BEFORE THE WEST VIRGINIA SUPREME COURT

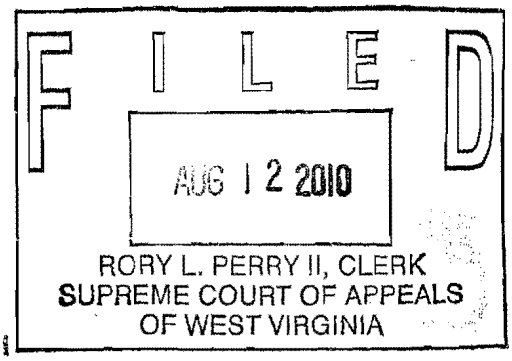
IN RE: THE MARRIAGE OF

JOHN C. CHAPMAN,
Petitioner Below/Appellee,

VS

CASE NO. 35665

LOUISE C. MILLIKAN
Respondent Below/Appellant.



APPELLANT'S BRIEF

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APPELLANT'S BRIEF

Now comes Appellant, Ms. Millikan and files this her Appellant Brief for the West Virginia Supreme Court.

KIND OF PROCEEDING AND RULING OF THE LOWER COURTS

This is a divorce case from the Family Court and Circuit Courts of Hardy County. After 34 years of marriage, Mr. Chapman filed for divorce in the Family Court of Hardy County. The case proceeded to an initial final hearing on the 24th day of August, 2007. After the hearing, on the same day, Family Court Judge, David Arrington, rendered a letter opinion.

The letter opinion contained 16 agreed errors. Counsel for the parties agreed to correct the agreed errors when preparing the Order for the hearing. One of the agreed errors was Judge Arrington's decision to limit Ms. Millikan's survivorship benefit in Mr. Chapman's Federal Pension to age 65. In light of the Cross and Smith decisions, infra., and after talking with Mr. Chapman, Attorney William Judy, counsel for Mr. Chapman, on October 12th, 2007, agreed that Ms. Millikan would retain the full survivorship benefit before preparing the August 24th, 2007 Order. Attorney Judy, Mr. Chapman's former counsel then prepared the Order for August 24th, 2007. It does not limit Ms. Millikan's survivorship benefit to her 65th birthday as the letter

opinion directed. Counsel for Ms. Millikan prepared a Pension Division Order for consideration dividing the pension as agreed upon, awarding Ms. Millikan the full survivorship benefit. Mr. Chapman took the Order to a D.C. attorney for approval and advised that he would have the Pension Division Order prepared by his D.C. attorney.

Ms. Millikan appealed the provisions of the August 24th, 2007 Order that were not agreed errors dealing with an improper credit, the denial of attorney fees and the denial of spousal support to the Circuit Court.

In the first Appeal, the Circuit Court corrected the improper credit and remanded the case to the Family Court to consider the fault of Mr. Chapman in bringing about the dissolution of the marriage when considering Ms. Millikan's request for attorney fees and spousal support.

Upon remand, the Family Court, again, denied Ms. Millikan an award of attorney fees, but awarded Ms. Millikan spousal support.

When the Family Court awarded Ms. Millkian monthly spousal support, Mr. Chapman discharged his original counsel, William Judy, and hired new counsel, Robert Aitcheson.

Mr. Chapman's new counsel did not prepare, or submit, the Federal Pension Division Order until February of 2008. It awarded Ms. Millikan $1.00 per month of the survivorship benefit, contrary to the agreement of the parties. Upon reviewing the Order, Ms. Millikan filed objections thereto and a Motion for Reconsideration, with regard to its content limiting her participation in the survivorship benefit to $1.00 per month. This first Pension Division Order was refused by the Plan Administrator.

She also filed a Contempt Petition with regard to the division of the Federal Pension. Mr. Chapman had not complied with the August 24th, 2007 Order of the Family Court requiring him

to pay her 50% of the Federal Pension from the time of the divorce hearing, until an appropriate Pension Division Order was entered. Instead of paying ½ of the gross amount of the Pension, Mr. Chapman was paying her ½ of his net. The gross amount of the Pension, at that time, was believed to be $4,485.00. Half of that amount would be $2,242.50. Mr. Chapman was paying Ms. Millikan $1,653.85 which is $588.65 less per month than half. From the gross Pension, Mr. Chapman had automatic deductions from the gross pension that deducted therefrom: $314.47 per month for health insurance that didn't cover Ms. Millikan; $627.41 per month for Federal withholding under his Social Security number, that didn't benefit her; $200.00 per month for State withholding under his Social Security number, that didn't benefit her; and $35.43 per month for life insurance, where Ms. Millikan was not the beneficiary. It was Ms. Millikan's position that none of the deductions were of any benefit to her and benefitted Mr. Chapman only. His income tax rate was higher than hers.

At the June 10th, 2008 hearing, there were two matters before the Court. One was Ms. Millikan's Motion for Reconsideration of the limitation of her survivorship benefits. During the course of the hearing, it became apparent that Judge Arrington was leaning towards reconsidering the limitation of the survivorship benefit to Ms. Millikan. (See the June 10th, 2008 Order)

The other matter was contempt for Mr. Chapman not paying ½ of the gross pension, pursuant to the August 24th, 2007 Order. At the June hearing, Judge Arrington directed Mr. Chapman to pay Ms. Millikan $588.65 per month from September 1st, 2007 through the date of the hearing, and effective July 1st, 2008, ½ of the gross amount of the Federal Pension until an appropriate COAP was entered and the Federal Pension Plan Administrator began paying Ms. Millikan half.

As a result of a medical appointment for the Judge, the hearing was continued to allow Mr. Chapman to present his evidence and argument in opposition to Ms. Millikan's Motion for Reconsideration.

After this hearing, Mr. Chapman filed a Motion to Disqualify Judge Arrington from hearing the balance of the case, presumably because Judge Arrington indicated that he would grant the Motion for Reconsideration. As a result of Judge Arrington's schedule and medical appointments, the matter was scheduled for hearing until the new Family Court Judge took office. It was then scheduled for March 10th, 2009.

Mr. Chapman still wasn't paying Ms. Millikan ½ of the gross pension. Ms. Millikan filed a second Petition for Contempt, setting it also, for hearing on March 10th, 2009 when the Reconsideration hearing was scheduled.

At the March 10th, 2009 hearing, Judge See denied Ms. Millikan's Motion for Reconsideration of the decision limiting her survivor benefits to the Federal Pension to age 65and adopted as her ruling, on this issue, the wording of the initial letter opinion of Judge Arrington, which was not contained in the August 24th, 2007 Order, not withstanding Ms. Millikan's Motion for Reconsideration, the evidence of the agreement of the parties, the value of the benefit, a marital asset, and the additional evidence offered by Ms. Millikan on the 10th of June, 2008.

Judge See then entered two Orders. She entered an Order dividing the Federal Pension, limiting Ms. Millikan's survivorship benefit to age 65, (Amended Civil Service Retirement and Survivor Annuity Benefits Order) on May 22nd, 2009. She entered another Order denying Ms. Millikan's Motion for Reconsideration, and she also amended, or altered, Judge Arrington's June 10th, 2008 Order regarding the Pension. Judge See forgave Mr. Chapman nine months after Judge

Arrington's Order and did not require Mr. Chapman to make up the difference between ½ of the gross and ½ of the net from September 1st, 2007 until March 10th, 2009. Ms. Millikan filed a Petition for Appeal with regard to these two issues with the Circuit Court of Hardy County.

On August 10th, 2009, Circuit Judge Jerry Moore rendered a decision upholding the rulings of the Family Court. It is from this decision and Order that Ms. Millikan appeals.

FACTS

John Chapman and Louise Millikan were married for 34 years. Mr. Chapman is a retired federal employee who earned his entire Federal Civil Service Retirement while the parties were married. Before Mr. Chapman retired, the parties made the joint decision that Ms. Millikan would receive the maximum survivor benefit from his pension, which was at the rate of 55%, in case Mr. Chapman died before she did. The maximum survivorship benefit for Ms. Millikan was in place, part of Mr. Chapman's retirement package when he filed for divorce. As a result of his Federal Employment, Mr. Chapman had not paid much into Social Security. His pension was vested and in pay status when he left Ms. Millikan and moved from the D.C. area to Hardy County, West Virginia.

The parties got divorced. There are two errors being appealed from the divorce that deal with his Federal Pension. The first error deals with whether, or not, Ms. Millikan is entitled to the 55% maximum survivorship benefit that was in place for her when Mr. Chapman retired. The second error deals with how much of the Federal Pension Ms. Millkian was entitled to from the time of the divorce hearing until the appropriate Federal Pension Division Order was entered.

Immediately after the August 24th, 2007 hearing, Judge Arrington issued a letter opinion. (See pages 35 - 39 of the record with the attachments) When counsel for the parties received the

letter opinion from Judge Arrington, they were back and forth discussing error in the letter opinion. On October 12th, 2007, the parties agreed to correct 16 errors in the letter opinion.

The letter opinion contains an attachment with a listing of the marital assets. Within that list of marital assets Judge Arrington included a $63,500.00 deed of trust indebtedness, clearly a debt, or negative asset. This single error created 14 other errors in the letter opinion. (See Item 11 on the marital property allocation attached to the August 24th, 2007 letter opinion Tr. 38)

Another of the agreed errors deals with the first assigned error in this Appeal. The letter opinion also limited Ms. Millikan's right to her survivorship benefit in the Federal Pension to her 65th birthday. It appears that Judge Arrington was somehow equating it with health insurance benefits, and not monthly retirement income. (See page 2, the 6th full paragraph of the August 24th, 2007 letter opinion Tr. 36) The Court concluded that at age 65 she would be eligible for Medicare and wouldn't need the pension. (What does medicare eligibility have to do with the need for retirement income?)

In September of 2007, the parties agreed that Ms. Millikan's 55% survivorship benefit would not be altered. Ms. Millikan volunteered to have a D.C. attorney prepare an Order dividing Mr. Chapman's pension pursuant to the agreement awarding her the maximum survivor benefit. This Pension Division Order was submitted to Attorney Judy in September of 2007. Mr. Chapman's counsel had been directed to prepare the other Order for the hearing. It can clearly be seen from the differences in the August 24th, 2007 letter opinion and its attachments, (See pages 38 and 39 of the record), and the August 24th, 2007 Order, and its attachments, (See page 62 and 63 of the record), that the agreed changes were made by Mr. Chapman's counsel, William Judy. Specifically, the Order places no limitation on Ms. Millikan's survivorship benefit,

whatsoever.

The August 24th, 2007 Order, also, ordered Mr. Chapman to pay Ms. Millikan ½ of the Federal Pension until an appropriate Pension Division Order was entered and its Plan Administrator began paying Ms. Millikan ½. (See paragraph V on page 60 of the record)

The Order of August 24th, 2007, denied Ms. Millikan spousal support, any award of attorney fees, and directed an improper credit to Mr. Chapman. Ms. Millikan appealed the portions of Judge Arrington's initial Final Order that weren't agreed errors that denied her spousal support, attorney fees, and awarded Mr. Chapman an improper credit for the D.C. house payments to the Circuit Court. Ms. Millikan did not appeal the limitation of the survivorship benefits. She understood, from the agreement in September, and the Order entered on October 24th, 2007, that didn't limit her benefit, that the parties were in agreement to leave her survivorship benefit as created, in tact. The Order prepared by Mr. Chapman's counsel, William Judy, and entered by Judge Arrington, does not limit her entitlement to the survivorship benefit, in any way. On Appeal, the Circuit Court corrected the improper credit for the house payments and remanded the case to the Family Court for reconsideration of the denial of spousal support and the denial of attorney fees directing the Family Court to consider the fault of Mr. Chapman in the dissolution of the marriage.

At the remand hearing, Judge Arrington awarded Ms. Millikan spousal support, but again denied her any award of attorney fees.

After the remand hearing, Mr. Chapman discharged his former counsel, William Judy, and hired Attorney Robert Aitcheson. In late February of 2008, Attorney Aitcheson prepared a Division Order for the Federal Pension, not as the parties had previously agreed upon with

Attorney Judy. It limited Ms. Millikan's survivor benefit to $1.00 per month if Mr. Chapman were to die. (See page 134 - 137 of the record)

Upon receipt of the Federal Pension Division Order in February of 2008, prepared by Attorney Aitcheson, drafted other than previously agreed upon, Ms. Millikan's counsel advised Attorney Aitcheson that the Division Order prepared was not as agreed upon and then, for the first time ever, learned that Mr. Chapman was maintaining that there was no agreement with regard to Ms. Millikan receiving in tact, the survivorship benefit of the Federal Pension. (Ms. Millikan believed in February of 2008, that the award of spousal support at the remand hearing, so infuriated Mr. Chapman that he denied the agreement with regard to the survivor benefit of the Federal Pension. Mr. Chapman appealed the award of spousal support back to the Circuit Court and was denied relief. He then Petitioned for Appeal to the West Virginia Supreme Court. His Petition was denied.)

Judge Arrington entered the Order limiting Ms. Millikan's survivor benefit to $1.00 per month, on March 5th, 2008. It was filed March 11th, 2008. It was later refused for deficiencies by the Plan Administrator.

When Ms. Millikan learned that the Order was entered and filed, Ms. Millikan, on March 24th, 2008, timely filed her objections to the Federal Pension Division Order, as drafted and entered, (See page 192 of the record), and filed a Motion for Reconsideration pursuant to Rule 25 of the Family Court Rules. (Tr. 194 - 200) She also filed a Motion for Contempt. (Tr. 171 - 174) Mr. Chapman was not paying her ½ of the gross Federal Pension since September 1st, 2007, as had been ordered by Judge Arrington in the August 24th, 2007, Order. (See page 5, paragraph V of the August 24th, 2007 Order, page 45 of the record)

On June10th, 2008, at the hearing on Ms. Millikan's Motions for Reconsideration and Contempt, Judge Arrington was advised that the March 5th, 2008, Pension Order entered had been refused by the Plan Administrator. He was further advised in the Motion for Reconsideration part of the hearing: that Ms. Millikan understood there was an agreement that she would receive the full survivorship benefit, that the Order, prepared by William Judy, Mr. Chapman's former counsel, did not limit her survivorship benefit; that the survivorship benefit, that had never been valued, was marital property; that the parties had planned, during their 33-year marriage, that the maximum 55% survivor benefit would be for Ms. Millikan's retirement income and security, if Mr. Chapman died before she did; that it wasn't just for health insurance; and that his decision was contrary to Ms. Millikan's property rights. It is believed that Judge Arrington had reviewed the Cross decision infra., and the Smith decision infra., that both set forth that a survivorship benefit is in fact marital property and subject to equitable distribution. The remarks of Judge Arrington during the June 10th, 2008 hearing, indicated that Ms. Millikan's Motion for Reconsideration would be granted by the former Family Court Judge. (See lines 11 - 15 of the June 10th, 2008 transcript, page 115)

Pursuant to Ms. Millikan's Contempt Petition, Judge Arrington ordered that Mr. Chapman was to begin paying Ms. Millikan ½ of the gross Federal Pension and not ½ of the net. Mr. Chapman was ordered to pay Ms. Millikan the monthly deficiency of $588.65 per month from September 1st, 2007, through June 1st, 2008. (See page 5 of the June 1st, 2008, Order, on the top of page 483 of the record)

As a result of the first two hours of the hearing being spent trying to eliminate Ms.

Millikan's counsel from representing her[1], and a medical appointment, the Court was unable to hear Mr. Chapman's evidence and arguments in opposition to Ms. Millikan's Motion for Reconsideration and the case was continued to allow Mr. Chapman that opportunity.

After the June 10th, 2008 reconsideration hearing, Mr. Chapman filed a Motion to Disqualify Judge Arrington from hearing the case. (See pages 658 - 672 of the record) As a result of a heavy docket, and medical appointments of Judge Arrington, the case could not be rescheduled for the continuation of the hearing until after the new Judge took office. As a result of redistricting, Hardy County came under the jurisdiction of newly elected Judge Amanda See.

Mr. Chapman still wasn't paying Ms. Millikan ½ of the gross pension. On February 23rd, 2009, Ms. Millikan filed a second Contempt Petition in this regard, setting it for hearing on March 10th, 2009, at the same time that the balance of Mr. Chapman's evidence was to be submitted pursuant to Ms. Millikan's Motion for Reconsideration. (See pages 703 - 706 of the record)

At the hearing on March 10th, 2009, Judge See made two rulings which Ms. Millikan appealed.

First, the new Family Court Judge denied Ms. Millikan's Motion for Reconsideration concerning the limitation of her survivorship benefits to age 65, and adopted as her ruling, the wording of the initial letter opinion of Judge Arrington, limiting her survivorship benefits to her 65th birthday, without consideration of the Motion for Reconsideration, not withstanding the Cross and Smith cases. Second, the Family Court Judge, without a pending pleading from Mr. Chapman, modified the ruling of Judge Arrington of June10th, 2008, with regard to Mr. Chapman paying Ms. Millikan ½ of the gross pension from September 1st, 2007. Instead of awarding Ms.

[1]Mr. Chapman, on June 10th, 2008, spent the first two hours of the hearing trying to have Ms. Millikan's counsel removed from the case, (See the last full paragraph of page 2 and the first full paragraph of the June 10th, 2008 Order, pages 480 and 481 of the record)

Millikan ½ of the gross pension, as had been ordered by Judge Arrington, Judge See altered the June 10th, 2008, Order directing the payment of ½ of the gross. Judge See forgave the nonpayment of ½ of the gross from September 1st, 2007, through March 10th, 2009, allowing Mr. Chapman to pay just ½ of the net, in effect requiring her to pay Federal and State income tax at a greater rate, ½ of his health insurance, and ½ of his life insurance. Judge See then ordered that Mr. Chapman start paying Ms. Millikan ½ of the gross amount of the Federal Pension, calling it "spousal support" so that it might be deducted from Mr. Chapman's income. The forgiveness of ½ of the gross amount, by Judge See, amounts to 17 months of receiving $588.65 less per month than ½ of the gross amount of the pension as ordered on August 24th, 2007, and on June 10th, 2008. This is $10,007.05 less than half of the pension for that period, and Ms. Millikan maintains that it is not equitable distribution.

Ms. Millikan appealed these decisions of the Family Court to the Circuit Court of Hardy County. (See pages 974 - 997 of the record)

On the 10th day of August, 2009, Judge Jerry Moore of the Circuit Court of Hardy County refused Ms. Millikan's Appeal and upheld the rulings of the Family Court. (See pages 1051 - 1063 of the record)

ASSIGNMENTS OF ERRORS

I. THE CIRCUIT COURT ERRED IN DENYING MS. MILLIKAN'S APPEAL OVER BEING DENIED EQUITABLE DISTRIBUTION OF THE SURVIVORSHIP BENEFIT OF THE FEDERAL PENSION AND ERRED IN UPHOLDING THE LIMITING LANGUAGE CONTAINED IN THE SECOND AMENDED CIVIL SERVICE RETIREMENT AND SURVIVOR ANNUITY BENEFIT ORDER ENTERED.

II. THE CIRCUIT COURT ERRED WHEN IT UPHELD THE FAMILY COURT'S

FORGIVENESS OF MR. CHAPMAN NOT PAYING UNTO MS. MILLIKAN ONE HALF OF THE GROSS AMOUNT OF THE FEDERAL PENSION RECEIVED FROM SEPTEMBER 1ST, 2007 THROUGH APRIL 14TH, 2009, AS HAD BEEN PREVIOUSLY ORDERED ON JUNE 10TH, 2008.

POINTS AND AUTHORITIES

THE CIRCUIT COURT ERRED IN DENYING MS. MILLIKAN'S APPEAL OVER BEING DENIED EQUITABLE DISTRIBUTION OF THE SURVIVORSHIP BENEFIT OF THE FEDERAL PENSION AND ERRED IN UPHOLDING THE LIMITING LANGUAGE CONTAINED IN THE SECOND AMENDED CIVIL SERVICE RETIREMENT AND SURVIVOR ANNUITY BENEFIT ORDER ENTERED.

Both the Family Court and the Circuit Court ruled that Ms. Millikan should be denied the survivorship benefits after her 65th birthday because she didn't appeal the limitation of the benefit in the August 24th 2007 Order.

When Judge Arrington's letter opinion of August 24th, 2007, was received, counsel for the parties, were back and forth regarding the errors contained therein. In September the parties agreed that Ms. Millikan's survivorship benefit would not be heard. Ms. Millikan pursuant to that agreement had a D.C. attorney prepare a Pension Division Order awarding her the maximum survivor benefit and submitted it to Mr. Judy for approval. (See page 992 - 997 of the record) On October 12th, 2007, the parties, finally, agreed to correct 16 errors in preparing the August 24th, 2007 Order. The 16 changes in the Order are as follows:

1. The 11th item on the Marital Property Allocation, a $63,500.00 debt, was removed from the asset column.

2. The total of the marital property was changed from $1,242,521.00 to $1,179.021.00.

3. The $63,500.00 debt was added to the debt column.

4. The total debt was changed from $193,500.00 to $257,000.00.

5. The net marital estate was changed from $1,049,021.00 to $922,021.00.

6. On the Marital Property Allocation Summary the allocation of retained marital property total was changed from $1,242.521.00 to $1,179,021.00.

7. The husband's share was changed from $743,145.00 to $679,645.00.

8. The total of the assumed marital debt was changed from $193,500.00 to $257,000.00.

9. The assumed marital debt for the husband was changed from $130,000.00 to $193,500.00.

10. The net marital property total was changed from $1,049,021.00 to $922,021.00.

11. The husband's net martial property was changed from $613,145.00 to $486,145.00.

12. The total net marital estate was changed from $1,049.021.00 to $922,021.00.

13. The husband's share of the net marital estate was changed from $524,510.50 to $461,010.50.

14. The wife's share of the net marital estate was changed from $524,510.50 to $461.010.50.

15. The cash payment to equalize equitable distribution, from the husband to the wife was reduced from $88,634.50 to $25,134.50.

16. There was no limitation of Ms. Millikan's survivorship benefit mentioned, or ordered, in the Order.

Mr. Chapman's former counsel prepared the Order for August 24th, 2007, making the 16 changes. The Order was signed on October 24th, 2007, and filed on October 30th, 2007. There are no words limiting Ms. Millikan's survivorship benefit in the Order, anywhere. (See the differences

between the August 24th, 2007 letter opinion, and its attachments, pages 38 - 39 of the record, and the August 24th, 2007 Order and its attachments, pages 62 and 63 of the record)

Ms. Millikan believed from the September 2007 agreement and the August 24th, 2007 Order prepared and filed October 30th, 2007, that her survivorship benefit was in tact, and was not going to be limited in any way. If there wasn't an agreement as represented, why would Mr. Judy, Mr. Chapman's then counsel, the lawyer assigned to prepare the Order, make all of the aforementioned changes, and leave out the limiting language in Judge Arrington's letter opinion dealing with the survivorship benefit when preparing the Order? Why would she have prepared a Division Order giving her the maximum benefit? If she had not believed there was an agreement, or if the Order of August 24th, 2007, had limited her survivorship benefit in any way, she would have appealed the limitation of the survivorship benefit. She appealed the erroneous Conrad Credit. She appealed the denial of spousal support. She appealed the denial of attorney fees. (See pages 48 - 49 of the record) It would have taken no extra time, or effort to appeal the limitation of the survivorship benefit if she didn't believe, and understand, from the agreement and Order that her survivorship benefit would remain in tact, particularly in light of the Cross and Smith decisions, infra.

In late February of 2008, when Ms. Millikan and her counsel learned from Mr. Chapman's new counsel that Mr. Chapman was maintaining that there was no agreement regarding the survivorship benefit, Ms. Millikan filed her objections to the limitations on the survivor benefit in the Pension Division Order and her Motion for Reconsideration of the limitation on the survivorship benefit. (See pages 192 - 200 of the record)

Rule 25 of the Family Court Rules provides for reconsideration of a Family Court Order.

WV Code 51-2A-10 provides the following allowable reasons for reconsideration: (1) mistake, inadvertence, surprise, excusable neglect, or unavailable case; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) clerical, or other technical deficiencies contained in the Order; or (5) any other reason justifying relief from the operation of the Order. The Motion must be filed within one year.

The Family Court and Circuit Court both ignored the reasons for allowing reconsideration when considering Ms. Millikan's Motion for Reconsideration saying that the limitation of Ms. Millikan's survivorship benefit should have been appealed. Ms. Millikan believes this is error. Why would Ms. Millikan appeal an agreement that was totally in her favor? Why would Ms. Millikan appeal the August 24th, 2007 Order when it didn't limit her survivorship benefits?

Was there a mistake? Certainly Ms. Millikan believed her survivorship benefits were to remain unaltered from September 2007, when the agreement was made, before the Order of August 24th, 2007 was prepared until after Mr. Judy was discharged and his new counsel in late February of 2008 prepared a Pension Division Order not in conformance with the agreement.

Was Ms. Millikan surprised in February of 2008 when the Pension Division Order appeared, limiting her survivorship benefits to $1.00 per month, instead of the maximum? For more than five months she believed that Mr. Chapman had agreed that her survivorship benefit would not be altered. The August 24th, 2007 Order didn't limit them in any way. His counsel said they wouldn't be altered. She submitted a Division Order awarding her the maximum.

Did Mr. Judy, Mr. Chapman's first attorney, somehow misrepresent what Mr. Chapman agreed to in September of 2007, before the Order of August 24th, 2007 was prepared, and entered, that wasn't discovered until the Division Order was prepared, in late February, limiting her

survivorship benefits? Certainly Ms. Millikan and her counsel understood, and believed there was an agreement, that her full survivorship benefit would remain in tact, otherwise, she would have appealed any part of the August 24th, 2007 Order limiting her benefit. In late February, Mr. Chapman's new attorney prepared an Order awarding Ms. Millikan a $1.00 per month survivorship benefit, with no mention of age. (Ms. Millikan in February believed that Mr. Chapman was denying the agreement because he was infuriated over her being awarded spousal support.) Later in June, Ms. Millikan learned, for the first time, at the June 10th 2008 hearing that Mr. Chapman, about six weeks after the divorce, had written the Office of Personnel Management directing that Ms. Millikan's survivorship benefit be reduced to $1.00 per month with the balance of the benefit going to his new wife of 13 days. (See page 991 of the record) This was not the parties' agreement. It isn't what was directed in Judge Arrington's letter opinion, either. (See the middle of the second page of the letter opinion, page 36 of the record)

Was there a clerical, or scrivener's error, in the preparation of the August 24th, 2007 Order that makes no mention of the survivorship benefit, or any limitation on the survivorship benefit for Ms. Millikan? Since there is no mention of the survivorship benefit, or an award of the survivorship benefit to either, or the denial of the benefit to Ms. Millikan, or words of limitation in the Order, it certainly appears there was at least a clerical, or scrivener's error, in the preparation of the August 24th, 2007 Order.

Are there other reasons that justify the relief requested in Ms. Millikan's Motion for Reconsideration of the limitation of the survivorship benefit? Yes, there are many and they follow.

1. The Cross and Smith decisions infra. tell us that this survivorship benefit is marital property subject to equitable distribution.

2. Ms. Millikan requested the survivorship benefit during the August 24th, 2007 hearing. (See pages 38 and 49, of the August 24th, 2007 hearing transcript) The benefit is marital property earned and acquired during the marriage.

3. Marital dollars are paying for the survivorship benefit. (See page 15 of Mr. Chapman's Response to Ms. Millikan's Petition for Appeal)

4. The Family Court has never valued the survivorship benefit. Ms. Millikan did not receive a lump sum payment through a cash settlement, or offset of other marital assets involved in exchange as Cross directs as the preferred method of equitable distribution. Mr. Chapman has indicated that its value may be as much as $700,000.00. (See page 985 of the record and Mr. Chapman's Response to Ms. Millikan's Petition for Appeal, on page 11)

5. The parties planned, during their 33-year marriage, that the survivorship benefit would be Ms. Millikan's retirement if Mr. Chapman died before she did. (See pages 48 and 49 of the August 24th, 2007 hearing transcript)

6. At the June 10th, 2008 hearing, from a letter introduced to the Court by Mr. Chapman, Ms. Millikan learned, for the first time, that on the 17th day of December, 2007, Mr. Chapman had written the Office of Personnel Management and directed that the survivorship benefit, but for $1.00 per month, be transferred to his new wife after being married to her for 13 days, removing all of the benefit, but $1.00 per month, from Ms. Millikan, his wife of 34 years. (See the December 17th, 2007 letter of Mr. Chapman, page 991 of the record) The wife of 13 days should not be entitled to the $700,000.00 benefit that the wife of 34 years had earned.

7. The Federal Pension Benefit, not the survivorship benefit, a marital asset, received by Mr. Chapman and Ms. Millikan has $500.00 deducted from it per month, to pay for the

survivorship benefit that Mr. Chapman directed to his new wife of 13 days. Ms. Millikan is receiving $250.00 less Federal Pension monthly, from her half, in order to pay for Mr. Chapman's new wife's survivorship benefit. (See page 15 of Petitioner's Response to Respondent's Petition for Appeal)

8. Mr. Chapman, as a federal employee, most of his work life, hasn't paid much into Social Security, so Ms. Millikan will not be able to file for Social Security benefits as a result of her 34 year marriage to Mr. Chapman.

9. If Mr. Chapman dies after Ms. Millikan turns 65, her share of the pension stops. Ms. Millikan will not receive the survivor income from the pension that the parties paid for, and planned, for her.

10. The Smith decision infra. directs that Ms. Millikan should receive the survivorship benefit of the plan for her retirement income if she outlives Mr. Chapman.

11. The Amended Civil Service Retirement and Survivor Annuity Benefits Order filed May 22nd, 2009, ends Ms. Millikan's retirement income and security, if Mr. Chapman dies after she reaches 65.

12. The August 24th, 2007 Divorce Order contains no language limiting Ms. Millikan's survivorship benefit, whatsoever.

What is the purpose of Rule 25, or Code 51-2A-10, if not to allow Ms. Millikan to bring to the attention of the Court the mistake, surprise, possible misrepresentation, clerical deficiencies, or the 12 other reasons justifying relief from the operation of the August 24th, 2007 Order that didn't limit her survivorship benefit?

The Family Court denied the Motion for Reconsideration, saying Ms. Millikan should have

appealed the August 24th, 2007 Order. The first Court Order, not refused by the Plan Administrator, limiting Ms. Millikan's survivorship benefit is the Amended Civil Service Retirement and Survivor Annuity Benefits Order from the March 10th, 2009, hearing, signed by Judge See, filed May 22nd, 2009. Prior to this Order, there is no Court Order limiting Ms. Millikan's survivorship benefit. There was no appealable Order, prior to the one filed May 22nd, 2009 that ever limited her survivorship benefit. On Appeal, Judge Moore upheld Judge See's ruling.

In the Cross decision, you held that the survivorship benefit is marital property subject to equitable distribution. Cross vs. Cross 178 WV 563, 363 SE 2nd 299 (1987) In the Smith decision, you remanded the denial of survivorship benefits to the Circuit Court of Mineral County with directions to award unto Mrs. Smith the survivorship benefit to protect her in the event of Mr. Smith's death. Smith vs. Smith 190 WV 402, 438 SE 2nd 582 (1993) Ms. Millikan's case should be no different.

In the instant case, the Family Court and the Circuit Court, in their decisions denying Ms. Millikan's Motion for Reconsideration, have ignored Rule 25 of the Family Court Rules and Code 51-2A-10. They have not followed well established law in equitable distribution. Under the Cross decision, the survivorship benefit is a martial asset that Mr. Chapman has valued as high as $700,000.00. It was not considered, or mentioned, in the Order of August 24th, 2007. Under the holding in the Smith case, Ms. Millikan should be awarded the maximum survivorship benefit. The reasons for reconsideration in 51-2A-10, set forth in this brief were ignored. The ruling of the Family Court, in this case, that was upheld by the Circuit Court, if allowed to stand, realistically, means that this martial asset, possibly worth as much as $700,000.00, is to be ignored

and if Mr. Chapman dies after Ms. Millikan reaches 65, his new wife gets the survivorship benefit and Ms. Millikan is cut off, placed on her own just when she would need the income that she and Mr. Chapman, for 34 years, planned for her retirement.

What the Family Court did and the Circuit Court upheld is error. This is almost the exact same situation that you corrected in the Smith case. Ms. Millikan is entitled to the full survivorship benefit pursuant to her Motion for Reconsideration after 34 years of marriage and not the new wife of 13 days.

THE CIRCUIT COURT ERRED WHEN IT UPHELD THE FAMILY COURT'S FORGIVENESS OF MR. CHAPMAN NOT PAYING UNTO MS. MILLIKAN ONE HALF OF THE GROSS AMOUNT OF THE FEDERAL PENSION RECEIVED FROM SEPTEMBER 1ST, 2007 THROUGH MARCH 10TH, 2009, AS HAD BEEN PREVIOUSLY BEEN ORDERED BY THE FIRST FAMILY COURT.

In the Order of October 24th, 2007, Mr. Chapman was ordered to pay Ms. Millikan ½ of the Federal Pension until such time that the Office of Personnel Management began paying Ms. Millikan her share directly, pursuant to an appropriate Federal Pension Division Order. (See paragraph V on page 5 of the August 24th, 2007 Order, page 60 of the record) The gross amount of the pension during this period was believed to be $4,485.00 per month. One half of that amount is $2,242.50. Mr. Chapman paid Ms. Millikan only $1,653.85 per month, $588.65 less than half.

Ms. Millikan filed a Motion for Contempt on March 17th, 2008, advising the Family Court that she was not receiving half of the gross amount, but half of the net amount. (See page 304 of the record) At the contempt hearing on June 10th, 2008, Mr. Chapman advised the Family Court

that from the gross amount he was having, automatically, deducted $314.47 monthly for his health insurance, which did not cover Ms. Millikan, $627.41 deducted monthly for Federal withholding under his Social Security number, (his tax rate was greater than hers), $200.00 deducted monthly for State withholding under his Social Security number, (his tax rate was greater than hers) and $35.43 per month for life insurance, when Ms. Millikan was not the beneficiary. (See the Order of June 10th, 2008, pages 481 and 482 in the record) Ms. Millikan now understands, from Mr. Chapman's Response to her Petition for Appeal, that an additional $500.00 is being withheld, from the pension, for the survivorship benefit that he has directed to be shifted to the new wife, if that part of her Appeal isn't granted. (See page 15 of Mr. Chapman's Response to the Petition for Appeal)

At the June 10th, 2008 hearing, Judge Arrington ordered Mr. Chapman to reimburse Ms. Millikan $588.65 per month for the time period from September 1st, 2007, when the parties were divorced until that hearing date, and beginning July 1st, 2008, he was ordered to pay her ½ of the gross amount. This was a Final Order. Mr. Chapman filed for reconsideration on August 5th, 2008. His Motion was denied September 10th, 2008. He did not appeal this ruling. (See pages 4 and 5 of the June 10th, 2008 Order, page 481 of the record)

After the June 10th, 2008 Order, Mr. Chapman still did not pay Ms. Millikan ½ of the gross amount. Ms. Millikan filed a second Contempt Petition, on February 23rd, 2009, and set it for hearing on the same day that the balance of Mr. Chapman's evidence on her Motion for Reconsideration was to be heard. (See page 703 of the record) On March 10th, 2009, nine months after Judge Arrington's June 10th, 2008, Contempt Order, newly elected Family Court Judge Amanda See, without any pending Motion from Mr. Chapman for relief, altered the June 10th,

2008, Order and forgave the nonpayment of ½ of the gross amount, based on tax evidence, and directed Mr. Chapman, effective March 10th, 2009, to start paying ½ of the gross amount, but then identified this payment as "spousal support" so that it could be deducted by Mr. Chapman from his income. (See page 4 of the March 10th, 2009 Order, pages 949 - 952 of the record)

What is wrong with this decision if allowed to stand?

1. Mr. Chapman had no pleading before the Court requesting this relief.

2. Ms. Millikan was realistically ordered to pay ½ of Mr. Chapman's health insurance, for 17 months, when he took her off the coverage.

3. Ms. Millikan was realistically ordered to pay ½ of Mr. Chapman's Federal tax on the pension, for 17 months, at a federal tax rate higher than her own.

4. Ms. Millikan was realistically ordered to pay ½ of Mr. Chapman's State tax on the pension, for 17 months, at a state tax rate higher than her own.

5. Ms. Millikan was realistically ordered to pay ½ of Mr. Chapman's life insurance premium, for 17 months, when she wasn't the beneficiary.

The action of the new Family Court Judge, which was upheld by the Circuit Court, forgives Mr. Chapman for the 17 months, between September 1st, 2007 and March 10th, 2009, of paying $588.65 less than half, per month, of the gross amount of the Federal Pension. During this time, Mr. Chapman received the benefit of $10,007.05 more from the pension than Ms. Millikan. The August 24th, 2007 Order and the June 10th, 2008 Order, that weren't appealed, directed ½ to each. This is not equitable distribution. This is not half. This is error.

Ms. Millikan is entitled to ½ of the gross amount of the Federal Pension during this time period.

RELIEF

WHEREFORE, Petitioner, Louise C. Millikan requests that the Honorable West Virginia Supreme Court of Appeals reverse and remand with directions to: amend the Amended Civil Service Retirement and Survivor Annuity Benefit Order to award Ms. Millikan, the Appellant the maximum survivorship benefit under Mr. Chapman's Federal Civil Service Retirement; award Appellant 50% of the Appellee's gross Federal Pension for the time period September 1st, 2007 through March 10th, 2009, plus interest at the legal rate; to award unto Appellant all of her reasonable attorney fees incurred involved with the Motion for Reconsideration and Contempt Petitions in the Family Court, the Appeal to the Circuit Court, and her Appeal to the West Virginia Supreme Court.

LOUISE C. MILLIKAN
By Counsel

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CERTIFICATE OF SERVICE

I, John G. Ours, counsel for the Respondent Below/Appellant, do hereby certify that I have served the foregoing APPELLANT'S BRIEF upon the Appellee by mailing a true copy thereof to his counsel, Mark W. Kelley, at his mailing address of 109 Capitol St., Suite 700, Charleston, WV 25301, by U.S. Mail, postage prepaid, on this the 11th day of August, 2010.

JOHN G. OURS