantially increase his or her income-earning abilities within a reasonable time by acquiring additional education or training;
* * * *
- (13) The costs of educating minor children;
- (14) The costs of providing healthcare for each of the parties and their

minor children;

* * *

(17) The financial need of each party.

West Virginia Code § 48-8-104 states that, in determining whether to award spousal support, "the court shall consider and compare the fault or misconduct or 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."

In the instant case, both parties are in their sixties and retired. Neither party intends to work again. Although Eugene is trained as an attorney and Brookeanne is trained as a practical nurse, neither has kept their professional licenses current. Eugene has closed his law practice and has relinquished his Judgeships. Brookeanne no longer works as a practical nurse. There are no minor children in the home, so neither party has to provide support and health insurance for them, and there are no minor-child educational expenses which must be incurred by either party. Additionally, each party received exactly one-half (50%) of the marital estate in the property distribution made by the Family Court, or \$401,543.96. In light of the above, it is this Court's opinion that both parties are similarly situated, financially speaking, post-divorce.

Further, although neither party maintains outside employment as a result of their retirement, and each party has allowed their professional licenses to lapse, this Court is satisfied that, if either party had to support themselves, each party is educated and trained so that employment in their respective fields would allow

each of them to support themselves. While it is true that Eugene's law degree affords him the ability to obtain a higher salary than Brookeanne's licensure as a practical nurse, this is of no moment because the Court is satisfied that, based upon the record, Brookeanne did not sacrifice any educational or employment opportunities during the course of her marriage. Indeed, Brookeanne had already completed her practical nurse's licensing before she married Eugene, and the record is devoid of any specific educational or vocational opportunities Brookeanne forfeited.

Furthermore, the Family Court relied upon an outdated standard when it found that Eugene engaged in "substantial inequitable conduct" during the marriage, as further justification for an alimony award to Brookeanne. That is, the Family Court found that, in light of the 2005 and 2006 incidents of physical altercations between Eugene and Brookeanne, Eugene engaged in "substantial inequitable conduct" toward Brookeanne, which justified an award of alimony to Brookeanne. However, "substantial inequitable conduct" is no longer the standard by which the Courts of this State judge a party's conduct in determining whether to award another party to a divorce, alimony. As was recognized in *Rexroad v. Rexroad*, 186 W.Va. 696, 701, 414 S.E.2d 457, 462 (1992), the legislature adopted a "uniform standard with regard to the role of fault as it bears on alimony," and precludes alimony in three instances only: where the party has committed adultery; where, subsequent to the marriage, the party has been

convicted of a felony, which conviction is final; and where the party has actually abandoned or deserted the other spouse for six months. In all other situations where fault is considered in awarding alimony under West Virginia Code § 48-8-104, "the court...shall consider and compare the fault or misconduct of either or both of the parties and the effect of such fault or misconduct as a contributing factor to the deterioration of the marital relationship."³ Therefore, "substantial inequitable conduct" by a party does not entitle the other party to an award of alimony. Rather, a finding must be made as to whether the conduct of one or the other party caused the deterioration of the marital relationship. The Family Court failed to make such a finding in this case.

Moreover, even if alimony could still be justified notwithstanding the foregoing, alimony should still not have been awarded because there is no credible evidence in the record as to Eugene's ability to pay alimony. The only evidence submitted to the Family Court by Brookeanne as to Eugene's ability to pay alimony is the testimony of C. Paige Hamrick, and his testimony is not reliable. Indeed, it is unclear to this Court what exactly is the opinion of C. Paige Hamrick as to the amount of alimony Eugene is able to pay to Brookeanne. At the beginning of his testimony, Mr. Hamrick stated that, post-divorce, Eugene would have a net monthly income of over \$12,500, based on historical data, and would

³It is important to note that, since the *Rexroad* decision, the legislature has amended the statutory law regarding consideration of a party's fault and its effect upon an award of alimony. However, no amendment has overturned the *Rexroad* decision or the pronouncements of that case.

therefore be able to pay a "substantial" amount of alimony. However, when it became clear that this figure was inaccurate because of Mr. Hamrick's failure to take into account various factors when analyzing Eugene's historical income, including Brookeanne's income and its impact upon the historical income attributed to Eugene, Mr. Hamrick eventually settled upon the opinion that, post-divorce, Eugene would have a net monthly income of between \$7,000 and \$8,000.

During his testimony, Mr. Hamrick admitted that he did not know the age of Brookeanne or Eugene, was not aware of their plans to retire (hence, eliminating their employment income from their financial picture), did not interview Brookeanne (his own client) prior to formulating his opinion, failed to take into account Brookeanne's income and its impact upon the historical income attributed to Eugene, and failed to take into account the fact that the commercial properties associated with Bitonti Street Rentals had been liquidated and the monies from that sale used to eliminate debt, including debt on the marital home as well as the mortgage on the commercial property. After taking the whole of Mr. Hamrick's testimony, it is unclear just what Mr. Hamrick's opinion is and, as a result, Mr. Hamrick's testimony is unreliable and should not have been given any weight.

For all of the foregoing reasons, this Court finds that the Family Court erred when it awarded Brookeanne permanent alimony and the Family Court's award of alimony to Brookeanne Sellaro is therefore reversed and vacated.

B. Mylan Stock

After reviewing the Family Court record, this Court is satisfied that the Family Court's decision to award the disputed 2812 shares of Mylan stock to Eugene as separate property was based upon the Family Court's determination that Eugene's testimony was more credible than Brookeanne's regarding the origin of said stock. As is set forth below in more detail, this Court will not disturb the Family Court's finding that the disputed 2812 shares of Mylan stock constituted Eugene's separate property, on appeal.

The record is clear that both Brookeanne and Eugene testified differently regarding whether the 2812 shares of Mylan stock constituted separate property or marital property. Brookeanne testified that the 2812 shares of Mylan stock were purchased at different times (she could not estimate the dates of purchase) with funds generated by Eugene's law practice, specifically after a case had settled. Eugene, on the other hand, testified that the initial set of shares of Mylan stock was either a gift from his mother, or purchased with funds given to him by his mother. Eugene further testified that the additional shares of Mylan stock were the result of subsequent stock splits. The Family Court's examination of the certificates of stock seemed to confirm Eugene's version of the story. There is no other evidence in the record which tends to show that the Mylan stock was separate or marital property.

Given the above, this Court is satisfied that the Family Court did not

commit clear error when it decided that the 2812 shares of Mylan stock constituted Eugene's separate property. The Family Court relied upon Eugene's testimony to support its decision. While this Court may have decided this issue differently in light of the fact that the presumption in West Virginia is that all property is marital, and that the burden of proof rests with that person asserting that a particular piece of property is separate, this Court will not disturb the Family Court's finding that Eugene's testimony was more credible than Brookeanne's. For these reasons, this Court affirms the Family Court finding that the 2812 shares of Mylan stock constituted Eugene's separate property.

C. New Trial

In the trial below, Brookeanne moved for a new trial after the close of evidence, but before a decision had been issued by the Family Court in these divorce proceedings. Essentially, Brookeanne claims that she received ineffective assistance of counsel during these proceedings below. This Court is satisfied that the Family Court's denial of Brookeanne's Motion for a New Trial was not an abuse of discretion by the Family Court. Indeed, a new trial is not the appropriate remedy for a litigant if they feel that they have not been served well by a privately retained, divorce attorney. Rather, an action in negligence may lie against said attorney, but a litigant is not entitled to a new trial, or a "do over," if they are not satisfied with the outcome of their litigation, or with the services of their privately retained attorney. Consequently, this Court hereby affirms the Family Court's

denial of Brookeanne's Motion for a New Trial.

V.
CONCLUSION

For the foregoing reasons, the Court **REVERSES** and **VACATES** the Family Court's award of permanent alimony for Brookeanne Sellaro; **AFFIRMS** the Family Court's finding that the 2812 shares of Mylan stock constitute the separate property of Eugene Sellaro; and **AFFIRMS** the denial of Brookeanne Sellaro's Motion for a New Trial.

It is so **ORDERED**.

All objections and exceptions are hereby noted and preserved.

The Clerk is directed to forward attested copies of this order upon entry to the Eugene Joseph Sellaro c/o Wesley W. Metheney, Esq., WILSON, FRAME, BENNINGER & METHENEY, 151 Walnut Street, Morgantown, WV 26505 and Holli Massey-Smith, Esq., 39 Fifteenth Street, Wheeling WV 26003; Brookeanne Sellaro c/o Michelle Widmer-Eby, Esq., WIDMER-EBY & ASSOCIATES, PLLC, 211 New Jersey Avenue, Morgantown, WV 26501.

ENTERED this 31st day of March, 2010.

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County, State aforesaid do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.

Jean Friend Circuit Clerk

JAMES P. MAZZONE, JUDGE