

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35665

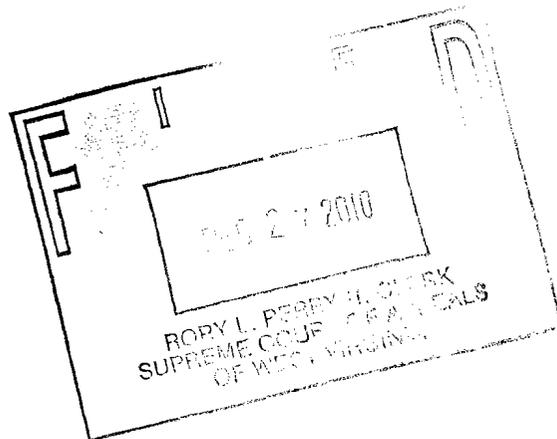
JOHN C. CHAPMAN,

Appellee/Petitioner below,

v.

LOUISE C. MILLIKAN,

Appellant/Respondent below.



BRIEF OF APPELLEE

Submitted by:

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II. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This is an appeal of a divorce case. More specifically, this is an appeal of an order of the Circuit Court of Hardy County, West Virginia, which was signed by the Hon. Jerry D. Moore on August 10, 2009 and entered by the Clerk on August 8, 2009. That order affirmed a decision of the Family Court of Hardy County, West Virginia which all parties (including the circuit court) have erroneously referred to as "the March 10, 2009" order.¹ Importantly, the proceeding before Judge See was not a final hearing in this divorce case. Rather, it was a hearing on (1) Appellant's *Motion for Contempt*; (2) Appellee's *Motion for Modification of Spousal Support*; (3) Appellant's *Motion for Reconsideration*; and (4) Appellant's "request for post-divorce attorney's fees." See "March 10, 2009" order².

¹The actual order in question was signed by Judge See on June 5, 2009 and entered by the Clerk on June 8, 2009. The hearing from which this order issued was held on March 10, 2009. However, since the circuit court's order and Appellant both refer to this as the "March 10, 2009" order, Appellee will use this designation to avoid confusion. The filings in this case are replete with inaccurate dates.

²Ms. Millikan's counsel filed a *Notice of Hearing* on February 23, 2010, attached to a *Motion for Contempt* and a *Motion for Attorney Fees* filed contemporaneously with the Notice.

Despite this case's convoluted factual and procedural history,³ Appellant Louise C. Millikan cites two errors on appeal. First, she claims that she was wrongfully denied a survivorship annuity from her former husband's Federal pension. Second, she claims that she is entitled to one-half of the gross amount of Appellant's pension payments received from the date of separation until the divorce was granted and that the lower courts improperly "forgave" some of the monies due her as a result of a contempt proceeding brought by Appellant.

As set forth below, Appellee contends that the lower courts' rulings were correct because: (1) the appeal on this issue is untimely, as she had previously appealed the *Final Order* that awarded her the former spouse survivorship benefit on other grounds and had not raised the former spouse survivorship benefit issue in that appeal; (2) Appellant received the relief she requested regarding Appellee's pension (in fact, she received slightly more); (3) having failed to timely appeal the *Final*

[Circuit Clerk Docket No. 142]. Mr. Chapman's counsel filed a *Notice of Hearing* that included ten (10) numbered matters. [Circuit Clerk Docket No. 144]. Ms. Chapman's counsel then filed a document titled *Respondent's Position Re: Petitioner's Notice of Hearing* filed on March 17, 2009 [Circuit Clerk Docket No. 148]. Judge See ruled on the issues listed in the "March 10, 2009" order, and deemed that any motion not ruled upon was denied.

³This case has involved four lawyers (including Appellee's current counsel), two family court judges, two circuit court judges, and a prior unsuccessful appeal to this Court.

Order in regard to the pension issue, she improperly tried to "appeal" the issue through a motion for reconsideration; and (4) the lower courts properly corrected an oversight in the *Final Order* regarding payment of post-separation pension payments by taking the tax consequences into effect.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellee John G. Chapman and Appellant Louise C. Millikan were married on September 16, 1973 and separated on or about December 8, 2005. Mr. Chapman had been employed by the federal government, and is a participant in the Civil Service Retirement System ("CSRS"), which is administered by the United States Office of Personnel Management ("OPM"). Ms. Millikan had worked for 23 years at the National Geographic Society and will receive a pension from the Society.

At the time the parties separated, Mr. Chapman had retired from federal service and was (and is today) receiving his federal pension payments.

A final hearing was held on August 23, 2007. The Hon. Roy David Arrington presided. The day after the final hearing, Judge Arrington issued a letter opinion [hereafter *Letter Opinion*] which was entered by the Clerk on August 28, 2007 [Circuit Clerk Docket No. 14]. The *Letter Opinion* contained rulings on apparently all issues that were before the court at the final hearing. Attached to the *Letter Opinion* was a two-page

document entitled "Marital Property Allocation: Distribution of Property."

Of relevance to this appeal, the *Letter Opinion* states in part:

"Each party has a pension with undetermined current values. Therefore QDROs, or their equivalents, must be prepared to divide these marital assets. Ms. Millikan's National Geographic pension will not begin paying until she is age 65. The anticipated payments will be approximately \$1,100 per month. Mr. Chapman's federal pension has paid him \$89,145.00 (approximately \$4,200 per month) following the separation of the parties for which Ms. Millikan did not receive any portion. These payments are marital property."

* * * *

"Currently, the parties have very good health insurance at very low cost. Ms. Millikan may remain on the plan if she receives a portion of Mr. Chapman's pension and she remains the survivor on the pension. The Court orders that Ms. Millikan remain as the survivor on the pension until she becomes qualified for Medicare at age 65."⁴

* * * *

"QDROs shall be prepared for the parties' respective pensions."

* * * *

"Mr. Judy⁵ shall prepare an order consistent with this letter opinion."

Letter Opinion, p. 2.

⁴A Civil Service Retirement System former spouse survivor annuity may be terminated upon a date established under the terms of the court order. CSRS and FERS Handbook, United States Office of Personnel Management, <http://www.opm.gov/retire/pubs/handbook/C074.pdf> Section 74A1.1-4

⁵Attorney William H. Judy represented Mr. Chapman at this stage of the proceedings.

A written Order [hereafter *Final Order*] was then signed by Judge Arrington on October 24, 2007 and entered by the Clerk the same day. [Circuit Clerk Docket No. 16]. The portions of that order which are relevant to this appeal are as follows:

"m. Both parties have a pension. [Mr. Chapman's] pension is from the Federal Government and [Ms. Millikan's] is from the National Geographic Society, which pension will not commence to pay until [she] is 66 years of age;

n. [Mr. Chapman] received \$89,145.00 in pension payments since the separation of the parties, of which none was divided to [Ms. Millikan];"

* * * *

"t. QDRO's [sic] or COAP should be prepared for each of the parties['] respective pensions; and"

* * * *

"v. [Mr. Chapman] should pay one-half of [his] Federal Retirement directly to [Ms. Millikan] until such time as the Office of Personnel Management commences to paying [Ms. Millikan] her half."

Final Order, pp. 3 and 5.

After directing the parties to divide these and other portions of the marital estate, and making other rulings relevant to the divorce, the *Order* stated as follows:

"This is a Final Order, and any party aggrieved by this Final Order may take an appeal either to the Circuit Court or directly to the Supreme Court[.]"

Id., at p. 6.

A. The Survivor Annuity.

Ms. Millikan filed an appeal [hereafter *Petition for Appeal to the Circuit Court*] of the *Final Order* on November 21,

2007 [Circuit Clerk Docket No. 17]. The appeal cited errors dealing with the improper allocation of a "Conrad" credit, see *Conrad v. Conrad*, 216 W. Va. 696, 612 S.E.2d 772 (2005), and the denial of Ms. Millikan's claims for attorney's fees and spousal support. Importantly, Ms. Millikan's appeal did **not** raise any issues regarding the former spouse survivor annuity. [*Petition for Appeal to the Circuit Court*, pp. 2-3]. After hearing the appeal, Circuit Court Judge Cookman signed an order on December 7, 2007 (which was entered by the Clerk on December 11, 2007) correcting the alleged "Conrad" credit errors, and then remanded the case to the family court to reconsider the denial of attorney's fees and spousal support. [Circuit Clerk Docket No. 23].⁶ On remand, the family court again denied Ms. Millikan's request for attorney's fees but granted her request for spousal support. This was contained in an order signed by Judge Arrington on January 16, 2008 and entered by the Clerk on February 5, 2008 [Circuit Clerk Docket No. 30].⁷

It is at this point that this case becomes very confusing from a procedural standpoint.

⁶By *Notice of Appearance* filed January 31, 2008, attorney Robert D. Aitcheson replaced Mr. Judy as Mr. Chapman's counsel. [Circuit Clerk Docket No. 26].

⁷Mr. Chapman then appealed the award of spousal support on March 5, 2008, and that appeal was subsequently denied by the circuit court by an order dated July 10, 2008, entered on July 14, 2008. [Circuit Clerk Docket No. 91]. That order is not relevant to this appeal.

A Civil Service Retirement and Survivor Annuity

Benefits Order, the so-called COAP,⁸ was circulated with a Rule 22⁹ Notice on February 20, 2008 (filed by the Circuit Clerk on February 22, 2010). [Circuit Clerk Docket No. 31]. The COAP was signed by Judge Arrington on March 5, 2008 and entered by the Clerk on March 11, 2008 [Circuit Clerk Docket No. 36]. This original COAP awarded Ms. Millikan one-half of Mr. Chapman's pension payment during his lifetime, and additionally awarded her

⁸The term COAP is used here instead of the term QDRO. Retirement benefits under the CSRS are specifically exempt from the Employee Retirement Security Act (ERISA) 29 U.S.C. §§ 1003(b)(1) and 1051 of Title 29, as a "governmental plan" as defined in § 1001(3) of Title 29 of the United States Code. Under ERISA, a pension plan is divided using a Qualified Domestic Relations Order ("QDRO"); under the CSRS, the equivalent of a QDRO is a Court Order Acceptable for Processing ("COAP"). "A QDRO is a creation of [ERISA] which specifically exempts [Civil Service Retirement System] and [Federal Employees Retirement System] benefits from its application." *Brown v. City of Fairmont*, 221 W.Va. 541, 544, 655 S.E. 2d 563, 566 (2007) (quoting *Barrett v. Barrett*, 202 W.Va. 424, 426, 504 S.E.2d. 659, 661 (1998)).

⁹Rule 22(b) of the Rules of Practice and Procedure for Family Court states, in pertinent part: "In proceedings in which one or both parties are represented by attorneys, the court may assign one or more attorneys to prepare an order or proposed findings of fact. An attorney assigned to prepare an order or proposed findings shall deliver the order or findings to the court no later than ten days after the conclusion of the hearing giving rise to the order or findings. Within the same time period the attorney shall send all parties copies of the draft order or findings together with a notice which informs the recipients to send written objections within five days to the court and all parties. If no objections are received, the court shall enter the order and findings no later than three days following the conclusion of the objection period. If objections are received, the court shall enter an order and findings no later than ten days after the receipt of the objections."

a former spouse survivor annuity in the amount of \$1.00 per month. [Circuit Clerk Docket No. 39]. The \$1.00 a month award is legally significant because it permits Ms. Millikan to receive Federal health insurance benefits.¹⁰

Although the timeline here is extremely confusing, it appears from a review of the docket sheet and the court filings made around that time, that Ms. Millikan's counsel filed *Respondent's Objections to the Proposed Civil Service Retirement and Survivor Benefit Order* on March 17, 2008. Mr. Chapman's counsel then submitted on March 17, 2008, via Rule 22, an amended COAP that granted Ms. Millikan the full former spouse survivor

¹⁰Under the Civil Service Retirement Spouse Equity Act of 1984 (Pub. L. No. 98-615, 98 Stat. 3195 ((5 U.S.C. § 8905)), former spouses of Federal employees, former employees, and annuitants qualify to enroll in a health benefits plan under the Federal Employees Health Benefits (FEHB) Program. The Act requires, *inter alia*, that to receive the federal health insurance, the former spouse must be entitled to a portion of the Federal employee's annuity or to a former spouse survivor annuity. 5 U.S.C. § 8901 *et seq.* The award of a former spouse survivor annuity in the amount of \$1.00 is sufficient to maintain FEHB health insurance for the former spouse (See 5 C.F.R. §§ 838.133 and 898.803(a)(3)(I), and [A Handbook for Attorneys on Court-ordered Retirement, Health Benefits and Life Insurance CSRS, FERS, FEHB, and FEGLI](#), United States Office of Personnel Management, www.opm.gov/retire/pubs/pamphlets/ri38-116.pdf, Subpart H -Benefits for Former Spouses. The continued health insurance is thus absolutely contingent upon the former spouse receiving some portion of the pension as it is paid; if the former spouse is to continue to have access to the FEHB beyond the death of the federal retiree, then some portion of the former spouse annuity must also be awarded.

annuity until she attains the age of 65¹¹, and an additional survivor annuity of \$1.00 per month after she attains the age of 65.¹²

Ms. Millikan filed *Respondent's Objections to the Amended Civil Service Retirement and Survivor Benefit Order* on March 24, 2008. [Circuit Clerk Docket No. 45] She then filed a *Motion for Reconsideration* on March 25, 2008. [Circuit Clerk Docket No. 47]. That motion, among other things, alleged that the COAP was defective because it did not reflect an agreement of the parties to grant Ms. Millikan a full former spouse survivorship annuity, meaning that she would continue to receive the full annuity until her death. This document is important because it constitutes the pleading in which Ms. Millikan first claimed that there was an error in the family court's *Letter Opinion* of August 24, 2007. Ms. Millikan's motion then goes on

¹¹By *Notice of Appearance* filed January 31, 2008, attorney Robert D. Aitcheson replaced Mr. Judy as Mr. Chapman's counsel. [Circuit Clerk Docket No. 26]. It is possible that Mr. Chapman's then-new counsel, in acquiescing to Ms. Millikan's request to extend the survivor benefit by \$1.00 per month after her age 65, misunderstood the request and drafted the initial COAP without the full former spouse survivor annuity to her age 65 and the \$1.00 annuity thereafter. On March 17, 2008, the day that she filed her *Objections* to this first COAP, he immediately submitted the *Amended Civil Service Retirement and Survivor Benefit Order* to the Court with a Rule 22 notice, having made the modification to a full annuity to age 65 and \$1.00 per month thereafter.

¹²According to the Family Court's *Order* of June 5, 2009 [Circuit Clerk Docket No. 175], the original COAP was rejected on technical grounds (for lack of the parties' Social Security numbers and the plan number).

to assert that counsel had previously "agreed" to correct the "error." In her motion, Ms. Millikan writes:

1. When the Family Court's letter opinion regarding the August 25th [sic] hearing, was received by counsel, counsel for the parties reviewed the letter decision and after reading the same, with no disrespect to the Family Court, determined there were several errors in the opinion, which counsel agreed to try to resolve, before preparing the Order, Petitioner's then counsel having been assigned the duty of preparing the Order. Counsel agreed that the errors contained in the letter opinion were as follows:

* * * *

D. About in the middle of the letter opinion, the Family Court directed that the full survivorship benefit of the Federal Pension be reduced so that the Respondent remained as the survivor only until attaining the age of 65 and becoming qualified for Medicare. Respondent's counsel, on behalf of Respondent urged Petitioner, notwithstanding [sic] this limitation, to agree that Respondent would have the full survivorship benefit[.]¹³

Id.

On March 27, 2008, Mr. Chapman filed *Petitioner's Response to Objection to Amended Civil Service Retirement and Survivor Benefits Order Submitted Under Rule 22(b) Notice Served March 17, 2008* [Circuit Clerk Docket No. 50]. In this response, Mr. Chapman's counsel stated that the COAP as filed¹⁴ "actually goes beyond the ruling of the Court to the benefit of Ms. Millikan. The Court did not order that she would have any

¹³The remainder of this paragraph simply contains Ms. Millikan's rationale for believing she should receive the survivorship annuity after age 65.

¹⁴This apparently refers to the amended COAP submitted on March 17, 2008 and not the original COAP that the family court judge entered on March 11, 2008.

portion of the survivor benefits beyond her age 65. Mr. Chapman voluntarily included this provision...." He further acknowledged that "[t]he parties did not come before the Court and the Court did not approve any such change but Mr. Chapman included it to benefit Ms. Millikan. If [Ms. Millikan] wants the COAP to be entirely consistent with the Court's ruling so be it, but then she would have no ability to obtain the health insurance under the Federal plan after her age 65."

Significantly, in order to rebut Ms. Millikan's assertion that the partes had agreed to grant her a full former spouse survivor annuity past the age of 65, Mr. Chapman's counsel attached to the response a letter from Ms. Millikan's counsel dated September 28, 2007 (which was written between the time of the August 24, 2007 *Letter Opinion* and the October 24, 2007 *Final Order*), in which, among other things, Ms. Millikan's counsel actually requested that the annuity be \$1.00 per month after age 65, not the full survivorship annuity, concluding:

"It seems to me that **given the Order the Judge has made**, Mr. Chapman's only concern would be whether or not a second wife would be able to have the benefit of a survivor's annuity. It would seem to me that if that is his concern, **the new wife ought to be able to have all of the survivor annuity, except \$1.00** and the benefits that go with annuity. Ms. Millikan would have the same benefits, but only receive \$1.00 per month. It just seems that **since the Judge has made the Order as he has, Mr. Chapman wouldn't mind the loss of \$12.00 a year** to know that his exwife [sic] would have the benefits that go with the federal retirement for the rest of her life, after he is gone."

Id. [Emphasis added].

Ms. Millikan's *Motion for Reconsideration* was initially heard on June 10, 2008, at the same time the court heard other matters that were noticed for that day. After hearing some of the issues, the court continued the hearing, without rendering a decision on the COAP issue, to a future date because the judge was scheduled for cataract surgery the following day. [Circuit Court Docket No. 87].

B. The contempt petition over pre-COAP pension payments.

In the meantime, on March 17, 2008¹⁵, Ms. Millikan filed a *Motion for Contempt* alleging that Mr. Chapman was not paying Ms. Millikan the appropriate portion of his pension payments.

Pursuant to the *Final Order*, pending the entry of COAP and the commencement of direct payments to Ms. Millikan, Mr. Chapman was paying Ms. Millikan one-half of his monthly pension payment. Mr. Chapman was paying her one-half of his net after deductions. Ms. Millikan's contempt petition alleged that he should instead be paying her one-half of his gross. The *Final Order* is silent on this issue.

At the hearing on June 10, 2008, Judge Arrington

¹⁵The Circuit Clerk Docket Sheet does not reflect that this document was filed, but does show that several other pleadings were filed on that date. The *Certificate of Service and Notice of Hearing* attached to the *Motion for Contempt* indicate that it was served by mail on March 14, 2008.

declined to find Mr. Chapman in contempt, but ruled that he should be paying Ms. Millikan one-half of the gross. The written order from that hearing, signed by Judge Arrington on July 2, 2008 and entered by the Clerk on July 8, 2008 [Circuit Clerk Docket No. 87] indicates that the tax issues were raised at that hearing. However, Judge Arrington made no specific rulings on the tax issue, and instead the written order concludes as follows:

Thereupon the Family Court advised the parties that the Family Court was undergoing cataract eye surgery the following morning and that it would be necessary for the Court to adjourn and continue the Motion for Reconsideration of the COAP and QDRO to a future date, and adjourned and continued the hearing, subject to being replaced on the Court's docket by either party.¹⁶

On August 5, 2008 Mr. Chapman filed a *Motion for Reconsideration* seeking credit for the tax liability that he was paying on the monies that he was ordered to split with Ms. Millikan. [Circuit Court Docket No.93]. That motion was summarily denied by an Order dated September 10, 2008 [Circuit Court Docket No. 109].

Ms. Millikan then filed a second contempt petition on February 23, 2009. [Circuit Court Docket No. 142].

¹⁶Ms. Millikan refers to the ruling on the gross v. net issue as a final order. However, this order was not a final appealable order because it did not dispose of all the issues, and it did not contain the requisite language to be such an order, pursuant to Rule 22(c) of the Rules of Practice and Procedure for Family Court.

C. Judge See's rulings.

Due to various scheduling conflicts, the hearing on the matter of the COAP was continued several times, and in the meantime, a redistricting apparently occurred in the family court system. Amanda See was elected as a Family Court Judge in Hardy County.

On March 10, 2009, a hearing was convened by Judge See, and the order reflects that the issues to be heard that day were Ms. Millikan's "Motion for Contempt against [Mr. Chapman] for not paying her health insurance premiums pending entry of a COAP dividing [Mr. Chapman's] pension and for paying her one-half ($\frac{1}{2}$) of the net amount of the pension versus the gross amount, and tax issues attendant thereto, . . . [Ms. Millikan's] Motion for Reconsideration with respect to former spouse survivor benefits[.]"¹⁷

At the March 10, 2009 hearing, Judge See made specific findings of fact regarding the COAP and the omission in the *Final Order* of Judge Arrington's ruling in the *Letter Opinion*.

"I am going to find based upon that - I mean, does anybody want to - based upon the representations of counsel and review of the record there is a letter opinion that appears to be fairly crystal clear. It is not directly addressed in the - there is nothing really put into the order with respect to any limitation other than what's in the letter opinion that was provided. Counsel reviewed it. Everybody agreed with the order."

¹⁷In addition to Ms. Millikan's issues, Mr. Chapman was seeking a modification of his spousal support obligation.

DVD of March 10, 2009 hearing, at 1:43:03 p.m.

She continued:

"I have no doubt in my mind that even if you didn't know what the ruling was at the hearing in August or whenever that hearing was, August 24, 2007 or August 2007, it was clear in there how that was to go and so the COAP will be drafted in accordance with the Court's ruling in [the] 8-24-07 letter."

Id., at 1:44:13 PM.

On June 5, 2009, Judge See signed a twelve-page Order from that hearing (which was entered by the Clerk on June 8, 2009) [Circuit Clerk Docket No.175].¹⁸ She concluded that

[t]he Family Court ruled on this issue on August 24, 2007; it was not appealed by the Respondent when the issue should have been raised and accordingly, this Court is of the opinion that the Respondent's Motion for Reconsideration with respect to the former spouse survivor benefits should be denied.

Id., at ¶ 7, p. 6.

¹⁸Ms. Millikan's brief states that "Judge See then entered two Orders. She entered an Order dividing the Federal Pension, limiting [the] survivorship benefit to [Ms. Millikan's] 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." *Appellant's Brief*, p. 5. This allegation is inaccurate. The "June 10th, 2008 Order" was the Order entered on July 8, 2008 from the hearing that was continued; this order was not a final, appealable order. In the "June 10th, 2008 Order," Judge Arrington continued the matter of the COAP and the award of the survivor benefit. Judge See properly took up the motion in March 2009. As is discussed below, what Judge See did should not be described as "amending or altering" a final, appealable order of Judge Arrington regarding the pension or the survivorship benefit. To be accurate, Judge See corrected an omission or oversight in the *Final Order*, after properly consulting the record.

In regard to the tax issue, at this hearing, Judge See considered the testimony of a certified public accountant regarding the tax consequences of dividing a pension payment which was being paid solely to Mr. Chapman, and the tax consequences he would bear as a result. Judge See concluded that:

At the outset, it is clear that it is not fair to Mr. Chapman for him to pay one-half of the gross amount of his Federal pension to [Ms. Millikan], but has to bear all of the taxes on the total gross amount. This would leave [Mr. Chapman] with considerably less than half of his Federal pension and [Ms. Millikan] with considerably more than half.

Id., at ¶ 9, p. 3. After considering the options proposed by the certified public accountant¹⁹ to correct this inequity, Judge See

¹⁹Judge See summarized this testimony as follows:

"10. Mr. Apple testified that one of the ways this matter could be handled is for Mr. Chapman to receive the entire check (until the COAP is accepted by the Office of Personnel Management and payments to Ms. Millikan are made directly). Mr. Chapman would then report the entire gross taxable amount of his pension on his return, calculate and pay all Federal and State taxes and claim credit for all taxes withheld. Ms. Millikan would not report any amount on her return."

11. The other method would be for Mr. Chapman to pay Ms. Millikan one-half of the gross amount of his monthly retirement check, report the entire gross taxable pension [on] his return and take a spousal support deduction for the full amount paid to Ms. Millikan. The net effect to Mr. Chapman would be the same as reporting one-half of the taxable gross on his return. Ms. Millikan would have to report the other half of the taxable gross on her return as spousal support income. Each would calculate and pay the Federal and State income taxes on their own half. Mr. Chapman would then claim all taxes withheld and should receive a refund of some of those taxes to supplement the less than one-half of the net he received after payment Ms. Millikan one-half of the gross."

decided that, commencing April 1, 2009, the best method would be for Mr. Chapman to claim the payments to Ms. Millikan as spousal support, thus providing a tax deduction to him for the payments made and constituting income to her for tax purposes. *Id.*, at ¶¶ 10, 11 and 15, pp. 3-4. Judge See specified that she was not changing Judge Arrington's prior ruling, but she was going to provide for the tax consequence where no ruling had previously been made on that issue. *Id.*, at ¶¶ 15 and 18, pp. 4 and 5.

D. The circuit court appeal.

From Judge See's rulings, Ms. Millikan filed her second appeal to the Circuit Court of Hardy County on June 17, 2009. Ms. Millikan at this time appealed Judge Arrington's award of the survivor benefit, and Judge See's decision regarding the allocation of tax consequences on Mr. Chapman's pension payments²⁰. A hearing was held before Judge Jerry D. Moore on August 3, 2009. Judge Moore entered an *Order* on August 11, 2009 [Circuit Court Docket No. 188], in which he affirmed Judge See's order of June 8, 2009. In a well-reasoned opinion, the circuit court found that there was no evidentiary support for Ms. Millikan's alleged agreement, that courts speak through their

Id., at ¶¶ 10 and 11, p. 3.

²⁰Mr. Chapman filed a *Reply to Petition for Appeal and Cross-Petition* on July 2, 2009. Any issues raised in his *Cross-Petition* that were disposed of in the *Order* entered on August 11, 2009, which are not germane to the instant appeal will not be discussed in this brief.

orders, that the family court's orders did not grant Ms. Millikan the surviving spouse annuity beyond age 65, and that Ms. Millikan did not appeal that denial.

As to Judge See's ruling on the tax issue, the circuit court thoroughly reviewed the family court's rulings on this issue, quoted extensively from that court's findings, and concluded that "When the tax consequences of this issue were finally considered by Judge See on March 10, 2009, the new presiding judge was confronted with the task of rendering a decision on an issue which had simply been ignored by the previous Family Court judge." *Id.*, at p. 10. The circuit court then further concluded that Judge See "made detail [sic] findings of fact that corrected the prior Orders of Judge Arrington. Again, this court cannot find the Family Court's Order of March 10, 2009, contained findings of fact which were clearly erroneous, or that the Family Court abused its discretion of applying the law to the facts." *Id.*, at p. 11.

It is from this *Order* that Ms. Millikan appeals.

Additional facts related to the issues on appeal are set forth below.

IV. RESPONSE TO ASSIGNMENT OF ERRORS

- A. Ms. Millikan's appeal should be denied as untimely.
- B. Ms. Millikan received in the *Letter Opinion* and *Final Order* the exact relief she requested, thus any error was "invited" and cannot now be corrected.

- C. The circuit court did not abuse its discretion in affirming the family court's denial of the *Motion for Reconsideration*.
- D. The Family Court did not err in addressing the tax consequences regarding Mr. Chapman's post-separation and pre-COAP benefits because this issue was completely omitted from the *Letter Opinion* and *Final Order*, and family courts are required to address the tax consequences of property and spousal support awards. Moreover, the Family Court's ruling on this issue was legally sound.

V. DISCUSSION OF LAW

A. Ms. Millikan's appeal should be denied as untimely.

Although this case is factually and procedurally confusing, at its core it is clear that Ms. Millikan's appeal is untimely. The relief that Ms. Millikan seeks is from the *Final Order* of October 24, 2007, as supplemented by the *Letter Opinion* of August 24, 2007. As detailed above, Ms. Millikan filed an appeal of the *Final Order*, but did not cite any error in regard to the survivor annuity issue.

Ms. Millikan did not raise any issue about the annuity in court until the *Motion for Reconsideration* was filed on March 25, 2008. That motion only seeks reconsideration of the COAP. However, the COAP is not the order that determined Ms. Millikan's rights in Mr. Chapman's pension; rather, it was simply the order that carries out the court's rulings in that regard.²¹ "The

²¹Furthermore, after the retirement of a Federal employee, the right to a CSRS former spouse survivor annuity - in any amount - must be awarded in the first order dividing any marital property whatsoever. "[5 U.S.C.] [S]ection 8341(h)(4) provides

entry of a QDRO is not a form of relief itself but, rather, is a means to carry out the equitable distribution of marital property." *Patricia A.M. v. Eugene W. M.*, 24 Misc.3d 1012, 1014 885 N.Y.S.2d 178, 181 (N.Y. Sup. Ct. 2009). Furthermore, "A proper QDRO obtained pursuant to a stipulation of settlement can

that a modification in a divorce decree or court-approved property settlement is not effective if it is made after the employee's retirement or death and involves an annuity. The OPM regulations make the same point quite explicitly. See 5 C.F.R. § 838.806(a) (stating that '[a] court order awarding a former spouse survivor annuity is not a court order acceptable for processing if it is issued after the date of retirement or death of the employee and modifies or replaces the first order dividing the marital property of the employee or retiree and the former spouse.'). The regulations also state that '[f]or purposes of awarding a former spouse survivor annuity ... the court order must be ... [t]he first order dividing the marital property of the retiree and the former spouse.' *Id.* § 838.806(b). Moreover, the regulations make clear that the first order does not include '(i) Any court order that amends, explains, clarifies, or interprets the original written order regardless of the effective date of the court order ... or (ii) Any court order issued under reserved jurisdiction or any other court order issued subsequent to the original written order that divides any marital property regardless of the effective date of the order.' *Id.* § 838.806(f)(2)." *Warren v. Office of Personnel Management*, 407 F.3d 1309, 1315 (Fed. Cir. 2005). "[5 C.F.R.][§ 838.]1004 goes on to define the 'first order dividing the marital property of the retiree and former spouse'...as...(A) The original written order that first ends...the marriage **if the court divides any marital property** (or approves a property settlement agreement that divides any property) **in that order, or in any order issued before that order**" *Rafferty v. Office of Personnel Management*, 407 F.3d 1317, 1319 (Fed. Cir. 2005). Thus, under Federal law governing the CSRS, Ms. Millikan's instant appeal may be moot as preempted by federal law. Mr. Chapman retired well before any order was issued dividing property. Both the *Letter Opinion* and the *Final Order* in this case awarded marital property, and any subsequent order or amendment to whichever of those is deemed to be the "first order dividing the marital property" would be considered a prohibited modification of that first order.

convey only those rights to which the parties stipulated as a basis for the judgment ... Thus, for example, a court errs in granting a domestic relations order encompassing rights not provided in the underlying stipulation ... or a QDRO more expansive than an underlying written separation agreement." *Id.*, citing *McCoy v. Feinman*, 99 N.Y.2d 295, 755 N.Y.S.2d 693, 785 N.E.2d 714 (2002).

Here, Ms. Millikan has attacked the wrong order. The substantive order at issue is the *Final Order*, as supplemented by the *Letter Opinion*, not the COAP that simply implemented the division of property set forth in the *Letter Opinion*. Ms. Millikan should have appealed the *Final Order* on this issue, as she did other issues, but she did not. For these reasons, Mr. Chapman submits that Ms. Millikan's appeal is untimely.

B. Ms. Millikan received in the *Letter Opinion* and *Final Order* the exact relief she requested, thus any error was "invited" and cannot now be corrected.

During the final hearing, Judge Arrington had made comments suggesting that given the parties' significant assets, he was inclined to offset the parties' respective pensions with other assets, as opposed to dividing the pensions. He stated that he "generally liked to leave pensions intact." He continued,

"You know, you have personal property, real estate, to try to balance out the values. And rather than say you get half of his and he gets half of yours, it is a lot easier if

value is given instead of split the pensions."

Transcript of August 23, 2007 hearing, p. 23. [Circuit Court Docket No. 111].

Ms. Millikan, however, wanted the pensions - especially Mr. Chapman's pension - divided, and testified as to why she preferred that method:

Q: Can you tell the Court whether or not you would be entitled to that health benefit without receiving half of the pension and the survivor annuity?

A: I can receive less than half of the pension, but I cannot go without the survivor annuity [sic], it is called a former spouse survivor annuity, that entitles me to the federal insurance which is what I have been on. (Pp. 39-40).

Q: Have you studied closely this federal pension and annuity as a result of this pending divorce?

A: Indeed I have.

Q: For *the purpose of* determining what you have to have from it *in order for you to have these [health] insurance benefits?*

A: Yes.

Q: Now, I want to ask you again; *I want you to tell the court*, what do you have to have from this federal annuity pension of your husband in order for you to have health insurance after this divorce?

A: I have to have a former spouse annuity and participate in the pension now.

Q: All right, without it...

A: No insurance.

Q: No health insurance.

A: No.

Q: And you would be going onto or into the health insurance market at age 61?

A. Uh -huh.

Q: I am embarrassed, I don't know the - when is one eligible for medicare?

A: 65."

Id., at pp.40-42. [Emphasis added].

Her counsel asked her for further details about the federal health insurance associated with Mr. Chapman's pension, which she answered. He then asked, "And that is where you are until medicare, which is four years away?" "A: Uh-huh." *Id.*, at p. 43.

The *Letter Opinion* from Judge Arrington that then followed granted Ms. Millikan **exactly** what she asked for:

"Currently, the parties have very good health insurance at very low cost. Ms. Millikan may remain on the plan if she receives a portion of Mr. Chapman's pension and she remains the survivor on the pension. The Court orders that Ms. Millikan remain as the survivor on the pension until she becomes qualified for Medicare at age 65."

* * * *

"QDROs shall be prepared for the parties' respective pensions."

* * * *

"Mr. Judy shall prepare an order consistent with this letter opinion."

Letter Opinion, p. 2.

Only after the fact did Ms. Millikan decide that she needed the annuity to continue after age 65 at the rate of \$1.00

month. This is confirmed by her counsel's letter of September 28, 2007:

"It seems to me that **given the Order the Judge has made**, Mr. Chapman's only concern would be whether or not a second wife would be able to have the benefit of a survivor's annuity. It would seem to me that if that is his concern, **the new wife ought to be able to have all of the survivor annuity, except \$1.00** and the benefits that go with annuity. Ms. Millikan would have the same benefits, but only receive \$1.00 per month. It just seems that **since the Judge has made the Order as he has, Mr. Chapman wouldn't mind the loss of \$12.00 a year** to know that his exwife [sic] would have the benefits that go with the federal retirement for the rest of her life, after he is gone."

Attachment to *Response to Objection to Amended Civil Service Retirement and Survivor Benefits Order Submitted Under Rule 22(b) Notice Served March 17, 2008*. [Emphasis added]. [Circuit Clerk Docket No. 50].

Despite Ms. Millikan's attempts in her brief to suggest otherwise, it is clear that she received the relief she requested, that her counsel understood that the *Letter Opinion* granted her the relief that she requested, and only after the hearing did she realize that she wanted a \$1.00 per month benefit beyond the age of 65.²²

²²Ms. Millikan suggests in her brief that since the *Final Order* did not contain "limiting language", that it somehow means that she should now receive the full survivorship annuity. This argument is misleading in light of counsel's letter of September 28, 2007, in which he acknowledges that the family court was terminating the survivor annuity at age 65.

Additionally, federal law is clear that the order must expressly award a survivor benefit as distinct from the pension itself. "[A]n award directing the payment of a share of a federal

It is well-settled in West Virginia that "[a] judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal." Syl. pt. 2, *In Re Aaron Thomas M.*, 212 W. Va. 604, 575 S.E.2d 214 (2002)), citing syl. pt. 21, *State v. Riley*, 151 W. Va. 364, 151 S.E.2d 308 (1966). Thus, if this Court could somehow come to the conclusion that a mistake was made in this case, it is evident that the mistake was invited by Ms. Millikan, and the law does not now afford her a remedy.

C. The circuit court did not abuse its discretion in affirming the family court's denial of the Motion for Reconsideration.

Procedurally, Ms. Millikan filed a *Motion for Reconsideration* of the COAP that was filed on March 11, 2008 but later rejected for technical errors which have no bearing on the issues in this case. Judge See then, in accordance with her

employee's retirement benefits is distinct from, and will not be interpreted as, an award of a survivor annuity." *Hokanson v. Office of Pers. Mgmt.*, 122 F.3d 1043, 1046 (Fed. Cir. 1997). The former spouse of a retired federal employee is entitled to a survivor annuity if the former spouse survivor benefit is expressly provided for: "[T]he statute [5 U.S.C. § 8341(h)(1)] requires that the right to a survivor annuity be 'expressly provided for' in the election or in the court order or court-approved settlement agreement." *Warren v Office of Pers. Mgmt.*, 407 F.3d 1309, 1313 (citing *Vaccaro v Office of Pers. Mgmt.*, 262 F.3d 1280, 1284-85 (Fed. Cir. 2001)). "The statute and regulations are clear. An award of a former spouse survivor annuity must be express. This requirement is not a mere technicality; it provides for a clear allocation of rights between the interested parties." *Hokanson*, 122 F.3d at 1047.

ruling on the *Motion for Reconsideration*, entered an *Amended Civil Service Retirement and Survivor Annuity Benefits Order* on May 22, 2009. [Circuit Clerk Docket Number 172].

The factual basis for the relief that Ms. Millikan seeks is that parties had an alleged "agreement" to "correct" errors in the *Letter Opinion* of August 24, 2007,²³ that Ms.

²³Ms. Millikan seems to be trying to create the illusion that the Family Court made a plethora of errors in the body of the *Letter Opinion* that counsel for the parties then "agreed to correct" when drafting the *Final Order*. In her March 2008 *Motion for Reconsideration*, she alleges that the errors in the *Letter Opinion* included an "agreed error" on the *Conrad* credit, the \$63,500.00 and \$127,000.00 errors on the Property Allocation chart, and, suddenly, the award of the survivorship benefit. At other times, she acknowledges that the parties did not agree at all that the *Conrad* credit amount was an error - she appealed the amount to the Circuit Court! In her appeal to this Court, her count of the number of "errors" "in the letter opinion" has grown to sixteen, but careful examination reveals only one error repeated 14 times in the Property Allocation chart, and no error at all - the award of the survivorship until her age 65, which she perversely labels a "denial of the survivorship benefit." Yes, there was one math error in the chart attached to the *Letter Opinion*, and this error was corrected in the chart attached to the *Final Order* that was approved and signed by Ms. Millikan's counsel; and, yes, the text of the *Final Order* failed to include the text of Judge Arrington's award of the former spouse survivor benefit. After cutting through the smoke and mirrors of Ms. Millikan's various assertions of three, four, or sixteen errors (depending on which pleading she has filed in which court, and which "count of the errors" seems to suit her mood, one fact is plain: the only legally cognizable error that occurred was that the *Final Order*, through omission or oversight, failed to mention that Judge Arrington had awarded to Ms. Millikan the former spouse survivor benefit to Mr. Chapman's pension until her age 65, when she would qualify for Medicare, because that survivor benefit was a federally-mandated prerequisite to her having access to the "platinum" federal health insurance plan. That's all. One legally cognizable error in the *Final* (and appealable) *Order*.

Millikan did not appeal the *Final Order* on this issue because of the alleged "agreement", and that the matter was only appealed after the COAP was entered which did not grant Ms. Millikan relief consistent with that "agreement." See generally *Motion for Reconsideration*. [Circuit Clerk Docket No. 47].

It is difficult to discern what "error" Ms. Millikan refers to in regard to the survivor annuity since the foregoing section demonstrates that the family court granted her the exact relief that she requested at the final hearing. It is even more difficult to discern how Ms. Millikan can now claim that there was "error" in not granting her a full survivor annuity beyond age 65, when the issue was never raised before March of 2008 and the only change that she sought between the issuance of the *Letter Opinion* and the entry of the *Final Order* (which her counsel endorsed) requested a \$1.00 a month annuity beyond age 65.

Other than the bare allegation in the *Motion for Reconsideration*, Ms. Millikan has no evidence that an agreement was ever reached to grant her a full survivor annuity after age 65, and there is no testimony and no documentation of any kind to support this claim.

Aside from her arguments regarding this phantom agreement, all of the arguments in her brief are simply arguments about how the parties' marital estate *should have been* divided

and why Ms. Millikan is entitled to the full survivor annuity. These are arguments for a final hearing, not a motion for reconsideration.

A motion for reconsideration is not a substitute for an appeal. The language in W. Va. Code § 51-2A-10 is analagous to W.V.R. Civ. P. 60(b), and in that regard this Court has stated:

It is well established that a Rule 60(b) motion does not present a forum for the consideration of evidence which was available, but not offered at the original proceeding. See *Jividen v. Jividen*, 212 W. Va. 478, 575 S.E.2d 88 (2002). The rule is designed to address mistakes attributable to special circumstances and not merely to erroneous applications of law. Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 60(b), p. 1189 (3d ed. 2008). Where the motion is nothing more than a request that the court change its mind, it is not authorized by Rule 60(b). *Id.* A trial court is not required to grant a Rule 60(b) motion unless a moving party can satisfy one of the criteria enumerated under it. *Id.* In other words, a Rule 60(b) motion is simply not an opportunity to reargue facts and theories upon which a court has already ruled. *Kerner v. Affordable Living, Inc.*, 212 W. Va. 312, 315, 570 S.E.2d 571, 574 (2002); *Powderidge Unit Owners Ass'n v. Highland Props.*, 196 W. Va. 692, 706, 474 S.E.2d 872, 886 (1996). Stated another way, the basis for setting aside a judgment under the rule must be something that could not have been used to obtain a reversal by means of a direct appeal.

Builders Service and Supply Co. v. Dempsey, 224 W. Va. 80, 75 680 S.E.2d 95, 100 (2009).

Here, after reviewing the record and hearing the arguments of the parties, Judge See concluded that

[t]he Family Court ruled on this issue on August 24, 2007; it was not appealed by the Respondent when the issue should have been raised and accordingly, this Court is of the opinion that the Respondent's Motion for Reconsideration with respect to the former spouse survivor benefits should

be denied.

Order signed June 5, 2009 and entered June 8, 2009 [Circuit Clerk Docket No. 175].

In its decision affirming the family court order, the circuit court stated:

West Virginia Code § 51-2A-14(b) provides that this Court may only consider matters on the record. Ms. Millikan fails to identify in the record the location of the specific embodiment of the alleged "agreement of the parties." There is no written agreement of the parties, or any verbal agreement stated upon the record by the parties or their counsel. Moreover, whether there was an agreement of the parties is a factual determination, and the Family Court did not find that there was an agreement of the parties.

Order signed August 10, 2009 and entered August 11, 2009, pp. 5-6 [Circuit Clerk Docket No. 188].

The circuit court went on to conclude as follows:

This Court is sympathetic to Ms. Millikan's argument and does not question the statements of counsel that Ms. Millikan believed there was an agreement that she would receive survivor benefits under the terms of the August 24, 2007 Order. However, she has the burden of proving that the Family Court's decision was based upon findings of fact which were clearly erroneous and that the Court abused its discretion. Even if this Court may have been inclined to make different findings or draw different inferences from the Order of August 24, 2007, it is clear that the Family Court's Order dated March 10, 2009 is supported by substantial evidence, is not clearly erroneous, nor was there an abuse of discretion.

Id., at pp. 7-8.

In this appeal, Ms. Millikan has offered nothing new. She continues to assert the existence of this phantom agreement, which is not only contradicted by the clarity of the *Letter*

Opinion, but also by her own counsel's letter requesting that the parties agree to change the court's ruling to award her \$1.00 a month after the age of 65. The argument that she is entitled to a full survivor annuity beyond age 65 never surfaced until her *Motion for Reconsideration*.

The lower court's rulings are correct, and whether she would have, or could have, been awarded the relief she now seeks, she neither sought such relief during the final hearing, nor appealed the order which did not award her that relief. Accordingly, the circuit court's order affirming the family court's denial of the motion for reconsideration must be affirmed.

D. The Family Court did not err in addressing the tax consequences regarding Mr. Chapman's post-separation and pre-COAP benefits because this issue was completely omitted from the *Letter Opinion* and *Final Order*, and family courts are required to address the tax consequences of property and spousal support awards. Moreover, the Family Court's ruling on this issue was legally sound.

From the record of this proceeding, the following facts are not in dispute:

1. After awarding Ms. Millikan a lump sum of one-half of the post-separation pension payments Mr. Chapman had received to that point, the *Final Order* ordered him to pay one-half of any subsequent payments to Ms. Millikan until such time as the COAP was accepted and she started receiving her payments directly.

2. The *Final Order* was silent as to whether the "one-half" was one-half of the gross or one-half of the net.

3. Mr. Chapman must pay federal and state income tax on these payments, and deductions are taken from his monthly check toward these obligations.

4. When Judge Arrington addressed the "gross v. net" issue in his June 2008 order, he still failed to address the tax consequences of such payments. Judge Arrington did not find him in contempt:

The Court: Right. Mr. Chapman's actions, you know, of giving half the net were not willful and contumacious. And he may have been right.

Mr. Aitcheson: Yeah.

The Court: So there is no contempt there.

Mr. Aitcheson: Okay. But then you just made a comment from the bench something to the effect that...

The Court: In retrospect it should be half the gross and not half the net.

Mr. Aitcheson: Well, how's - who is going to pay - he is the one who's got to pay the taxes on that.

The Court: She too.

Mr. Aitcheson: No.

Mr. Ours: Yes.

Mr. Chapman: Your Honor, I paid taxes on the entire amount in 2007. Now, I counted that as all my income in 2007. Now, I can amend

my return, have my accountant amend my return, and I have a call into him so I can see whether or not that is possible and also if it's possible, if I am paying her through private check, and getting it on my pay stub, my W-2 from the office of personnel management, whether or not I can claim that as a deduction.

The Court: Uh-huh, you need to look into it.

Mr. Aitcheson: I think before the Court says he needs to pay her half the gross if he is going to be expected to pay taxes on that, that isn't going to work. I think we need some accountant to tell us...

The Court: And there is nothing to prevent Ms. Millikan from reimbursing for half the taxes.

Transcript of June 10, 2008 hearing, p. 116, line 13 - p. 118, line 9. [Circuit Clerk Docket No. 89].

Nowhere during the hearing of June 10, 2008 does Family Court Judge Arrington make a ruling on the tax considerations, or how to shift the tax burden to Ms. Millikan. The hearing was continued, shortly after the exchange above, because of the judge's scheduled surgery. The Order from the June 10, 2008 hearing does not address the taxes at all; it merely reiterates that Mr. Chapman should pay half the gross.

The fact is that Ms. Millikan's pending (for nearly a year) *Motion for Reconsideration* prevented the entry of a COAP, and the Office of Personnel Management could not begin payment directly to Ms. Millikan of the court-ordered half of the gross

of Mr. Chapman's pension until the entry of the COAP. Although the Family Court did find at the June 10, 2008 hearing that Mr. Chapman should be paying half the gross to her, the hearing was continued before the court could hear evidence and actually rule on how to make that happen in way that was fair to Mr. Chapman on the tax issue, and the *Letter Opinion* order prepared by Ms. Millikan's counsel reflects the lack of a ruling on this issue. When the hearing was eventually reconvened before Family Court Judge Amanda See, she heard testimony on the "gross v. net pension payments" and the logically consequent tax issue²⁴.

5. Judge See finally considered the tax consequences in connection with a contempt motion on March 10, 2009. At this hearing, all parties conceded that Judge Arrington's order had failed to take into account the tax consequences of the pension division. The issue was not "should the tax consequences be taken into account," but rather "how shall the tax consequences be addressed?" Mr. Chapman's counsel pointed out that Judge Arrington's ruling at the June 10, 2008 hearing that Mr. Chapman pay her one-half the gross amount of his pension was an

²⁴Ms. Millikan's counsel argues that there was no pleading before Judge Amanda See that allowed her to hear the tax issue. Because the June 10, 2008 hearing on her *Motion for Contempt* filed in March of 2008 had been continued, and because her *Motion for Contempt* filed in March of 2009 raised the issue of "gross vs. net" pension payments, it is baffling that she claims that an issue that she raised in two pleadings was not properly before the Family Court.

incomplete ruling:

The Court has said the Court is not going to, you know, change Judge Arrington's ruling. Fine, we'll deal with that however. But the Court does have an obligation to make a complete ruling. And a complete ruling says how the tax issue is going to be dealt with.

DVD of March 10, 2009 hearing, at 12:36:19 PM.

This is part and parcel of the ruling. If he's supposed to pay the gross, then he needs to know and the Court needs to say how he's going to be reimbursed for her half of the taxes."

DVD of March 10, 2009 hearing, at 12:34:04 PM.

It is well-settled that a family court must take the tax consequences attendant to equitable distribution into account when those consequences are reasonably ascertainable. See, e.g., *Kapfer v. Kapfer*, 187 W. Va. 396, 419 S.E.2d 464 (1992); *Hudson v. Hudson*, 184 W.Va. 202, 399 S.E.2d 913 (1990).

It is also true that in circumstances such as here, where a pension is in "pay status" at the time of the divorce and that pension is wholly or partly marital, that there will be some passage of time between the time that the parties separate and the time when a QDRO or similar order is entered which results in the division of that asset. Notwithstanding that passage of time, the non-payee spouse is still entitled to receive his or her share of the money received during this gap. See, e.g., *Conrad v. Conrad*, 216 W.Va. 696, 612 S.E.2d 772 (2005) (holding that wife was entitled to recover half of marital portion of husband's disability and annuity payments received during

pendency of action).

Somebody has to pay taxes on the pension payments that Mr. Chapman receives. After the COAP is processed by OPM and she begins receiving direct payments, then Ms. Millikan will have to pay taxes on the money she receives. In the interim, if he pays her half of the gross, and then pays all of the taxes, then she has a received a windfall. Judge See heard the evidence, heard from a certified public accountant, and chose a method suggested by the accountant to correct this inequity.

In Appellant's Brief, Ms. Millikan asserts that Judge Arrington's order of July 8, 2008, that Mr. Chapman pay half the gross, was a final order. Although the status of this order as a "final" order is suspect, see Footnote 14, Part III B, *supra*, the fact remains that the tax consequences of that decision were not addressed.

Furthermore, Appellant raised the issue of the "gross vs. net amount" herself in the *Motion for Contempt* that she filed with a *Notice of Hearing* on February 23, 2009 [Circuit Clerk Docket No. 142]. She again referred to this *Motion for Contempt* as having been "recently filed" in her *Respondent's Position Re: Petitioner's Notice of Hearing* filed on March 17, 2009 [Circuit Clerk Docket No. 148].

Ms. Millikan is also arguing that Judge See "forgave" monies owed to her. What she had asked was to receive half the

gross of his pension during the interim between separation and the entry of a COAP, tax-free. What Judge See found was as follows:

Mr. Ours: Specifically the shortfall, we acknowledge that he has paid the net and continues to pay the net and has never paid the gross even though he was ordered to, what's your ruling?

Mr. Aitcheson: I think the court's ruling was no harm, no foul.

The Court: Yeah, I mean there is technically contempt but I didn't find that it was willful contemptuous or - he is ordered - I am not going to find contempt there. He was ordered to do it. It is technically contempt of that order but there is really, you know, we kind of moved into a situation today where we had some income information and the court believes the harm, there hadn't been any problem with it yet except for some slight tax issues, that may be the case for 2008 but they may be slight. And frankly there is no harm at this point and I'm not going to find...

Mr. Ours: No disrespect, you are overruling Judge Arrington.

The Court: Well, that may be at this point, but today it was - I am hearing the contempt. He didn't find that it was willful or contemptuous either. He hadn't asked that it be paid back and frankly I'm not either.

Mr. Ours: So that I understand, are you saying that the net amount he paid in '08 is going to be called alimony on his return and taxed to her as alimony received?

Mr. Aitcheson: No, because he paid her the net.

The Court: He paid the net and I understand the tax issues with the different states and different incomes and tax brackets, but that was one of the ways to resolve it to make sure the taxes were paid on it.

DVD of March 10, 2009 hearing, 5:08:01 PM.

Appellant's arguments again are merely the same arguments asserted below. She does not state how the family court's ruling was wrong as a matter of law, how the family court's findings of fact were clearly erroneous, or how the family court's ruling was an abuse of discretion. She fails to address how the circuit court erred in upholding the family court's rulings.

Ms. Millikan's arguments on this issue have no merit, and this Court should therefore affirm the circuit court's order which affirmed the family court's ruling in this regard.

VI. CONCLUSION

At the final hearing, the original judge suggested that he was leaning toward offsetting the parties pensions instead of dividing them in-kind. Ms. Millikan asked the family court to divide the pensions for one specific reason - as long as she was receiving benefits under Mr. Chapman's pension, she would be eligible for Federal health insurance. She wanted to insure that eligibility until she became eligible for Medicare at age 65.

The Court gave her what she asked for and ordered that she remain as a survivor on the pension until she reached the age

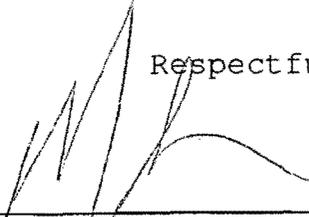
of 65.

After the fact, she asked for more; to-wit: a survivor annuity of \$1.00 a month after age 65. Mr. Chapman was apparently willing to grant this request, but when it came time to actually enter the COAP, Ms. Millikan then claimed that the parties had agreed that she would retain full survivor benefits beyond age 65, not just the \$1.00 a month. The lower courts have analyzed and rejected this claim, and Ms. Millikan has offered nothing new in this appeal.

In the interim, Mr. Chapman has rightfully been ordered to pay over to her one-half of the pension payments he receives until the COAP becomes effective. Ms. Millikan wants to receive half of the gross with no responsibility for the tax effects of those payments. When the family court finally considered this issue, based upon competent evidence it directed that the payments to her be considered spousal support so the tax effects could be borne equitably by the parties. This was a responsible ruling by the family court, properly upheld by the circuit court, and should be affirmed by this Court on appeal.

For the reasons set forth herein, Appellee John G. Chapman prays that the Court affirm the ruling of the Circuit Court below, and further prays that the Court order Appellant to pay his attorney's fees and costs incurred in this appeal. Appellee further prays for such other relief as the court deems just and proper.

Respectfully submitted this 27th day of December, 2010.

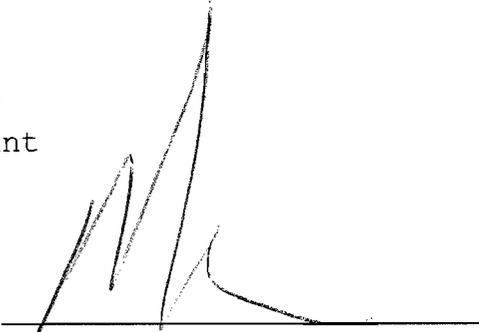


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CERTIFICATE OF SERVICE

I, Mark W. Kelley, an attorney for Appellee, John G. Chapman, hereby certify that on December 27, 2010, I served a true and correct copy of the foregoing "**BRIEF OF APPELLEE**" on the parties hereto via U.S. Mail, first class, postage prepaid, addressed as follows:

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