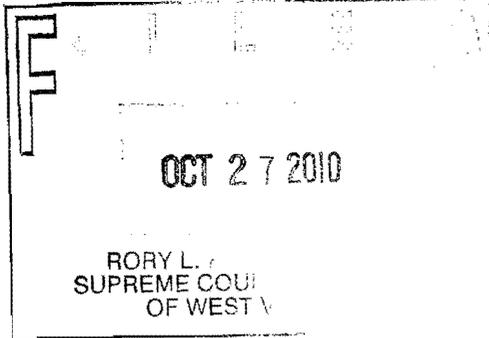


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35696



**JUDITH KING,**  
**Petitioner Below, Appellee**

vs.

**CHARLES E. KING, JR.,**  
**Respondent Below, Appellant**

and

**PHYLLIS SLACK KING,**  
**Intervenor Below, Appellant**

---

Hon. Thomas W. Steptoe, Jr., Senior Status Judge  
Circuit Court of Kanawha County  
Civil Action No. 01-D-1553

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**BRIEF OF THE APPELLANTS**

**Counsel for Appellant**

Ancil G. Ramey, Esq.  
WV Bar No. 3013  
Steptoe & Johnson, PLLC  
P.O. Box 1588  
Charleston, WV 25326-1588  
Telephone (304) 353-8112

David J. Lockwood, Esq.  
WV Bar No. 2203  
Lockwood & Lockwood  
741 Fifth Avenue  
Huntington, WV 25701  
Telephone (304) 697-4100

**Counsel for Intervenor**

Andrew S. Nason, Esq.  
WV Bar No. 2707  
Pepper & Nason  
8 Hale Street  
Charleston, WV 25301  
Telephone (304) 346-0361

**Counsel for Appellee**

Delby B. Pool, Esq.  
WV Bar No. 2938  
230 Court Street  
Clarksburg, WV 26301  
Telephone (304) 623-9711

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## I. INTRODUCTION

This is the brief by Charles E. King, Jr. [Judge King], and Phyllis Slack King [his wife], from an order of the Circuit Court of Kanawha County entered on February 25, 2010, denying their petition for appeal from an order of the Family Court of Kanawha County entered on December 18, 2009, which modified a qualified domestic relations order [QDRO] and negated reservation of Judge King's right to elect "the form of benefit at the time of payment" upon his retirement.

Not only was the Family Court's order contrary to the plain language of the QDRO, it was contrary to the procedures of the Consolidated Public Retirement Board [Retirement Board], requiring its reference to anything other than QDROs in order to determine the benefit rights of former spouses.

Finally, the Family Court awarded a windfall to Judge King's former spouse by directing Judge King to purchase an annuity to address a contingency which even the Family Court acknowledged may never occur.

Without reversal of the Family Court's ruling, considerable doubt has been cast upon the entire process of awarding benefits in programs administered by the Retirement Board as it will require not only review of QDROs, which are the only documents relied upon by the Retirement Board, but also divorce decrees, settlement agreements, and other documents that are not provided to and not relied upon by the Retirement Board in administering its programs.

Consequently, Judge King and his wife request this Court to reverse the Family Court's order.

## II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

On May 25, 2009, Ms. King filed a "Corrected Petition for Rule to Show Cause," complaining that Judge King's election of a 100% joint survivor annuity upon his retirement violated the provisions of the Final Order and Qualified Domestic Relations Order.

The Final Order, dated November 7, 2003, provides nothing with express respect to Judge King's retirement account, but merely states, "That the Settlement Agreement of the parties as set forth in Joint Exhibits A and B filed herein, are adopted verbatim incorporated and made a part of this Order in their entirety." *Exhibit A* at 3.

With respect to the retirement account, the Settlement Agreement *drafted by Ms. King's counsel*, states as follows: "To Judy King . . . ½ his pension as survivor spouse . . ." *Id.* at *Exhibit A*. It provides nothing with respect to Judge King's right to elect "the form of benefit at the time of payment" upon his retirement.

Rather, the QDRO, dated November 7, 2003, which governs the allocation of any of Judge King's retirement benefits, provides:

- a. "Retirement benefits for [Ms. King] pursuant to this Order shall be calculated *at such time as benefits for payout* to [Judge King] *are calculated* (the 'Calculation Date') whether *as a result of retirement*, death or withdrawal from service for any other reason."
- b. "The marital property portion of [Judge King's] retirement benefits shall be the amount to which [Judge King] is entitled multiplied by a fraction, the numerator of which shall be the

number of months of [Judge King's] contributing service from the parties' date of marriage through the parties' date of separation and the denominator of which shall be the total number of months of the [Judge King's] contributing service . . . ."

- c. "[Ms. King] shall be entitled to 50% of the marital property portion of [Judge King's] retirement benefits *as determined in paragraph 5a*, above, *payable at the same time and in the same manner* (either in the annuity form or, if allowed, in a lump sum) as paid to [Judge King] or, *if a joint and survivor or other optional form of annuity is elected* by [Judge King], at the same time as paid to [Judge King] *and [Judge King's] beneficiary*."
- d. "[N]othing in this Order shall be construed as granting the [Ms. King] any election rights with respect to the form of benefit; rather, *the form of benefit at the time of payment shall be elected by [Judge King]*."
- e. "If [Judge King] elects to be paid retirement benefits in the form of an annuity, the annuity payable to [Ms. King] shall continue to the earlier of (a) [Ms. King's] death or (b) the cessation of the payment of [Judge King's] annuity, *including survivor payments under a joint and survivor or other optional form of annuity*."

*Exhibit B* at 2-3.

In accordance with its provisions, a copy of the QDRO was provided by the Clerk to Retirement Board. *Id.* at 5.<sup>1</sup>

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<sup>1</sup> In her pleadings below, Ms. King complains that Judge King did not provide a copy of the Qualified Domestic Relations Order to the Retirement Board, but the Board was provided a copy by the Clerk of this Court upon its entry. Indeed, by letter dated December 9, 2008, Ms. King's counsel was informed, "Her monthly Qualified Domestic Relations Order (QDRO) amount *was calculated pursuant to the QDRO on file with the Consolidated Public Retirement Board (CRPD)(enclosed) and the statutory formula found at WV CSR 162-1.*" *Exhibit D* (emphasis supplied). Finally, at the time of Judge King's PEIA retirement, the Board calculated Ms. King's monthly benefits at \$961.83 using the QDRO on file in its offices. Thus, the QDRO was on file with the

On October 9, 2008, Judge King exercised his right to begin receiving retirement benefits from the Retirement Board, selecting his wife, the intervenor, Phyllis Slack King, as beneficiary. *Exhibit C*. Upon Judge King's election to begin receiving retirement benefits, Ms. King began receiving payment of the portion of those benefits to which she was entitled under the QDRO. Petitioner's Memorandum in Support of Her Corrected Petition to Show Cause at 3.

Even though the QDRO clearly states, "[N]othing in this Order shall be construed as granting [Ms. King] any election rights with respect to the form of benefit; rather, the form of benefit at the time of payment shall be elected by [Judge King]," Ms. King filed a petition with the Family Court, complaining that Judge King selected a 100% annuity naming the intervenor as beneficiary, rather than a 50% annuity naming Ms. King as "a 50% joint survivor." *Id.* at 8.

Despite the fact that the QDRO provides the "form of benefit at the time of payment" was completely within Judge King's "election" and Judge King was therefore free to select a straight life annuity or to select the actuarial equivalent in a reduced annuity payment, naming someone as the recipient of a survivor's benefit upon his death, the Family Court's three-page order effectively amended the QDRO by holding, "It *appears* to the Court that this designation goes beyond a mere agreement to divide the pension by QDRO but also an agreement that the

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Retirement Board and, at least according to the Board, Ms. King's benefits were calculated in accordance with the QDRO and with West Virginia law.

parties would name the other as 50% survivor.” *Exhibit E* at 1, November 5, 2009. (emphasis supplied).

Of course, this is plainly wrong as demonstrated not only by reference to the language of the QDRO itself, but by its interpretation by the Retirement Board which construed the QDRO to allow Judge King to do exactly what it says he could do, i.e., “the form of benefit at the time of payment shall be elected by [Judge King].”<sup>2</sup>

Because the Family Judge’s ruling was contrary to the Retirement Board’s interpretation of the plain language of the QDRO, it left the parties in a quandary because Judge King’s decision to exercise his right of election to name the intervenor as his survivor was irrevocable as the Family Court acknowledged:

It is quite possible that under the pension laws of today  
the Consolidate [sic] Pension [sic] Retirement Board may

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<sup>2</sup> Indeed, the Executive Director of the Retirement Board testified as follows:

Q. And he chose an annuity. Judge King chose an annuity, did he not?

A. He had to take an annuity, but he chose a certain type of annuity, yes, Mr. Lockwood.

Q. And he had the option to do that?

A. He has the sole option to choose what type of annuity he can take from the Public Employees Retirement System.

Q. And under the terms of the QUADRO, the alternate payee has absolutely no say-so whatsoever; is that correct?

A. Yes.

Tr., July 23, 2009, at 27-28. So, there was no dispute in the record, at least as far as the Retirement Board is concerned, that Judge King did exactly what the QDRO entitled him to do.

refuse to adjust Respondent's option. This has troubled the Court as to how that could be cured. Unless there is a better idea, the Respondent would be required to reimburse the Petitioner on a regular basis the difference between the pension payouts and he must obtain an annuity sufficient to pay the Petitioner an amount equal to the 50% payout she would receive had his pension election named her as 50% survivor should the Respondent predecease the Petitioner.

*Exhibit E* at 2-3.

Moreover, under Ms. King's analysis, there could never be termination of Ms. King's right to receive benefits due to "a cessation of the payment of [Judge King's] annuity, *including survivor payments under a joint and survivor or other optional form of annuity,*" as provided in the QDRO, because Judge King could never make the election to name his wife as his beneficiary, to continue to receive benefits until her death in the event of his death.

Not only is the Family Court's order contrary to the language of the QDRO as interpreted by the Retirement Board,<sup>3</sup> it is completely silent on (1) what is the current difference, if any, between what Ms. King is receiving and what she would

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<sup>3</sup> Even the Family Judge acknowledged at the hearing that the QDRO does not provide what Ms. King is seeking: "THE COURT: And apparently that QUADRO [sic] did not set out that he was mandatorily required to name Mrs. King as his survivor beneficiary, did it? THE WITNESS: No, it didn't," Tr., July 23, 2009, at 18, and that witness was Anne Lambricht, Executive Director of the Retirement Board. Moreover, Ms. King's counsel tacitly acknowledged that the QDRO did not so provide by asking Ms. Lambricht, "[A]m I correct that if this Court wished to modify the Qualified Domestic Relations Order that it entered in 2003 as it pertains to Charles King's benefit under PERS to grant a larger percentage thereof to Judith King, could the Board recognize and implement that order?" *Id.* at 21.

have received had he not exercised his right to name his wife as beneficiary;<sup>4</sup> (2) what amount of annuity would be necessary to address the theoretical possibility that both Judge King and his wife should predecease Ms. King; and (3) what alternatives, if any, the Family Court would consider to the relief awarded.<sup>5</sup>

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<sup>4</sup> Although the Family Court ordered no monetary relief, apparently reserving such order for future proceedings, Ms. King offered calculations from the Retirement Board which indicates that “if Judith King was selected as the named survivor under a J&S 50% option,” her monthly annuity would be \$1,138.83, instead of the \$961.83 she has been receiving. Petitioner’s Memorandum of Law in Support of Her Corrected Petition for a Rule to Show Cause at 12. As the Executive Director of the Retirement Board explained, however, her monthly annuity may be less because Judge King’s wife’s birthday was used to calculate the annuity, but Ms. King will receive that annuity for a longer period of time:

Q. [B]ecause they used Phyllis King, the second wife’s date of birth for the calculation, that significantly reduced the amount of money going to Judith King?

A. I have to answer this in two ways. In terms of per month, yes, but in terms of future benefits, it would be expected that the payment would last much longer because the current Mrs. King is younger and would be expected to live longer. So I can’t tell you about total, but I can tell you it would be less per month, but likely last for a longer time period.

Tr., July 23, 2009, at 31.

<sup>5</sup> In defense of the Family Court, Ms. King engaged in a great deal of obfuscation in the proceedings below. For example, she repeatedly asserted that Judge King was in contempt of the QDRO by failing “to complete an annuity selection . . . designating Judith L. King as a 50% joint survivor,” even though such designation was unnecessary because the Retirement Board was provided with a copy of the QDRO upon its entry and Ms. King began receiving her retirement benefits when Judge King began receiving his retirement benefits; by failing “to produce a birth certificate for Phyllis Slack King as required on the Benefit Option form,” which such production was not required by the QDRO and had absolutely nothing to do with Ms. King; by failing “to provide to the Board a copy of the Decree of Divorce,” when it was provided with a copy of the QDRO, which is all it uses to determine anyone’s right to retirement benefits; by failing “to inform the Board that pursuant to the Decree of Divorce . . . Judith L. King is a 50% joint survivor,” when a copy of the QDRO was provided to the Retirement Board and the divorce decree contains no such provision but merely incorporates by reference other documents; and by failing “to inform the Board that pursuant to the parties’ agreement and the Decree of Divorce, the retirement benefit to which Judith L. King was entitled included the contributions he made to the retirement after the parties separated,” which is not what the parties agreed nor

Consequently, even though he believed no relief was appropriate,<sup>6</sup> Judge King filed a timely reconsideration motion asking that he “be allowed to purchase and keep in effect a term insurance policy on the life of his wife, payable to the former wife should the present wife predecease the first wife.” Motion to Reconsider at 1. This would protect Ms. King from losing the financial benefit of continued retirement payments in the statistically unlikely event that Judge King’s wife, who is younger than both Judge King and Ms. King, should survive Judge King, but predecease Ms. King.

Ms. King, however, opposed Judge King’s motion on two substantive grounds: (1) “the annuity is required only if Respondent is unable to change his options with the Consolidated Retirement Board” and (2) “the annuity is required in the alternative to provide . . . the same benefit she would have been entitled . . . which would have no relevance to the life expectancy of Respondent’s second wife.” Petitioner’s Objection to Respondent’s Motion to Reconsider at 2.

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what the divorce decree provided. Petitioner’s Memorandum in Support of Her Corrected Petition for Rule to Show Cause at 8-9. As even Anne Lambright, Executive Director of the Retirement Board, testified, “All I’m allowed to look at, Your Honor, is the QUADRO. We don’t look at the full court order. *I’ve never seen the full court order in this case or any other case.*” Tr., July 23, 2009, at 18 (emphasis supplied). It was in this context of Ms. King’s obfuscation that the Family Judge made his ruling.

<sup>6</sup> Judge King and his wife acknowledge that under the QDRO, as interpreted by the Retirement Board, its Executive Director testified that if both Judge King and his wife should die, Ms. King’s benefits would be terminated. Tr., July 23, 2009, at 29.

This is wrong in two respects. First, the Retirement Board has already rejected Judge King's request to change his options.<sup>7</sup> *Exhibit F*. Second, if Judge King's wife should predecease Ms. King, her benefits would be terminated as Judge King has elected, pursuant to the terms of the QDRO, to name his wife as his beneficiary; but, by obtaining a life insurance policy on his wife, Ms. King would be fully protected in the event that his wife should predecease him.

The Family Court, however, giving no reasoning, rejected Judge King's reconsideration motion by order entered on December 18, 2009, stating only, "That the Motion to Reconsider filed by the Respondent herein is hereby denied." Order, Dec. 18, 2009. The Family Court also entered an Order on December 18, 2009, making final its previous rulings of November 5, 2009, for purposes of this appeal. Order, Dec. 18, 2009.

Judge King filed a timely appeal from the Family Court's rulings, but on February 25, 2010, the Circuit Court entered an order denying that appeal, as well as Judge King's request for oral argument on that appeal.

With respect to Judge King's argument that the Family Court ignored the plain language of the QDRO which preserved to Judge King any and all discretion

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<sup>7</sup> Indeed, the Executive Director of the Retirement Board testified at the Family Court hearing as follows:

If your question is can Judge King's retirement, the terms of the retirement and what he has chosen, be overturned, the answer to that one is from the CPRB Board's perspective, no. He's made his selections. He has retired.

Tr., July 23, 2009, at 16-17.

with respect to his election of benefit at the time of retirement, the Circuit Court summarily held, “there is no basis to grant the appeal on this ground,” Order at 5, but provided no explanation other than reciting the Family Court’s reference to a previous Circuit Court ruling when different issues were being litigated.<sup>8</sup>

Certainly, the parties agreed that Ms. King would receive 50% of whatever benefit Judge King elected upon her retirement. The parties never agreed, however, that Judge King was bound to elect any particular form of benefit and, indeed, the QDRO, as interpreted by the Retirement Board, expressly reserved the form of election of benefits to Judge King. Moreover, upon Judge King’s retirement, Ms. King began receiving the retirement benefits to which she was entitled under the QDRO.

If Ms. King wanted her spousal share of Judge King’s retirement benefit and wanted to preclude Judge King from naming any subsequent spouse as beneficiary, her attorney could have placed such language in the QDRO, which Judge King

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<sup>8</sup> Indeed, the Circuit Court described the issue before it in the earlier proceeding as follows: “Respondent filed a Petition which sought to modify the QDRO’s . . . to change the calculation date. Specifically, the Petition prayed that ‘the Qualified Domestic Relations Orders be *modified* . . . and asserted that the ‘calculation date’ . . . ‘should be determined as of the date of separation of the parties or the entry of the Qualified Domestic Relations Order and not as of the time the benefits to the Participant are paid out.’” Order, June 26, 2009, at 3. That issue, relative to the “calculation date,” but nothing else, was resolved by a ruling that, *as to that issue*, “The agreement of the parties is clear and unambiguous . . . .” *Id.* at 5. The Circuit Court’s error was to hold that if a document is deemed clear and unambiguous for one purpose, it is clear and unambiguous for all purposes, which is obviously incorrect. Based upon that syllogism fallacy, the Circuit Court did not proceed to interpret the QDRO in relation to the issues presented or to acknowledge that by going outside the QDRO to interpret it the Family Judge, by definition, was construing rather than applying the language of the QDRO, thereby triggering the rule of construing documents against the drafter.

would have opposed. Judge King, however, was agreeable to the QDRO's granting Ms. King "50% of the marital property portion of [Judge King's] retirement benefits" as long as "nothing in this Order shall be construed as granting the [Ms. King] any election rights with respect to the form of benefit; rather, the form of benefit at the time of payment shall be elected by [Judge King]."

With respect to Judge King's argument that the Family Court should have construed any ambiguity in the QDRO against Ms. King as her attorney was the drafter, the Circuit Court held that "there is no legal basis for applying rules of construction, except those relating to plain meaning." Order at 4. This ruling, however, is erroneous for three reasons. First, the QDRO was ambiguous, as a matter of law, if the Family Court had to go outside its provisions to the Settlement Agreement in order to construe it. Second, the QDRO was ambiguous if the Family Court had to fill in the interstices of the QDRO with provisions not contained therein. Finally, the QDRO was obviously ambiguous when Ms. King construed it one way and Judge King and the Retirement Board construed it another.

With respect to Judge King's argument that the Family Court failed to afford the required deference to the Retirement Board's interpretation of the QDRO, an activity in which is routinely engages, the Circuit Court summarily held, "there is no basis to grant the appeal on this ground," Order at 6, but providing no explanation other than reciting the Family Court's reference to a previous Circuit Court ruling when different issues were being litigated.

Finally, with respect to Judge King's argument that the Family Court abused its discretion by ordering that an annuity rather than a life insurance policy be purchased in order to address the remote possibility that both Judge King and his wife predecease Ms. King, the Circuit Court summarily concluded, "This Court notes that while the Family Court Judge seemed to invite 'a better idea,' it appears that he did not think that Appellants' alternative was, in fact, a better idea." Order at 6. Of course, nowhere does the Circuit Court address the fact that the Family Court gave absolutely no reason for rejecting Judge King's proposal to use a life insurance policy rather than an annuity to deal with this issue. Again, if Judge King dies prior to Ms. King and Judge King's wife is still living, Ms. King will suffer absolutely no reduction in benefits.<sup>9</sup>

Only if both Judge King and his wife predecease Ms. King, will Ms. King suffer any loss of benefits. Yet, the Family Court has Judge King purchasing some unspecified annuity for Ms. King apparently paying her benefits for a contingency

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<sup>9</sup> As the Executive Director of the Retirement Board testified:

Q. . . . If Judge King, God forbid, dropped dead yesterday, the way it is set up now with his retirement that is already in place, his former wife would get that designated portion that she would be entitled to under the terms of marital property. Is that correct?

A. As long, and the answer to that question is, as long as his current spouse is alive.

Q. And his current spouse would get that part that he was entitled to?

A. Yes.

Tr., July 29, 2009, at 26-27; see also *id.* at 28 ("Q. In other words, if Judge King passes away and Judge King's subsequent wife is alive, under the designation currently in place, Judith's income stream will not be adversely affected. A. Correct.").

that not only may not happen, but because Judge King's wife is much younger than he and Ms. King, is actuarially very unlikely to happen.

Judge King asserts that the Circuit Court erred by failing to grant his appeal and by failing to reverse the Family Court where (1) the language of the QDRO was clear that the "form of benefit at the time of payment" was reserved to Judge King's "election;" (2) the language of the QDRO was clear that Ms. King was only entitled to "50% of the marital property portion" of Judge King's retirement benefits "payable at the same time and in the same manner" as paid to "Judge King" or "if a joint and survivor" form of "annuity is elected;" (3) neither the final order nor the QDRO provides that Ms. King is Judge King's "50% joint survivor" and the parties contemplated possible remarriage and the naming of a beneficiary other than Ms. King; (4) if the QDRO is ambiguous and requires construction by reference to documents outside the QDRO, the Family Judge should have construed the QDRO against its drafter, Ms. King, but he did not do so; (5) if the QDRO is ambiguous and requires construction, the Family Judge should have deferred to the Retirement Board's construction, but he did not do so; and (6) the Family Judge has ordered the present-day purchase by Judge King of an annuity, in an unspecified amount, payable to Ms. King, to address a contingency, Ms. King's surviving both Judge King and his wife, that may never happen, resulting in a windfall to Ms. King.

Consequently, Judge King and his wife respectfully request that this Court reverse the judgment of the Family Court.

### III. DISCUSSION OF LAW

#### A. STANDARD OF REVIEW.

“In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law de novo.” Syl. pt. 1, *Miller v. Miller*, 216 W. Va. 720, 613 S.E.2d 87 (2005).

Here, there are no disputed issues of fact and, therefore, the clearly erroneous standard has no application. Rather, the Family Judge erred, as a matter of law, by effectively modifying a QDRO to provide for an election expressly reserved to Judge King; in failing to construe the QDRO against its drafter when he went outside its provisions in order to interpret it; and in failing to give deference to the Retirement Board in its interpretation of the QDRO. The Family Judge also abused his discretion in ordering Judge King to purchase an annuity to address the mere possibility that both Judge King and his wife may predecease Ms. King, particularly when a less expensive and just as effective alternative of a term life insurance policy was offered by Judge King that would protect Ms. King from an unlikely contingency, while preventing a potential windfall if that contingency should not occur.

**B. THE FAMILY COURT ERRED AS A MATTER OF LAW BY MODIFYING THE QDRO TO COMPEL AN ELECTION EXPRESSLY RESERVED IN THE QDRO TO JUDGE KING.**

With respect to Judge King's election, W. Va. Code § 5-10-24 provides, "Prior to the effective date of his or her retirement, but not thereafter except upon the death of a spouse, a member may elect to receive his or her annuity as a straight life annuity payable throughout his or her life, *or* he or she may elect to receive the actuarial equivalent, at the time, of his or her straight life annuity in a reduced annuity payable throughout his or her life, and nominate a beneficiary, in accordance with option A or B set forth below." (emphasis supplied). Thus, any retiree has the statutory right, upon his or her retirement, to take either a straight life annuity payable throughout his or her life, with no survivor's benefit, *or* an actuarially reduced equivalent, with a survivor's benefit, naming a beneficiary.

As previously discussed, under the plain language of the QDRO, Judge King was free to select a straight life annuity *or* to select the actuarially reduced equivalent, naming someone as the recipient of a survivor's benefit upon his death. He elected to name his wife as beneficiary, which reduced his current benefits, but protects his wife should he predecease her.<sup>10</sup>

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<sup>10</sup> Because of the direct financial impact the outcome of this case could have on her receipt of payments as Judge King's beneficiary, his present wife, Phyllis Slack King, filed a motion to intervene, which was granted.

Alternatively, if his wife should predecease Judge King,<sup>11</sup> W. Va. Code § 5-10-24 provides, “Upon the death of a spouse, a retirant may elect any of the retirement options offered by the provisions of this section in an amount adjusted on a fair basis to be of equal actuarial value as the annuity prospectively in effect relative to the surviving member at the time the new option is elected.” Thus, under the QDRO, Ms. King’s benefits would likely increase at that time.

In this case, the QDRO provides, “[Ms. King] shall be entitled to 50% of the marital property portion of [Judge King’s] retirement benefits . . . payable at the same time and in the same manner (*either in the annuity form* or, if allowed, in a lump sum) as paid to [Judge King] *or, if a joint and survivor or other optional form of annuity is elected* by [Judge King], *at the same time as paid to [Judge King] and [Judge King’s] beneficiary.*” (emphasis supplied).

In other words, Ms. King is entitled to and is receiving 50% of her marital property portion of Judge King’s retirement benefits and should Judge King die and his wife commence receiving survivor’s benefits, she will be entitled to 50% “at the same time as paid to . . . [Judge King’s] beneficiary.”

If Ms. King wanted to compel Judge King to “designat[e] Judith L. King as a 50% joint survivor,” Petitioner’s Memorandum in Support of Her Corrected Petition

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<sup>11</sup> Judge King’s present wife was born on September 14, 1962, Exhibit C to Circuit Court Petition for Appeal at 5; Ms. King was born on September 25, 1948, Exhibit C to Circuit Court Petition for Appeal at 2; and Judge King was born on May 1, 1947, Exhibit C to Circuit Court Petition for Appeal at 2. Thus, as of the date of this petition for appeal, Judge King’s present wife is 47 years old, Ms. King is 61 years old, and Judge King is 63 years old. Obviously, the likelihood that Judge King’s present wife will predecease Ms. King is actuarially small.

to Show Cause at 8, she should have placed that language in the QDRO her attorney drafted, but that language is absent.<sup>12</sup>

Not even Ms. King's own QDRO requires her to elect a 50% joint survivor annuity, instead providing only that, "The Participant does select a joint and survivor form of annuity." Exhibit D to Circuit Court Petition for Appeal at 3. Thus, it is hard to understand how Ms. King can complain that Judge King elected a 100% joint and survivor annuity, when she has already selected a joint and survivor form of annuity, and is free to elect either 100%, as did Judge King, or 50%.

Rather than applying the QDRO, as written, however, and construing both the QDRO and the Settlement Agreement against Ms. King, as drafter of both documents, the Family Court, ignoring the disjunctive "or" in the QDRO, entered an order on November 5, 2009, ordering alternative relief.

The Family Court holds, "The Final Order in the divorce has attached as an Exhibit A which . . . states . . . that Judith King receive one half of Respondent's

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<sup>12</sup> Indeed, as the Executive Director of the Retirement Board explained in her testimony:

[O]nly the administrator of the pension system has the ability to accept or reject a QUADRO, which is why most people, including all counsel at table here, send the QUADROs to the system to have it reviewed in draft form and whether it would be acceptable or not for the Judge to enter it.

Tr., July 23, 2009, at 21-22. Ms. King's counsel is an experienced domestic relations practitioner, obviously well-known to the Retirement Board, and if she wanted the QDROs she prepared reviewed by the Retirement Board to make certain it accomplished what she now asserts she wanted to accomplish, she had the opportunity to do so. In the absence of such review, however, she proceeded at the peril of her client.

pension as survivor spouse. . . . It *appears* to the Court that this designation goes beyond a mere agreement to divide the pension by QDRO but also an agreement that the parties would name the other as 50% survivor.” *Id.* at 1. (emphasis supplied).

Of course, this makes no sense for several reasons: (1) it is a QDRO, not the divorce decree, that dictates the distribution of retirement benefits; (2) it was anticipated that both parties would continue to work and accumulate additional service credit, but only that portion of any retirement benefits received attributable to service credited during the marriage would be distributed to the other spouse; (3) both the Settlement Agreement and QDRO were drafted by Ms. King’s counsel; and (4) most importantly, nowhere in the Settlement Agreement, Final Order, or QDRO does it provide that the parties “would name the other as 50% survivor.”

Rather, reading the Settlement Agreement and QDRO *in pari materia*, it is clear that Ms. King is entitled only to receive (1) 50% of the “marital property portion” of Judge King’s retirement benefits and (2) 50% of annuity paid to the Judge King’s “beneficiary” upon his death should Judge King’s “beneficiary,” his wife, survive him.

The Family Court also held, “His actions have caused the Petitioner’s payout on the retirement to be considerable less than she would have received as a 50% survivor.” *Exhibit E* at 3. Again, the QDRO clearly states, “[N]othing in this Order shall be construed as granting the [Ms. King] any election rights with respect to the form of benefit; rather, the form of benefit at the time of payment shall be

elected by the [Judge King].” *Exhibit B* at 2-3. Thus, Judge King was well within his rights to elect a 100% annuity.

Moreover, the QDRO states, “[Ms. King] shall be entitled to 50% of the marital property portion of [Judge King’s] retirement benefits as determined in paragraph 5a, above, payable at the same time and in the same manner (either in the annuity form or, if allowed, in a lump sum) as paid to [Judge King] or, if a joint and survivor or other optional form of annuity is elected by [Judge King], at the same time as paid to [Judge King] and [Judge King’s] beneficiary.” *Exhibit B* at 3.

Thus, Ms. King is not receiving “considerably less” than that to which she is entitled; rather, she is receiving exactly that to which she is entitled, i.e., “50% of the marital property portion of [Judge King’s] retirement benefits . . . payable at the same time and in the same manner . . . as paid to [Judge King]” and, later, “at the same time as paid to [Judge King] and [Judge King’s] beneficiary.”

It is well-settled in West Virginia that “a court speaks only through its orders.” *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 671, 535 S.E.2d 727, 736 (2000).<sup>13</sup> In West Virginia, it is the QDRO which determines allocation of retirement benefits.

As this Court has noted, “Under the Internal Revenue Code, a QDRO is defined as a domestic relations order ‘*which creates or recognizes the existence*

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<sup>13</sup> See also *State v. White*, 188 W. Va. 534, 536 n. 2, 425 S.E.2d 210, 212 n. 2 (1992) (“[H]aving held that a court speaks through its orders, we are left to decide this case within the parameters of the circuit court’s order.” (citations omitted)); *State ex rel. Erlewine v. Thompson*, 156 W. Va. 714, 718, 207 S.E.2d 105, 107 (1973) (“A court of record speaks only through its orders[.]” (citations omitted)).

*of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan.'* 26 U.S.C. § 414(p)(1)(A)(I).” *Chenault v. Chenault*, 224 W. Va. 141, 145, 680 S.E.2d 386, 390 (2009) (emphasis supplied).

The QDRO in this case was entered on November 7, 2003, and was never appealed by Ms. King. It clearly provides that, “[Ms. King] shall be entitled to 50% of the marital property portion of [Judge King’s] retirement benefits as determined in paragraph 5a, above, payable at the same time and in the same manner (either in the annuity form or, if allowed, in a lump sum) as paid to [Judge King] or, if a joint and survivor or other optional form of annuity is elected by [Judge King], at the same time as paid to [Judge King] and [Judge King’s] beneficiary.” *Exhibit B* at 3.

First, under this language, Ms. King is entitled to only “50% of the marital property portion of [Judge King’s] retirement benefits.” She is not entitled to dictate what “retirement benefits” are received by Judge King to which she is to receive a 50% distribution.

Second, those benefits are “payable at the same time and in the same manner . . . as paid to [Judge King] *or, if a joint and survivor . . . annuity is elected by [Judge King], at the same time as paid to [Judge King] and [Judge King’s] beneficiary,*” who is the intervenor. Ms. King’s argument, accepted by the Family Judge, was that Ms. King could dictate who was beneficiary, even though the QDRO reserved that decision to Judge King, subject to Ms. King’s entitlement to 50% of

the marital property portion of Judge King's retirement benefits in light of his election.

Third, with respect to Judge King's discretion, "[N]othing in this Order shall be construed as granting [Ms. King] *any election rights with respect to the form of benefit*; rather, the form of benefit at the time of payment shall be elected by [Judge King]." Again, however, under the Family Court's decision, it is Ms. King who is dictating Judge King's election, which was expressly reserved to Judge King.

Finally, "If [Judge King] elects to be paid retirement benefits in the form of an annuity, the annuity payable to [Ms. King] shall continue *to the earlier of (a) [Judge King's] death or (b) the cessation of the payment of [Judge King's] annuity, including survivor payments under a joint and survivor or other optional form of annuity*" or, in other words, if Ms. King dies, her benefits terminate or, if both Ms. King and Judge King's "survivor," i.e., the intervenor, shall outlive him, her proportionate benefits will continue as long as Judge King's survivor, the intervenor, continues to receive benefits.<sup>14</sup>

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<sup>14</sup> At the hearing in this matter, the following proffer was made regarding this issue:

MR. NASON: Your Honor, there are two people here from the Retirement Board. I have talked to Teresa Miller. I anticipate she will testify that the designation that was made does not interfere on Judge King's death with the money that Judith is getting now. She will continue to get that, and all he did was leave the half that Judge King is now receiving, his portion, to his current wife.

So we collectively believe that is what the agreement required him to do and that he did and that on his death, the designation he made will not interfere with the income stream that Judith is currently getting under the Qualified Domestic Relations Order.

If Ms. King objected to the QDRO, she should have appealed it instead of waiting until Judge King made his discretionary election and then have the Family Court amend the QDRO to direct Judge King to make an election after it has already been made.

Res judicata or claim preclusion “generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action.” *State v. Miller*, 194 W. Va. 3, 9, 459 S.E.2d 114, 120 (1995).

This Court recognized in *Conley v. Spillers*, 171 W. Va. 584, 588, 301 S.E.2d 216, 219 (1983), that “the underlying purpose of the doctrine of res judicata was initially to prevent a person from being twice vexed for one and the same cause.”

In *Conley*, this Court also observed the following additional rationale underlying the doctrine of res judicata: “To preclude parties from contesting matters that have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, claim preclusion serves to conserve judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Id.*, quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

Here, Judge King had every right to rely upon the QDRO, as written, as drafted by Ms. King’s counsel, and as never appealed. The Retirement Board had every right to rely upon the QDRO and the applicable statutes and regulations in

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Tr., July 23, 2009, at 11-12.

calculating Ms. King's retirement benefits. The language of Settlement Agreement casts no credible doubt on the plain language of the QDRO.

First, the Settlement Agreement's language "1/2 his pension as survivor spouse" is general, while the language of the Qualified Domestic Relations Order is much more specific and it is well-settled that where "one being specific and one being general, the specific provision prevails." *Bowers v. Wurzburg*, 205 W. Va. 450, 462, 519 S.E.2d 148, 160 (1999); See also Syl. pt. 3, *Crim v. O'Brien*, 69 W. Va. 754, 73 S.E. 271 (1911)("If two inconsistent descriptions of land intended to be conveyed are contained in a deed of conveyance, one general and indefinite as to boundaries, and *the other specific as to boundary lines and corners, the latter description will prevail over the former.*")(emphasis supplied).

Second, the QDRO was drafted *after* the Settlement Agreement by Ms. King's counsel who presumably would not have included language inconsistent with the Settlement Agreement she also drafted; thus, it is the QDRO, not the Settlement Agreement that should be the primary source document. See, e.g., *Weiss v. Soto*, 142 W. Va. 783, 804-05, 98 S.E.2d 727, 740 (1957)("where several parts are absolutely irreconcilable, *the latter must prevail.*")(emphasis supplied).

Here, however, the Family Court elected to use the earlier, more general language in the Settlement Agreement to effectively rewrite the QDRO, after Judge King had already made his election, and has indicated that it intends to award monetary relief against Judge King based upon that modification.

What the Family Court did was nothing less than to re-write the Settlement Agreement and QDRO, ignoring language which left election of benefits to Judge King's discretion.<sup>15</sup> Accordingly, appellants request that this Court hold that the Retirement Board's application of the plain language of the QDRO was correct.

**C. THE FAMILY COURT ERRED BY CONSTRUING THE QDRO IN A MANNER INCONSISTENT WITH THE RETIREMENT STATUTES AND ITS INTERPRETATION BY THE RETIREMENT BOARD.**

Not only did Judge King interpret the QDRO to permit his election of the annuity and beneficiary selected, but so did the Retirement Board. Moreover, because Judge King has already exercised his election, it is too late, under the retirement statute, for that election to be changed. Indeed, the Family Court acknowledged, "It is quite possible that under the pension laws of today that the Considate [sic] Pension [sic] Retirement Board may refuse to adjust the Respondent's option," *Exhibit E* at 2, which has been confirmed by the Retirement Board which has notified Judge King, "There is no statutory provision to permit you to amend or submit a new benefit option form . . .," *Exhibit F*. If the QDRO was to be construed rather than applied, which was what the Family Court did, it should have deferred to its interpretation by the Retirement Board, which it did not.

In Syllabus Point 4 of *Security Nat. Bank & Trust Co. v. First W. Va. Bancorp, Inc.*, 166 W. Va. 775, 277 S.E.2d 613 (1981), this Court held,

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<sup>15</sup> Indeed, it is ironic that Ms. King has now benefited from an interpretation of the QDRO different than its plain language, when she argued in her previous petition for appeal to this Court that, "because the Qualified Domestic Relations Orders had not been appealed, there was no basis in law or equity to modify them, assuming *argumendo* the Court had jurisdiction to do so." Ms. King's Petition for Appeal at 6.

“Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Similarly, in Syllabus Point 7 of *Evans v. Hutchinson*, 158 W. Va. 359, 214 S.E.2d 453 (1975), this Court held, “Where a statute is of doubtful meaning, the contemporaneous construction placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown unless it is clear that such construction is erroneous.”

In this case, however, the Family Court gave no deference to the Retirement Board’s calculation of the petitioner’s benefits under the QDRO, the respondent’s election, and the applicable statutes and regulations. As previously noted, the Retirement Board calculated the petitioner’s monthly annuity at \$961.83 using the QDRO on file in its offices. *Exhibit D*. Without any meaningful explanation, however, the Family Court rejected the Retirement Board’s interpretation of the QDRO and the applicable statute and regulations, and simply substituted its own.

Accordingly, appellants request that this Court hold that the Retirement Board’s interpretation and application of the plain language of the QDRO was correct.

**D. THE FAMILY COURT ERRED BY FAILING TO CONSTRUE THE QDRO AND SETTLEMENT AGREEMENT AGAINST THE PARTY WHOSE COUNSEL DRAFTED THOSE DOCUMENTS.**

The Family Court held, “At the time of the agreement both parties were represented by counsel. The Respondent is a Circuit Court Judge knowledgeable in

legal matters and, therefore he knew or should have known what he was agreeing to.” *Exhibit E* at 2.

Of course, this reasoning is flawed for several reasons: (1) if the Family Court was really applying the clear meaning rule, it would have been unnecessary to reference some negative inference arising from Judge King’s legal knowledge; (2) the rule that contracts are construed against the drafter applies to transactions in which those contracts are drafted by two parties with the assistance of counsel; (3) the fact that Judge King is knowledgeable in the law is irrelevant as Ms. King was represented by counsel so knowledgeable in the law of domestic relations that she drafted the Settlement Agreement and QDRO; and (4) Judge King knew very well what his obligations under the Settlement Agreement and QDRO were, i.e., he had the discretion to elect what type of benefit he received at the time of his retirement, Ms. King would be entitled to 50% of the “marital property portion” of Judge King’s retirement benefits, and Ms. King would be entitled to 50% of the annuity paid to the Judge King’s “beneficiary” upon his death.

Even the Circuit Court rejected the Family Judge’s rationale that the rule requiring construction of any ambiguity against the drafter was inapplicable because Judge King is knowledgeable in the law: “This Court notes that . . . it does not agree that different standards ought to apply to circuit court judges than to members of the wider community,” Order at 4, but nevertheless refused to even grant Judge King’s appeal because “there is no legal basis for applying rules of construction, except those relating to plain meaning,” *id.*

Contrary to the Family Court's reasoning, this Court routinely applies the rule that documents are construed against the drafter when both sides are represented by counsel.

For example, in *Croft v. TBR, Inc.*, 222 W. Va. 224, 228, 664 S.E.2d 109, 113 (2009), where both sides were represented by counsel, the Court recently stated, "as we identified in *Meadows [v. Wal-Mart Stores, Inc.]*, 207 W. Va. 203, 530 S.E.2d 676 (1999)], courts apply contract principles to offers of judgment, 207 W. Va. at 220, 530 S.E.2d at 693, and in so doing '*courts tend to interpret Rule 68 offers against the defendants who drafted them[.]*' 12 [Charles Alan Wright, et al.], FEDERAL PRACTICE & PROCEDURE . . . § 3005.1 at 112 [2d ed. 1997] (footnote omitted). Consequently, unless the offer explicitly includes attorney's fees, the courts construe the offer to be silent as to attorney's fees if fees are not explicitly included, thereby necessitating an attorney's fee award beyond the sum included in the offer." (emphasis supplied).<sup>16</sup> Applying the Family Judge's flawed analysis in this case, however, courts would not construe Rule 68 offers against the drafter because both offeror and offeree are represented by counsel.

Plainly, "Uncertainties in an intricate and involved contract should be resolved against the party who prepared it." Syl. pt. 1, *Charlton v. Chevrolet Motor Co.*, 115 W. Va. 25, 174 S.E. 570 (1934). Moreover, courts are "not at liberty to

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<sup>16</sup> See also *Shafer v. Kings Tire Service, Inc.*, 215 W. Va. 169, 176 n.8, 597 S.E.2d 302, 309 n.8 (2004)(same). Similarly, in *Estate of Tawney v. Columbia Natural Resources, L.L.C.*, 219 W. Va. 266, 273, 633 S.E.2d 22, 29 (2006), where some of the lessors were large land companies represented by counsel, the Court nevertheless observed, "We choose to adhere to our traditional rule and construe the language against the lessee."

rewrite the contract between the parties.” *Kelly v. Painter*, 202 W. Va. 344, 348, 504 S.E.2d 717, 175 (1998).

Other courts have construed settlement agreements against the drafter. See, e.g., *Stone v. Metropolitan Life Ins. Co.*, 184 Fed. Appx. 584 at \*3 (8th Cir. 2006)(“Because MetLife drafted the settlement agreement, Stone’s interpretation prevails.”); *Lexicon, Inc. v. Safeco Ins. Co. of America, Inc.*, 436 F.3d 662, 672 (6th Cir. 2006)(“because the settlement agreement appears to be ambiguous, it may be relevant which party drafted it, as some Kentucky case law indicates that an agreement must be construed against the drafter.”); *Erdman v. Cochise County*, 926 F.2d 877, 880 (9th Cir. 1991)(“Typically, a settlement agreement is analyzed in the same manner as any contract, i.e., any ambiguities are construed against the drafter”).

Certainly, it is Judge King’s contention that the QDRO clearly and expressly reserved his election rights under the retirement statute. But once the Family Court felt it necessary to go outside the QDRO and look the Settlement Agreement to glean the intent of the parties, it erred in failing to construe the Settlement Agreement and QDRO against Ms. King whose attorney drafted both.<sup>17</sup> Moreover,

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<sup>17</sup> See *Federated Rural Electric Insurance Exchange v. R.D. Mooney & Associates, Inc.*, 2008 WL 2554380 at \*2 (11<sup>th</sup> Cir.) (“We may not, however, look outside the plain language of the contract to create ambiguity.”)(citation omitted); *Knutson v. USG Corp.*, 526 F.3d 339, 342 (7<sup>th</sup> Cir. 2008) (“As explained by Francis Bacon more than 400 years ago, an ambiguity is ‘patent’ when it is recognized as an ambiguity just by reading the document; it is latent when it is not recognized as an ambiguity until you know something outside the contract.”)(citations omitted); *United Mine Workers v. Brushy Creek Coal Co.*, 505 F.3d 764, 768 (7<sup>th</sup> Cir. 2007) (“[O]nce a contract is shown to be ambiguous, evidence outside the language of the contract itself becomes admissible to disambiguate the language.”); *City of*

as the QDRO was drafted by Ms. King's attorney after the Settlement Agreement, the Family Court's decision to use the Settlement Agreement to discern the meaning of the QDRO violated the merger doctrine.<sup>18</sup>

Accordingly, appellants request that this Court that the Retirement Board's interpretation and application of the plain language of the QDRO was correct.

**E. THE FAMILY COURT ERRED IN ORDERING JUDGE KING TO PURCHASE AN ANNUITY TO ADDRESS A CONTINGENCY THAT MAY NEVER ARISE, RESULTING IN A WINDFALL TO MS. KING.**

In what can only be described as a perplexing order, the Family Court has ordered, "*Unless there is a better idea*, the Respondent would be required to reimburse the Petitioner on a regular basis the difference between the pension payouts [even though there is no difference in light of Judge King's "election" under the QDRO] and he must obtain an annuity sufficient to pay the Petitioner an amount equal to the 50% payout she would receive had his pension election named her as a 50% survivor *should the Respondent predecease the Petitioner* [even though that may never occur]." *Exhibit E* at 4. (emphasis supplied). In other words, Judge King has been order to purchase an uncertain annuity, under

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*Tacoma v. United States*, 31 F.3d 1130, 1134 (Fed. Cir. 1994) ("Outside evidence may not be brought in to create an ambiguity where language is clear"); *Beta Sys., Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988) ("[E]xtrinsic evidence will not be received to change the terms of a contract that is clear on its face").

<sup>18</sup> See Syl. pt. 1, *Warner v. Haught, Inc.*, 174 W. Va. 722, 329 S.E.2d 88 (1985) ("A written contract merges all negotiations and representations which occurred before its execution, and in the absence of fraud, mistake, or material misrepresentations extrinsic evidence cannot be used to alter or interpret language in a written contract which is otherwise plain and unambiguous on its face." Syl. pt. 3, *Iafolla v. Douglas Pocahontas Coal Corporation*, 162 W. Va. 489, 250 S.E.2d 128 (1978).")

uncertain terms, in an uncertain amount because of the mere possibility that the Judge King and his wife should predecease Ms. King.

It is Judge's King's belief that nothing further is necessary for the Retirement Board to continue paying benefits to Ms. King upon his death should he predecease her. It is also Judge King's belief that nothing further is necessary for the Retirement Board to continue paying benefits to Ms. King upon his death and his wife's death. The reason for this is that the QDRO has been filed with the Retirement Board which is bound to comply with its terms.

Although in his reconsideration motion, Judge King proposed purchasing a life insurance policy on his wife to take into account that contingency, which would fully protect Ms. King at a fraction of the cost, and could provide for contingent beneficiaries to take into account that (a) Ms. King might predecease Judge King and Judge King's wife, which would cutoff her right to receive benefits under the QDRO; (b) Judge King's wife might predecease Judge King, which would permit Ms. King to continue to receive benefits under the QDRO; or (c) Judge King's wife might not predecease Ms. King, which would continue to permit Ms. King to receive benefits under the QDRO.

Obviously, it would be a windfall to Ms. King (a) if she should die and an annuity is in place that presumably pays her estate even though her right to receive benefits dies with her under the QDRO; (b) if Judge King's wife should die prior to Judge King and Ms. King benefits continue to her death because Judge King has not died; or (c) if Judge King's wife should not die which would continue to permit

Ms. King to receive benefits. Only by allowing purchase of a life insurance policy that includes the proper contingencies can a remedy be effectuated that will not result in a windfall to Ms. King.

This Court has reversed orders, like the one entered in this case, where a family court has abused its discretion. See, e.g., *Arneault v. Arneault*, 219 W. Va. 628, 643, 639 S.E.2d 720, 735 (2006) (“we find that the circuit court abused its discretion in affirming the family court’s final equitable distribution of the marital estate.” Likewise, in this case, the Family Court abused its discretion in ordering Judge King to purchase an annuity to address a contingency that even the Family Judge acknowledged might never materialize.

#### IV. CONCLUSION

Appellants request that this Court hold that the Retirement Board’s interpretation and application of the plain language of the QDRO was correct or, alternatively, remand with directions that Judge King be permitted to purchase a life insurance policy that includes the proper contingencies can a remedy be effectuated that will not result in a windfall to Ms. King.

**CHARLES E. KING, JR.**

By Counsel

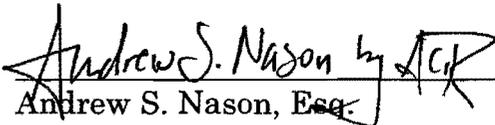


Andil G. Ramey, Esq.  
WV Bar No. 3013  
Steptoe & Johnson, PLLC  
P.O. Box 1588  
Charleston, WV 25326-1588  
Telephone (304) 353-8112

David J. Lockwood, Esq.  
WV Bar No. 2203  
Lockwood & Lockwood  
741 Fifth Avenue  
Huntington, WV 25701  
Telephone (304) 697-4100

**PHYLLIS SLACK KING**

By Counsel

  
Andrew S. Nason, Esq.  
WV Bar No. 2707  
Pepper & Nason  
8 Hale Street  
Charleston, WV 25301  
Telephone (304) 346-0361

# **EXHIBIT A**

IN THE FAMILY COURT OF KANAWHA COUNTY WEST VIRGINIA

IN RE: THE MARRIAGE OF:

JUDITH L. KING,

PETITIONER

vs.

CHARLES E. KING, JR.,

RESPONDENT.

03 NOV -7 AM 8:42

CATHY S. GATSON, CLERK  
KANAWHA COUNTY FAMILY COURT  
CIVIL ACTION NO. 01-D-1553

FINAL DECREE OF DIVORCE

On the 9<sup>th</sup> day of October, 2003, came the Petitioner, Judith L. King, in person, and by her attorney, Delby B. Pool and came also the Respondent, Charles E. King, Jr., in person, and by his attorney, William Parrish McKittrick, pursuant to the Order of this Court setting this matter for a final hearing.

Whereupon the parties presented to the Court that they had reached an accord regarding all issues and presented to the Court the documents containing their written Settlement Agreement, identified as Joint Exhibit A and Joint Exhibit B. The parties moved that these exhibits be marked and filed as part of the record. The motion was granted.

Whereupon this matter proceeded upon the pleadings of the parties previously filed herein, the joint exhibits of the parties previously filed herein, the testimony of the parties, being duly sworn, said testimony being electronically recorded and representations of counsel on behalf of the parties.

Accordingly, the Court makes the following findings of fact and conclusions of law:

1. That the parties were bona fide residents of Kanawha County, West Virginia for more than one year preceding this action, and remain residents of Kanawha County, West Virginia.
2. That the parties were married in Harrison County, West Virginia on June 12, 1971 and for purposes of valuing the assets, last lived together as husband and wife in Kanawha County, West Virginia, on August 30, 2001.

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3. Neither party is an infant, incompetent person, incarcerated convict, or in the military service of this or any other country.

4. That this Court has jurisdiction and venue over the parties and subject matter to this action.

5. That two children were born to the parties, both of whom are over the age of eighteen (18) years and fully emancipated.

6. That the parties have reached total agreement with regard to all issues, the terms of which agreement is reduced to writing, signed and marked Joint Exhibit A and Joint Exhibit B, which are filed as part of the record. The Court finds that the terms of the agreement was entered into knowingly, intelligently and freely by the parties. The Court further finds that the terms of the agreement are fair and equitable, were not obtained by fraud or duress, are expressed in terms which can be enforced by the Court and should be adopted by this Court into a final decree of divorce.

7. Both parties have waived permanently, all claim they have against each other for spousal support and each party will be responsible for his or her attorney's fees and costs in this action.

8. The Petitioner seeks a divorce on the grounds of irreconcilable differences which have been admitted by the Respondent, and they are entitled to a divorce on those grounds.

9. Neither party seeks a restraining order.

10. Both parties have waived on the record any right of appeal of this final order.

Accordingly, based on the foregoing findings of fact and conclusions of law, it is hereby ADJUDGED, ORDERED and DECREED as follows:

A. That the Petitioner, Judith L. King, and the Respondent, Charles E. King, Jr., be and they are hereby divorced from one another and the marriage heretofore celebrated between the Petitioner and Respondent on June 12, 1971 be, and the same is hereby terminated.

B. That the Settlement Agreement of the parties as set forth in Joint Exhibits A and B filed herein, are adopted verbatim incorporated and made a part of this Order in their entirety.

C. That both parties have waived spousal support and each is barred from hereafter seeking spousal support against the other in this case.

D. Each party shall pay his or her own attorney fees and costs incurred in this action.

E. Pursuant to the applicable Rules of Practice and Procedure for Family Court, the parties are notified as follows:

1. This is a final order;

2. Both parties have waived their right to appeal this Order.

F. The Clerk of this Court shall forward certified copies of this Order to:

1. Delby B. Pool, Counsel for Petitioner, 230 Court Street, Clarksburg, WV, 26301;

2. William Parrish McKittrick, Counsel for Respondent, 18746 Harmony Woods

Lane, Germantown, Maryland 20874.

G. This matter will remain on the docket for the entry of Qualified Domestic Relation Orders to complete the distribution of the assets in this case.

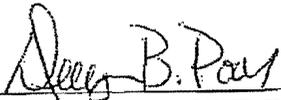
ENTER: November 5, 2003

  
FAMILY COURT JUDGE

RECORDED

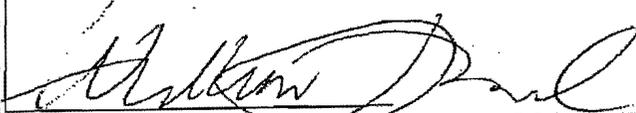
Date: 11/7/03  
Certified copies sent to:  
 counsel of record  
 parties  
 other  
(please indicate)  
By:  certified/1st class mail  
 fax  
 hand delivery  
 interdepartmental  
Other directives accomplished  
R. Covender  
Deputy Circuit Clerk

PREPARED BY:



DELBY B. POOL, ESQUIRE  
Counsel for Petitioner  
State Bar ID #2938  
230 Court Street  
Clarksburg, West Virginia 26301  
(304) 623-9711

APPROVED BY:



WILLIAM PARRISH MCKITTRICK, ESQUIRE  
Counsel for Respondent  
18746 Harmony Woods Lane  
Germantown, Maryland 20874

**EXHIBITS**  
**ON**  
**FILE IN THE**  
**CLERK'S OFFICE**