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FILED
DATE 8-11-09

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

JOHN G. CHAPMAN,
Petitioner,

CLERK
KS
DEPUTY

v.

Civil Action No. 06-D-82

LOUISE C. MILLIKAN,
Respondent.

ORDER

This matter comes on before the Court for consideration of Ms. Millikan's *Petition for Appeal to the Circuit Court* filed with this Court on June 17, 2009, Mr. Chapman's *Reply to Petition for Appeal and Cross-Petition* filed on July 2, 2009, Ms. Millikan's *Motion to Dismiss* filed on July 13, 2009, and Mr. Chapman's *Reply to Respondent's Motion to Dismiss* filed on July 16, 2009. A hearing was held on August 3, 2009, at which time the Court considered the oral argument of the parties. After carefully reviewing the aforesaid pleadings, the entire Court file, and considering the oral argument of the parties, this Court does hereby AFFIRM the Family Court's Order of March 10, 2009, for the reasons hereinafter set forth.

Standard of Review

When reviewing a decision of the family court, the scope of this Court's review is relatively narrow. Pursuant to West Virginia Code §51-2A-14(b), "the circuit court shall review the findings of fact made by the family court judge under the clearly

erroneous standard and shall review the application of the law to the facts under an abuse of discretion standard.” Under the clearly erroneous standard, if the findings of fact and the inferences drawn by a family law judge are supported by substantial evidence, such findings and inferences may not be overturned even if a circuit court may be inclined to make different findings or draw contrary inferences. Robinson v. Coppala, 212 W. Va. 632, 636, 575 S.E.2d 242 (2002) (internal citations omitted). To determine whether the Family Court Judge has abused its discretion when applying the law to the facts, our case law offers guidance and indicates three principal ways in which it occurs:

(1) when a relevant factor that should have been given significant weight is not considered: (2) when all proper factors, and no improper ones, are considered, but the family law master in weighing those factors commits a clear error of judgment: and (3) when the family law master fails to exercise any discretion at all in issuing the order.

Drennen v. Drennen, 212 W.Va. 689, 693, 575 S.E.2d 299 (2002).

Opinion

Ms. Millikan first alleges that the Family Court erred by failing to award her survivorship benefits under Mr. Chapman’s Civil Service Retirement. An evidentiary hearing was held in the Family Court before the Honorable Roy David Arrington on August 23, 2007. Judge Arrington issued an opinion letter August 24, 2007, wherein he made the following finding with regard to Mr. Chapman’s pension:

“Currently the parties have a very good health insurance plan at 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.”

Judge Arrington directed William Judy, then counsel for Mr. Chapman, to prepare an Order consistent with the opinion letter.

Mr. Judy prepared an Order dated August 24, 2007, entered on October 24, 2007, which contained the following language with regard to Mr. Chapman’s federal retirement benefits:

“The Petitioner should pay one-half of the petitioner’s Federal Retirement directly to the Respondent until such time as the Office of Personnel Management commences paying the Respondent her half.”

Thereafter on November 21, 2007, Ms. Millikan filed an Appeal to the Circuit Court on other issues, but not the survivorship benefit issue, and the case was remanded to the Family Court by Order of the Circuit Court dated December 7, 2007. The Family Court issued an Order dated January 16, 2008, with regard to the remand issues.

On January 31, 2008, a Notice of Appearance was filed by Attorney Robert D. Aitcheson who replaced Attorney William Judy as counsel for Mr. Chapman. Mr. Chapman filed a Petition for Appeal on March 5, 2008, which was denied by the Circuit Court by Order dated July 10, 2008.

A Civil Service Retirement and Survivorship Annuity Benefit Order was entered by the Family Court on March 5, 2008, wherein Mr. Chapman's Federal Civil Service Retirement Benefits was divided equally between the parties, but Ms. Millikan's survivorship benefits was limited to \$1.00 per month for life to allow her access to federal health insurance if she survived Mr. Chapman. This Order was rejected by the Civil Service.

Ms. Millikan filed a Motion for Reconsideration on March 25, 2008, in which she contended that the parties had agreed that she would recover full survivorship benefits. A hearing was held on said Motion before the Honorable Judge Arrington on June 10, 2008. After hearing the Respondent's evidence, Judge Arrington continued the case without rendering a decision because he was scheduled for eye surgery the next day. Mr. Chapman subsequently filed a Motion to Disqualify Judge Arrington, and the case was not heard until March 10, 2009, when the Honorable Judge Amanda See considered this issue along with other matters.

Judge See made the following findings with regard to this issue:

"The issue stood silent from August 24, 2007 until March, 2008 when the Respondent filed her Motion for Reconsideration. The 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."

"The letter opinion of the Family Court dated August 24, 2007 does not allot former spouse survivor benefits to the Respondent."

“The Final Order in this Civil Action, reviewed and approved by both counsel at the time, was entered October 24, 2007. That Order did not allot survivor benefits to the Respondent.”

Ms. Millikan contends that subsequent to Judge Arrington’s opinion letter dated August 24, 2007, the parties agreed that she would receive one-half (½) of Mr. Chapman’s federal pension, including survivorship benefits, as contemplated throughout the parties 34 years of marriage. She argues that the agreement of the parties is evidenced by the fact that the limiting language (until age 65) contained in Judge Arrington’s letter of August 24, 2007, was not contained in the Order dated August 24, 2007.

Mr. Chapman denies that the parties agreed that Ms. Millikan was to receive survivorship benefits under his federal pension. In support of his position he refers to a letter from counsel for Ms. Millikan dated September 28, 2007, wherein Ms. Millikan requests the sum of \$1.00 per month from his survivorship benefits in order she would be eligible for insurance coverage; and to Mr. Chapman’s letter to the Office of Personnel Management, dated December 17, 2007, wherein he requests that Ms. Millikan receive \$1.00 per month survivorship benefit and that the remainder of his survivorship benefits be payable to his new wife, Cecilia Rocha.

West Virginia Code §51-2A-14b 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.

It is well settled that a Court speaks through its orders. See, State ex rel. Erlewine v. Thompson, 156 W.Va. 714, 718, 207 S.E.2d 105, 107 (1973); State v. White, 188 W.Va. 534, 425 S.E.2d 210 (1992). See also, Moats v. Preston County Commission, 206 W.Va. 8, 521 S.E.2d 180 (1999). Judge Arrington's opinion letter dated August 23, 2007, did not grant survivorship benefits to Ms. Millikan, and the Family Courts Order dated August 24, 2007 did not contain language which granted survivorship benefits to Ms. Millikan. Judge See found that the aforesaid opinion letter and order did not allot survivorship benefits to Ms. Millikan, and that this issue was not timely appealed. Ms. Millikan's reliance upon an alleged agreement of the parties is an attempt to inject settlement negotiations into the record contrary to Rule 408 of the West Virginia Rules of Evidence which provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. **Evidence of conduct or statements made in compromise negotiations is likewise not admissible.** This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias

or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. (Emphasis added).

The Family Court did not find that the opinion letter dated August 23, 2007, and more importantly, the Family Court's Order dated August 24, 2007, were ambiguous, vague, or over broad in their language. If the Family Court had found the aforesaid Orders to be ambiguous it would have been required to resort to the record for the solution thereof. See, Tressler Coal Mining Co. v. Klefeld, 125 W.Va. 301, 24 S.E.2d 98 (1943); Farmers of Greenbrier County v. County Court of Greenbrier Co., 105 W.Va. 567, 143 S.E. 347 (1928); Dudley v. Browning, 79 W.Va. 331, 90 S.E. 878 (1916); Waldron v. Harvey, 54 W.Va. 608, 46 S.E. 603 (1904). Again, the record contains no document or transcript that would justify modification of the Family Court's Order.

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 survivorship 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 dated 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.

Ms. Millikan next contends the Family Court erred by failing to require Mr. Chapman to pay the difference between one-half ($\frac{1}{2}$) of the gross amount of his federal pension and one-half ($\frac{1}{2}$) of the net amount of his federal pension. The Family Court Order dated August 24, 2007, provides that Mr. Chapman was to pay one-half ($\frac{1}{2}$) of his federal retirement to Ms. Millikan until such time as the Office or Personal Management commences paying Ms. Millikan her one-half ($\frac{1}{2}$). The Order is silent as to whether it was the gross or net amount of the pension.

Mr. Chapman's gross pension was \$4,485.00 per month, with one-half ($\frac{1}{2}$) of the gross being \$2,242.50. However, his net income included deductions for health insurance, federal and state taxes, and life insurance. Mr. Chapman paid Ms. Millikan \$1,653.85 per month which was one-half ($\frac{1}{2}$) of the net.

On March 17, 2008, Ms. Millikan filed a Motion for Contempt. By Order dated June 10, 2008, Judge Arrington declined to hold Mr. Chapman in contempt, but found that he should have been paying to Ms. Millikan one-half ($\frac{1}{2}$) of his gross pension from September 1, 2007 until July 1, 2008, and that beginning on July 1, 2008, he was to pay her one-half ($\frac{1}{2}$) of his gross pension.

Mr. Chapman filed a Motion for Reconsideration on August 5, 2008, in which he requested credit for taxes paid on his retirement which was summarily denied by Order dated September 10, 2008. Ms. Millikan filed a second Motion for Contempt

on February 23, 2009.

A hearing was held on March 10, 2009, before Judge See who considered the testimony of Kenneth W. Apple, C.P.A., with regard to the tax consequences pertaining to the payment of one-half of Mr. Chapman's retirement to Ms. Millikan.

Judge See's Order bearing the same date stated, in part, as follows:

"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 the Respondent, but has to bear all of the taxes on the total gross amount. This would leave the Petitioner with considerably less than half of his Federal pension and the Respondent with considerably more than half."

"The Order of August 24, 2007 is unclear as to what the Court intended. However, in the Order of June 10, 2008, the former Family Court Judge directs that the Petitioner pay one-half of the gross amount of his Federal pension to the Respondent."

"The Petitioner has filed a Motion for Modification for the court to take into account the tax consequences to both parties."

"Through March, 2009, the Petitioner has been paying the Respondent one-half of the net amount of his pension."

"This Court is not going to change the ruling of the former Family Court Judge except to provide that the tax consequences shall be taken into account by adopting the second method proposed by Mr. Apple. That is, Mr. Chapman shall pay Ms. Millikan one-half of the gross monthly Federal pension check and take a spousal support deduction for the full amount hereafter paid to Ms. Millikan. Ms. Millikan shall report the payments commencing April 1, 2009 as spousal support on her tax return. Mr. Chapman will claim all of the taxes withheld and should receive a refund to supplement the amount less than the net he would be receiving on a monthly basis."

“The Petitioner shall commence paying the Respondent one-half of the gross amount of his monthly Federal pension benefits beginning April 1, 2009 and until the COAP is accepted by the Office of Personnel Management and payment comes to Respondent from the government.”

“The amount of the monthly payment by Petitioner to Respondent beginning April 1, 2009 until Respondent commences receiving payment of her portion of the pension from the Federal government, is designated as temporary spousal support. It is the intention of the Court that an acceptable COAP be entered forthwith and forwarded to the Office of Personnel Management and that the amount of time the Petitioner is having to pay Respondent one-half of his gross pension shall be of short duration.”

“The Court in designating these payments as temporary spousal support, is to assure that each party will bear the tax consequences on their one-half of the Federal pension benefits only.”

“Through the month of March, 2009, the Petitioner has paid the Respondent one-half of the net amount and accordingly, he will bear the tax consequences on the gross amount of the pension for that period of time.”

In his Order of August 24, 2007, Judge Arrington failed to determine whether Mr. Chapman was to pay Ms. Millikan one-half of his gross or one-half of his net pension. By Order dated June 10, 2008, Judge Arrington Ordered that Mr. Chapman was to pay one-half of his gross pension from September 1, 2007. 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. Judge See

that the matter was barred by the doctrine of Res judicata.

On or about November 14, 2008, Mr. Chapman filed an Appeal with the West Virginia Supreme Court of Appeals, but did not allege any error with regard to insurance coverage. This Petition was refused on January 29, 2009.

At the March 10, 2009 hearing, Judge See did not specifically address this issue, but denied all Motions not specifically ruled upon in said Order.

Mr. Chapman also contends that the Family Court abused its discretion by awarding Ms. Millikan attorney fees in the Order dated September 10, 2008. Mr. Chapman had filed three separate Motions for Reconsideration. On June 23, 2008, he had filed a Motion for Reconsideration with regard to the Order entered on February 5, 2008, and on August 5, 2008 he filed two additional Motions for Reconsideration. The Court found that these issues were barred by the doctrine of Res judicata, and therefore awarded attorney fees to Ms. Millikan's counsel.

At the March 10, 2009 hearing, Judge See found that it was appropriate to award Ms. Millikan attorney fees at the September 10, 2008 hearing but disallowed attorney fees for services on June 18, 19, 25, 27 and for July 2, 10, 15, and September 2, 2008 hearings. It is apparent to this Court that the Family Court carefully and meticulously considered the issue of attorney fees.

Mr. Chapman cites no authority in support of his allegations that the Family Court erred with regard to the issues of health insurance premium or attorney fees, but

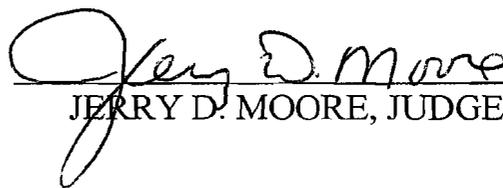
merely alleges that the Family Court abused its discretion. With regard to these issues, this Court finds that the Family Court's findings of fact are not erroneous, nor did the Family Court abuse its discretion of law in applying the law to the findings of fact.

WHEREFORE, in consideration of the foregoing, this Court does hereby AFFIRM the Family Court's final Order with regard to all issues raised in Ms. Millikan's Petition for Appeal and Mr. Chapman's Cross-Petition of Appeal.

★The Clerk shall mail true copies of this Order to all counsel of record, and to the Family Court Judge.

★Nothing further is remaining to be done in this matter, and the Circuit Clerk shall remove this action from the docket and place it among the matters ended.

ENTERED this 10th day of AUGUST, 2009.


JERRY D. MOORE, JUDGE

**A TRUE COPY
ATTEST:**

Janet S. Ferrell by
Clerk of said Court R. Shockey