

No. 35696

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JUDITH L. KING,

**Petitioner Below ,
Appellee,**

v.

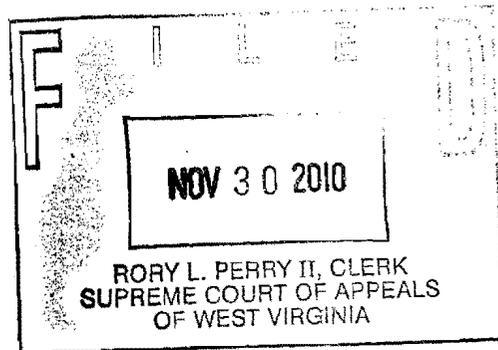
**Family Court No. 01-D-1553
Honorable Thomas W. Steptoe, Jr.
(Kanawha County)**

CHARLES E. KING, JR.

**Respondent Below,
Appellant,**

and

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



APPELLEE'S BRIEF

DELBY B. POOL
W. Va. Bar No. 2938
Attorney at Law
230 Court Street
Clarksburg, West Virginia 26301
(304) 623-9711 (phone)
(304) 623-2915 (facsimile)
Counsel for Appellee,
Judith L. King

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**I. ERRORS AND OMISSIONS IN APPELLANTS' "INTRODUCTION"
AND "PROCEDURAL HISTORY AND STATEMENT OF FACTS"**

A. Introduction

The "Introduction" set forth in Appellants' Brief omits that by agreement in 2003, Judith L. King ("Judith") and Charles E. King, Jr. ("Charles") amicably settled their pending divorce action. Pursuant to their settlement, Judith and Charles agreed that each was to receive one-half of the other's retirement benefits as survivor spouse valued as of the date of distribution. Appellants also omit that this agreement was written, signed by the parties, and was incorporated into and made a part of the parties' Final Decree of Divorce entered by the Family Court of Kanawha County. At the time the Final Decree of Divorce was tendered for entry by the Court, Charles and Judith also submitted two Qualified Domestic Relations Orders (QDROs). The QDROs were identical in their application to each party's benefit. Special Family Judge Ronald Anderson approved and entered the QDROs on November 5, 2003. Certified copies were sent to the Consolidated Public Retirement Board.

Unfortunately, in 2008, Charles embarked on a mission to defeat Judith from receiving her share of his retirement benefits, as he had previously agreed and as ordered pursuant to the Final Decree of Divorce.

First, Charles filed a Petition to modify the QDROS which allocate the retirement interest. In the petition he made no assertion that there was an issue of ambiguity in the parties' settlement, decree of divorce, or the QDROs. He sought to change the valuation dates. Instead of valuing the retirement benefits as of the date of distribution, Charles wanted to reduce the parties' respective benefits by valuing them as of the date of divorce, contrary to what the parties agreed. (Petition, March 5, 2008, p.3)

Subsequently, Charles abruptly changed his position during testimony and asserted that the QDROs were “ambiguous.” The Family Court agreed the orders were ambiguous and ruled that they must be modified. On appeal, the Family Court’s Order was overruled. The Honorable Thomas Steptoe, Jr. ruled that the parties’ agreement and the Final Decree of Divorce were clear and unambiguous. He ordered Charles to follow them. Judge Steptoe’s ruling is *res judicata* with regard to all the issues herein. Appellants skirt by Judge Steptoe’s Order because it interferes with their theory of appeal.

B. Procedural History and Statement of Facts

Furthermore, in their brief, Appellants overlook and ignore the following litigation, final orders, and conduct of Charles that is relevant and directly impacts the true issues as to (i) whether Charles intentionally violated the parties’ Settlement Agreement and the Final Decree of Divorce and (ii) the remedies available to Appellee to restore her to *status quo*.

By operation of a Final Decree of Divorce entered in the above styled matter on November 5, 2003, Judith and Charles were divorced and the terms of their Settlement Agreement were adopted and incorporated into said decree. Qualified Domestic Relations Orders were also entered on November 5, 2003.

Pursuant to the terms of the parties’ Settlement Agreement, as adopted by the Final Decree of Divorce, Judith was to receive one-half of Charles’s pension as survivor spouse and he was to receive one-half of her pension as survivor spouse.

The two QDROs expressly provided that “Retirement benefits for the Alternate Payee pursuant to this Order shall be calculated at such time as benefits for payout to the Participant are calculated (the “Calculation Date”) whether as a result of retirement, death or withdrawal from service for any other

reason.” (See ¶ 4 of the respective QDROs entered in this action) Paragraph 5 of the QDROs further states:

The Participant’s retirement benefits shall be divided between the Participant and Alternate Payee on the Calculation Date, as follows:

- a. The marital property portion of the Participant’s retirement benefits shall be determined as follows: the marital property portion of the Participant’s retirement benefits shall be the amount to which the Participant is entitled, multiplied by a fraction, the numerator of which shall be the number of months of the Participant’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 Participant’s contributing service as of the Calculation Date.

Both QDRO’s were accepted in 2003 by the Retirement Board when they were submitted. (Tr., July 23, 2009, p. 18)

On March 5, 2008, Charles filed a Petition to modify the two QDROs to change the calculation date asserting this would result in a windfall to Judith because Charles had repaid to his retirement benefit money “withdrawn” during the marriage. Judith filed a “Motion to Dismiss for Lack of Subject Matter Jurisdiction and Other Reasons.” During the hearing Charles asserted that the payback was not repayment of a debt. (Tr., June 1, 2008, p. 16) However, Charles specifically identified a debt of \$12,600 owed to the retirement board in his financial statement during the divorce proceeding.

In her Motion to Dismiss, Judith also claimed that Charles had failed to comply with the Settlement Agreement because he had failed to pay the debt secured by his life insurance after the sale of the last marital home as he had agreed to do, and he had failed to transfer the life insurance policy to her. In response to the Motion to Dismiss, Charles changed his Petition for relief to that of “clarification” of the QDRO’s to prevent unjust enrichment.

On June 1, 2008, the Code of State Rules was modified, providing only two dates for the valuation of QDROs. At the hearing on May 1, 2008, pursuant to his Petition to modify, Charles relied on the modified Code of State Rules to support his final argument that the QDROs entered in 2003 were not in compliance with said rules.

Following the hearing, by Order entered July 21, 2008, the Family Court stated: “. . . it is the Court’s opinion this issue is neither a modification or reconsideration and there is not a jurisdictional question. It is a question of clarification of the contract or written agreement the parties had presented.” The Family Court ruled: “It is the Court’s opinion the parties agreement involved the division of assets as they existed at the time of entering into the agreement and presentation to the Court and does not anticipate actions which may take place subsequent thereto. Therefore, the current Qualified Domestic Relations Orders do not relate to the pensions as they were at the time the agreement was presented to the Court. Instead, the Qualified Domestic Relations Orders must be drawn to reflect the financial positions and entitlements at the time of the Final Hearing.”

By Order entered in the Clerk’s office on August 5, 2008, the Order of the Family Court entered July 21, 2008 was stayed, upon the motion of Judith.

Judith filed a Petition of Appeal of the Family Court Order directly to the Supreme Court of Appeals of West Virginia on November 13, 2008. Charles filed a Response in which he acknowledged that “the parties had agreed that the Petitioner, Judith King, would specifically receive the following assets: “. . .(1) one-half of the Respondent’s pension as survivor spouse . . .” On January 29, 2009 this Court granted Judith’s petition for appeal and remanded the matter to the Circuit Court of Kanawha County. By Administrative Order entered March 31, 2009, the Honorable Thomas W. Steptoe Jr., Senior Status

Judge, was recalled for temporary assignment to the Circuit Court of Kanawha County to preside in this matter.

On June 26, 2009, an Order on Remand from the Supreme Court of Appeals, Reversing Order of Family Court was entered by Judge Steptoe in which the Family Court's Order was reversed.

The following Findings of Fact were included in said Order:

6. It was further agreed that the IRA investment in Petitioner's name would be divided equally as of the *date of distribution* and that each party retained one half the pension benefit of the other as survivor spouse. Respondent kept all of his IRA.

7. In his verified financial statement, acknowledged June 29, 2001, Respondent identified the following debt under the category of unsecured creditors: "Consolidated Public Retirement Board, \$12,600."

8. Once this accord as to assets and debts was reached, the parties also agreed to waive all claim for spousal support against each other.

9. Based on their agreement, two Qualified Domestic Relations Orders (QDROs) were prepared and tendered by counsel simultaneously with the Final Decree of Divorce. One QDRO applied to Petitioner's retirement benefit, and the other QDRO applied to Respondent's retirement benefit. They were identical in their application to each party's benefit. The QDROs were approved and entered November 5, 2003, by Special Family Court Judge Anderson, and certified copies were sent to the parties and to the Consolidated Public Retirement Board. These QDROs were legally binding under the rules in existence at the time of their approval and entry.

10. On or about March 5, 2008, Respondent filed a Petition which sought to modify the QDROs entered November 5, 2003, to change the calculation date. Specifically, the Petition prayed that "the Qualified Domestic Relations Order be *modified* under Rule 60(b) of the West Virginia Rules of Civil Procedure" and asserted that the "calculation date" of the parties' respective accounts "should be determined as of the date of separation of the parties or the entry of the Qualified Domestic Relations Orders and not as of the time the benefits to the Participant are paid out."

Further the following **conclusions of law** were included in said Order:

3. The agreement of the parties is clear and unambiguous as set forth in the Decree of Divorce and the Qualified Domestic Relations Orders entered November 5, 2003. Therefore, there is no basis for “clarification” as requested by Respondent. *See* Syllabus Pt. 3, *Waddy v. Riggleman*, 216 W. Va. 250, 606 S.E.2d 222 (2004), citing Syllabus Pt. 2, *Bethlehem Miners Corp v. Haden*, 153 W. Va. 721, 172 S.E.2d 126 (1969) and Syllabus Pt. 2, *Orteza v. Monongalia County General Hospital*, 173 W.Va. 461, 318 S.E.2d 40 (1984).

4. Even if the agreement of the parties was vague as asserted by Respondent, the parties’ intention is clearly expressed that each is to receive one of the other’s pension as surviving spouse as of the date of distribution in the Qualified Domestic Relations Orders. Therefore there is no basis for clarification.

5. Pursuant to West Virginia Code §51-2A-14(c), this Court shall review the findings of fact made by the family court judge under a clearly erroneous standard and shall review the application of law to the facts under an abuse of discretion standard. The undersigned respectfully disagrees with the Family Court Judge’s finding that this issue was one of clarification and not modification. This matter was brought on as a petition to modify by the Respondent who was seeking to change the *status quo ante*. The Family Court Judge’s Order requires the submission of new QDROs “consistent with the findings and opinion of the Court.” This was a modification which the Family Court lacked jurisdiction to entertain. The undersigned is of the opinion that the Family Court’s findings of fact that this was a clarification and that the parties did “not contemplate actions which may take place subsequent thereto” are clearly wrong and the conclusion of law that this issue was not a modification is an abuse of discretion.

This Order was not appealed. Throughout their brief, Appellants studiously avoid the controlling dictates of this Order, which was entered following remand from this Court. Any discussion of its holding is jettisoned to Footnote 8, where oblique reference is made to “a previous Circuit Court ruling when different issues were being litigated.” (*See* identical language in Appellants’ Brief at p. 11)

Upon information and belief, Charles applied for his retirement benefit on October 9, 2008. (Movant’s Exhibit 1, filed July 23, 2009) Charles retired November 1, 2008, only five years after his divorce from Judith.

At the time he retired, Charles did not complete any forms with the Consolidated Public Retirement Board to designate Judith as the survivor for one-half of his benefit, contrary to the requirement of the Final Decree of Divorce and their agreement. He did not file a copy of the Final Decree of Divorce, entered November 5, 2003, with the Board.

Moreover, upon his retirement, Charles did complete a "Public Employees Retirement System Benefit Option Form," in which he selected the type of annuity he wished. Instead of designating Judith as the "50 percent Joint and Survivor" of the annuity as he was required, he designated a woman named Phyllis Slack King ("Phyllis"), as the "100 percent Joint and Survivor" beneficiary of his retirement annuity. In the form, he identified Phyllis as his wife and stated her date of birth was September 14, 1962. He did not file a birth certificate or a marriage license as the form required.

Pursuant to an agreed order entered October 30, 2008 by the Family Court, it was agreed that Charles would transfer to Judith his life insurance policy 706-647 with the debt due and owing on it, and he waived all claim to the IRA in her name. This settled and resolved his failure to abide by the Final Decree of Divorce and Settlement Agreement as to his breach of the two duties, to pay the debt on the life insurance policy and to transfer it to Judy. At this point in time, Judy did not know that Charles had failed to designate her as the "50 percent Joint and Survivor" beneficiary on his retirement.

After Charles retired, Judith received a check from the Consolidated Public Retirement Board which was an amount considerably less than the amount she believed she was entitled to receive monthly as her portion of his retirement. She received only \$961.83 for a monthly payment when it should have

been \$2,547.97. (See Movant's Exhibit 1, July 23, 2009)¹ Because she could not get information from the Board as to how the benefit was calculated and because Charles refused to sign a release to enable her to get this information, she filed with the Family Court a Motion to Compel or For Relief in the Alternative.

On February 23, 2009, the Family Court of Kanawha County, the Honorable Ronald E. Anderson presiding, entered an "Order Granting Motion" whereby the Executive Director of the Consolidated Retirement Board was ordered to provide all information Judith King requested including, but not limited to: "... all information the (Respondent) provided to the Board; all elections he made after November 5, 2003; all debt he paid off after November 5, 2003 regarding said retirement; the calculation of Judith's share of the retirement . . ."

On or about March 23, 2009, Judith received information from the Consolidated Board confirming that Charles had not designated her as the "50 percent Joint and Survivor" of the retirement annuity to which she was entitled. (Movant's Exhibit No.1, July 23, 2009)

On or about May 15, 2009, after trying to resolve the problem without success, Judith filed a Petition for a Rule to Show Cause because information obtained from the Board confirmed Charles had not designated her as the surviving spouse for one-half the retirement annuity. She asserted that this violation of the Court's Order was causing her ongoing monetary damages.

A hearing on Judith's Petition for a Rule to Show Cause was set for July 23, 2009. On July 17, 2009, Andrew S. Nason, Esquire, on behalf of Phyllis, filed and served by mail, a Motion to Intervene asserting *inter alia*, that: she is married to Charles, that Charles, signed a Public Employees Retirement

¹A later calculation by the Board following the terms of the applicable QDRO and designating Judith as the "50 percent Joint and Survivor" reveals she should be receiving \$2,547.97 per month. (Exhibit 3, Petitioner's Memorandum of Law, August 6, 2009)

System Benefit Option Form to make her the payable on death beneficiary of his survivor benefit and that if Charles passes away and Judith and Phyllis are still alive, Phyllis will receive “that portion of [Charles’s] retirement benefit that he is currently receiving without detriment to [Judith] and the benefit that she is currently receiving.” Thus, Phyllis sought to intervene to protect what Charles had improperly gifted to her, contrary to and in direct violation of the prior Final Decree of Divorce and agreement with Judith. No notice of hearing was attached.

On July 23, 2009, the date set for the hearing on the Petition for a Rule to Show Cause, Judith appeared in person and by counsel, Delby B. Pool. Charles also appeared in person and by David J. Lockwood, Esquire. Phyllis did not appear in person. Andrew S. Nason appeared as her counsel. Although Attorney Pool objected to allowing Phyllis to intervene, the motion was granted.

The hearing proceeded and Judith called Charles as her first witness. Charles admitted he knew that the Settlement Agreement and Final Decree of Divorce **required** him to designate Judith as the survivor of one-half of the retirement annuity and that he did not so designate her. (Tr., July 23, 2009, pp. 6-7)

Judith then presented Anne W. Lambright, Executive Director of the Consolidated Public Employees Retirement Board (Board), who sponsored Movant’s Exhibit No. 1, and confirmed that Charles designated Phyllis as the “100 percent Joint and Survivor” of his retirement annuity. Ms. Lambright confirmed this designation reduced the value of the money being received by Judith (*Id.* at 31, 34). She asserted that if Charles dies, Judith would only continue to receive what she is receiving now “as long as his current spouse is alive.” (*Id.* at 26-27).

Ms. Lambright also confirmed that when a participant retired, he has to choose an annuity (*Id.* at 27). She confirmed that Charles could have chosen the annuity option that is the “50 percent Joint and Survivor” benefit for Judith, and it would have allowed a benefit for his second wife. (*Id.* at 35-36) She explained that there are three choices to a retiring person. The first choice is a straight life annuity, which means when the retired person dies, nobody gets any money. (*Id.* at 36) When “50 percent” is chosen, that means when the retiree dies, whoever is designated as his/her survivor “gets one-half of what you were getting.” This causes a 20 to 25 percent actuarial reduction. (*Id.*) The third choice every retiree has is “100 percent joint survivor” and that means when the retiree dies, the survivor gets all that the retiree was receiving before he died. (*Id.* at 37)

She also confirmed that in her opinion if a revised QDRO were entered to give Judith a greater percentage, it could be implemented prospectively only. (*Id.* at 22) Movant’s Exhibit 2 and 3 were also accepted by the Court through the testimony of Teresa Miller, which are alternative possible calculation variables prepared by the Board pursuant to Judith’s request if Charles had correctly designated her as the “50 percent Joint and Survivor” and credit for his service since 1973 was included. (*Id.* at 39-42) Exhibit 3 makes the correct calculation in accord with the parties’ Settlement Agreement. (*See* “Addendum,” attached hereto.)

During the marriage, both parties were in the state retirement system, but their salaries and contributions were not the same.

At the completion of the hearing, the Family Court Judge stated on the record that he found Charles knew what he signed in regard to the Settlement Agreement reached in the underlying divorce. (*Id.* at 10) Further, Charles’s attorney, Mr. Lockwood, confirmed on the record with regard to Judith: “She is a

survivor spouse for her half which she bargained for in the agreement, Judge” (*Id.* at 8) The Family Court Judge requested each party to submit a memorandum of law on the issue. Judith attached, as an exhibit to her memorandum of law, the calculation of her benefit by the Board which would be the correct calculation had Charles designated her as the 50 percent survivor and the QDRO was followed by the Board as to the calculation date.

By Order entered December 17, 2009, the Family Court Judge granted Judy’s “Petition for a Rule to Show Cause.” Specific findings were made by the Family Court Judge, to wit:

1. The Final Order in the divorce has attached an Exhibit A which contains memorandum of an agreement of the parties. That memorandum states in Roman Numeral II that Judith King receive one half of Respondent’s pension as survivor spouse. In addition, it gives one half of Petitioner’s pension to Respondent 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.

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.

His actions in naming his new wife as the 100% survivor is contrary to his previous agreement with the Petitioner. His actions have caused the Petitioner’s payout on the retirement to be considerably less than she would have received as a 50% survivor. It also places her in a position of receiving a total benefit much less than that agreed to if Respondent and his current spouse became deceased before Petitioner.

The naming of his current spouse diminishes the current payout to Petitioner as well as placing Petitioner’s continued payments dependent on the life of the Respondent’s current spouse.

The intervener (Respondent’s current spouse) has no rights superior to the preexisting rights of the Petitioner.

It is therefore the opinion of this court that the Respondent should be Ordered to resubmit his retirement options naming the Petitioner as 50% survivor.

The Respondent shall also be responsible for any sums of money the Petitioner did not receive as a result of his failure to designate her 50% survivor to the date of a correction of the survivorship option. The overpayment needs to be calculated based upon the decision and the eventual outcome of this decision.

It is quite possible that under the pension laws of today that the Consolidate (sic) Pension Retirement Board may 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.

The Family Court ordered Charles to take specific steps to correct the results of his wrongful conduct to wit:

2. The Respondent is ORDERED to **resubmit** his retirement options to the Consolidated Pension Retirement Board naming the Petitioner as a 50% survivor;
3. The Respondent is responsible for any sums of money the Petitioner did not receive as a result of his failure to designate her a 50% survivor to the date of a correction of the survivorship option. The overpayment shall be calculated based upon the decision and the eventual outcome of this decision;
4. In the event the Consolidated Pension Retirement Board refuses to adjust Respondent's option, then and in that event the Respondent is required to reimburse the Petitioner on a regular basis the difference between the pension payoffs and he must attain an annuity sufficient to pay the Petitioner an amount equal to the 50% payout she would receive had his pension election named her as the 50% survivor, should the Respondent predecease the Petitioner."

Charles then filed a Motion to Reconsider with the Family Court. In the Motion to Reconsider none of the Family Court's findings or rulings were disputed. All Charles sought was that a different

remedy be imposed upon him in lieu of obtaining an annuity for Judith to make her whole. The Motion to Reconsider was denied on December 17, 2009.

On January 19, 2010, Charles filed a petition for appeal of the Family Court's Order which granted the rule to show cause. He assigned four grounds of appeal. The first three of the grounds were an effort to reargue the issues previously ruled upon by the Honorable Thomas W. Steptoe Jr., Senior Status Judge. The fourth ground was an argument as to the annuity Charles was ordered to obtain for Judith, if he could not correct the benefit elections he made at retirement.

The petition for appeal and a response by Judith were reviewed and considered by the Judge Steptoe. In his Order Denying Appeal, entered March 1, 2010, Judge Steptoe reaffirmed his previous ruling that given the lack of ambiguity in the Settlement Agreement which was incorporated into the Final Decree of Divorce, there was no legal basis for applying rules of construction, except those relating to plain meaning. Judge Steptoe also noted his prior conclusions as to the QDRO upon which he had previously ruled. Judge Steptoe considered Charles' third assignment of error – that the Family Court failed to adopt the Board's interpretation of the QDRO (which was based on the invalid election of Charles to nominate his second wife as the "100 percent Joint and Survivor" beneficiary) – and likewise found no basis on which to grant an appeal.

Charles' fourth assignment of error (dispute with the Family Court's remedy for the failure to comply with the settlement agreement and Decree of Divorce) was not found to be a basis upon which to grant an appeal.

On June 15, 2010, Charles and Phyllis appealed the Order Denying Appeal to this Court. Judith respectfully requests that the rulings of the lower tribunals be affirmed.

II. APPELLEE'S RESPONSE TO ASSIGNMENTS OF ERROR

A. The Family Court's Order granting the Rule to Show Cause properly requires the Appellant Charles E. King Jr. to take steps to correct the impact of his wilful and knowing failure to designate Judith King as his "50 percent Joint and Survivor" beneficiary when he retired, so that he is compliant with the terms of the Settlement Agreement and Final Decree of Divorce.

B. There is no basis for application of the rule that a document should be construed against the drafter and the Family Court's Order properly enforces the Settlement Agreement, Final Decree of Divorce and QDRO at issue herein.

C. The Family Court properly required Appellant King to purchase an annuity to place his first spouse in a comparable retirement benefit status in that Appellant's wilfully erroneous designation of his second spouse (intervenor) as retirement beneficiary violated the terms of the Final Decree of Divorce and Settlement Agreement and is invalid *ab initio*, a fraud upon the state, as well as an unlawful taking of a right previously awarded to Appellee Judith King.

D. The Family Court did not err by refusing to defer to calculations of the Consolidated Public Retirement Board in that the board's narrow, rigid interpretation of statutes and regulations is clearly wrong and arbitrarily prevents a correction of acts of fraud which is not in the best interests of state members.

E. The terms of the form Qualified Domestic Relations Order, giving a participant the general right to select the type of his retirement benefit annuity, is merely a tool to implement the Final Decree of Divorce and does not excuse Appellant King from complying with the Settlement Agreement and Final Decree of Divorce in that a QDRO may not enlarge or diminish the relief a court grants in a divorce decree.

III. STANDARD OF REVIEW

This Court recently stated in *Howell v. Goode*, 674 S.E.2d 248 (W.Va. 2009) that in establishing a standard of review for examining a lower tribunal's rulings, this Court has consistently held as follows:

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*.

IV. ARGUMENT

Appellants do not make specific assignments of error in their brief. Therefore, Judy responds herein to Appellants' "argument headings" and respective legal argument set forth therein.

A. **THE FAMILY COURT'S ORDER GRANTING THE RULE TO SHOW CAUSE PROPERLY REQUIRES APPELLANT CHARLES E. KING JR. TO TAKE STEPS TO CORRECT THE IMPACT OF HIS WILFUL AND KNOWING FAILURE TO DESIGNATE JUDITH KING AS THE "50 PERCENT JOINT AND SURVIVOR" BENEFICIARY WHEN HE RETIRED, SO THAT HE IS IN COMPLIANCE WITH THE TERMS OF THE SETTLEMENT AGREEMENT AND FINAL DECREE OF DIVORCE.**

Appellants first argue that "[t]he family court erred as a matter of law by modifying the QDRO to compel an election expressly reserved in the QDRO to Judge King." (*See*, Brief of the Appellants, Argument Heading B, p. 15)

In response, Judith first notes that Appellants' reference to West Virginia Code § 5-10-24 omits discussion of other pertinent language regarding divorce and remarriage contained in the statute:

Upon divorce, a member may elect to change any of the retirement benefit options offered by the provisions of this section to a life annuity in an amount adjusted on a fair basis to be of equal actuarial value of the annuity prospectively in effect relative to the retirant at the time the option is elected: Provided, That the retirant furnishes to the board satisfactory proof of entry of a final decree of divorce or annulment: Provided, however, That the retirant certifies under penalty of perjury that no qualified domestic relations order that would restrict such an election is in effect: Provided further, That no cause of action against the board may then arise or be maintained on the basis of having permitted the retirant to name a new spouse as annuitant for any of the survivorship retirement benefit options. (Emphasis added)

Upon remarriage, a retirant may name the new spouse as an annuitant for any of the retirement benefit options offered by the provisions of this section: Provided, That the beneficiary shall furnish to the board proof of marriage: Provided, however, That the retirant certifies under penalty of perjury that no qualified domestic relations order that would restrict such a designation is in effect: Provided further, That no cause of action against the board may then arise or be maintained on the basis of having permitted the retirant to name a new spouse as annuitant for any of the survivorship retirement benefit options. The value of the new survivorship annuity shall be the actuarial equivalent of the retirant's benefit prospectively in effect at the time the new annuity is elected. (Emphasis added)

As discussed *supra*, at the time he retired, Charles did not complete any forms with the Consolidated Public Retirement Board to designate Judith as the survivor for one-half of his benefit, contrary to the requirement of the Final Decree of Divorce and their Settlement Agreement. The "Benefit Option Form" signed by Charles E. King on October 9, 2009 fails to reference Judith. He did not file a copy of the Final Decree of Divorce, entered November 5, 2003, with the Board. In fact, Charles specifically failed to take the following required actions when he completed the Benefit Option Form for the Consolidated Public Retirement Board:

1. He failed to complete an annuity selection regarding the Qualified Domestic Relations Order (QDRO) entered November 5, 2003, designating Judith as a 50 percent joint survivor;

2. He failed to produce a birth certificate for Phyllis Slack King, as required on the Benefit Option Form with regard to his designation of her as a 100 percent joint survivor for any rights he retained after the application of the aforesaid QDRO. He also failed to produce a marriage license;
3. He failed to provide to the Board a copy of the Final Decree of Divorce entered November 5, 2003;
4. He failed to inform the Board that pursuant to the Final Decree of Divorce entered November 5, 2003, Judith L. King is a 50 percent joint survivor, and
5. He failed to inform the Board that pursuant to the parties' agreement and the Final 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 and up to the date of retirement for the calculation date.

In the case at bar, a lawful order issued; namely, the Final Decree of Divorce, which adopted the parties' signed agreement that Judith was to receive one-half Charles' pension benefit as survivor spouse. Based on the parties' agreement, two QDROs were prepared to be tendered by counsel simultaneously with the Final Decree of Divorce. One QDRO applied to Judith's retirement benefit, while the other QDRO applied to Charles' retirement benefit. The QDROs were identical in their application to each party's benefit. The QDROs were approved and entered by the court on November 5, 2003. Certified copies were sent to the parties and to the Consolidated Public Retirement Board. Charles admits he knew what he signed and therefore knew when he retired that Judith was to receive one-half his pension as

survivor spouse. When Charles retired, however, he willfully failed to designate Judith to receive one-half his pension as surviving spouse. He did not designate her to receive anything. Instead, he designated another person to whom he has allegedly remarried as the “100 percent Joint and Survivor” beneficiary.

There are two categories of contempt. A direct contempt is done in the presence of the Court. A constructive (or indirect) contempt is not done in the presence of the Court. *See In re: Yoho*, 301 S.E.2d 581 (W.Va. 1983). Contempt of court is defined as including disobedience to any lawful process, judgment or decree or order of the Court pursuant to West Virginia Code § 61-5-26. Contempts may be criminal or civil in nature. Civil contempts do not seek to punish the respondent but rather to benefit the complainant. The remedial measures applied are either compensatory or coercive pursuant to *Bailey v. Bailey*, 35 S.E.2d 81, 83 (1945), which further provided as follows: “The purpose of a civil contempt proceeding is not punitive, but is intended to operate coercively in order to make certain that the court’s judgments are carried out.”

Moreover, Syllabus Points 2 and 3, *In Re: Brandon Lee H.S.*, 629 S.E.2d 783 (W.Va. 2006) provide, as follows:

2. [W]hether a contempt is civil or criminal depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate. Syl. Pt. 1, in part, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

3. Where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order, the contempt is civil. (*State ex rel. Robinson, supra*)

Family Courts have the same power and authority as the Circuit Courts in contempt hearings. This includes the power to enforce its orders with remedial or coercive sanctions designed to compensate a complainant for losses sustained and must give the contemnor an opportunity to purge himself. *See* West Virginia Code §§ 48-1-304 and 51-2A-9; *Deitz v. Deitz*, 659 S.E.2d 331 (W.Va. 2008).

To date, litigation to protect Judith's valid interests has been costly, encompassing the response to Charles' initial Petition to modify; the Motion to Compel that she had to file to obtain the truth as to Charles' retirement elections; her successful initial appeal to this Court, and ultimately her prosecution of a Petition for a Rule to Show Cause, which is the subject of the current appeal before this Court.

Judith has filed repeated motions for her attorney's fees and costs she has incurred because of Charles' clear pattern and plan to try to keep her from recovering the retirement benefit as agreed and ordered. Under applicable State law and case law, Judith is clearly entitled to an order to require Charles to pay to her all of her fees and costs in these matters. *See Landis v. Landis*, 674 S.E.2d 186 (W.Va. 2007), where the cost of litigation was held to be aggravated by the husband's intransigence, and *Deitz v. Deitz*, 659 S.E.2d 331, 340 (W.Va. 2008), citing West Virginia Code § 51-2A-9 (2001) (Supp. 2007): "Ancillary relief (in a contempt proceeding) may provide for an award of attorney's fees."

While there do not appear to be any West Virginia decisions directly on point to the instant matter, it is instructive to review relevant decisions from other jurisdictions. In *Seitz v. Kozman*, 2006 Ohio App. LEXIS 3540, the former wife filed a motion to show cause pursuant to her former husband's failure to assign a portion of his retirement benefits to her. He had collected his full pension for five full years without notifying his former wife that he had retired and with knowledge that his employer had deemed the QDRO

prepared pursuant to the parties' separation agreement to be defective. The former wife subsequently filed a motion to show cause, seeking attorney fees and court costs for her former husband's failure to comply with the prior court order granting her a portion of his pension upon his retirement. (*Id.* at 2-3) The appellate court affirmed the decision of the lower tribunals which found him in contempt, stating: "Kozman never made a good faith effort to comply with the order and, instead, admits receiving money that was not his . . ." *Id.* at 8.

In *Ingraham v. Ingraham*, 2009 Conn. Super. LEXIS 116, the parties had entered into a separation agreement during their divorce proceedings which was incorporated by reference into the final divorce decree and contained a provision requiring the former husband to pay his former wife one-half of his pension benefits pursuant to a QDRO. *Id.* at 2-3. Following contract law principles, the court found the former husband in contempt for his wilful failure to satisfy his obligation pay his former wife her full share of certain pension benefits. The court stated: "This was not a good faith dispute, as the language of the agreement and the intent of the parties was clear." *Id.* at 8.

In *Tortorich v. Tortorich*, 1995 Ark. App. LEXIS 261, the trial court found the former husband in contempt for failing to comply with the decree of divorce. The appellate court affirmed, stating that "[d]isobedience of any valid judgment, order, or decree of a court having jurisdiction to enter it may constitute contempt." *Id.* at 3. The court further stated: "Despite appellant's arguments, a review of the record leaves the impression that appellant's noncompliance with the decree was not the result of inadvertence, confusion, or ambiguity in the decree, but was rather the result of a studied indifference to the decree and a reluctance to comply with its provisions." (*Id.* at 21)

The basic elements of contempt were proven by a preponderance of the evidence in the case *sub judice*. By his actions, Charles was in civil contempt of Final Decree of Divorce, entered November 5, 2003. Charles obdurately refuses to be bound by the parties' Settlement Agreement, the Final Decree of Divorce, the Order on Remand from the Supreme Court of Appeals of West Virginia, Reversing Order of Family Court, as well as the most recent Order of the Family Court from which he now appeals. The rulings of the lower tribunals pursuant to Judith's Petition to Show Cause must be affirmed.

B. THERE IS NO BASIS FOR APPLICATION OF THE RULE THAT A DOCUMENT SHOULD BE CONSTRUED AGAINST THE DRAFTER AND THE FAMILY COURT'S ORDER PROPERLY ENFORCES THE SETTLEMENT AGREEMENT, FINAL DECREE OF DIVORCE AND QDRO AT ISSUE HEREIN.

The terms of Settlement Agreement, Final Decree of Divorce, and QDRO having already been determined on a prior appeal to be clear and unambiguous, no further inquiry is needed as to "against whom" they should be construed. Pursuant to "Arguments B and D," Appellants assert that Judith's counsel drafted the QDROs and the Settlement Agreement, and that therefore the Family Court "erred by failing to construe the QDRO and Settlement Agreement against the party whose counsel drafted those documents." (*See* Brief of Appellants, p. 25) This argument is wholly without merit.

Pursuant to the Order on Remand from the Supreme Court of Appeals of West Virginia, Reversing Order of Family Court, filed on June 26, 2009, the Honorable Thomas W. Steptoe, Senior Status Circuit Court Judge, ruled that "[t]he agreement of parties is **clear and unambiguous** as set forth in the Decree of Divorce and the Qualified Domestic Relations Orders entered November 5, 2003. Therefore, there is no basis for 'clarification' as requested by Respondent." (Emphasis added)

Our Supreme Court of Appeals recently confirmed in *McGraw v. The American Tobacco Company*, 681 S.E.2d 96 (W.Va. 2009) that “a valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation **but will be applied and enforced according with such intent.**” (*McGraw* at 108, citing Syl. Pt. 1, *Cotiga Development Co. v. United Fuel Gas Co.*, 128 S.E.2d 626 [W.Va. 1962]). (Emphasis added) *See also* Syl. Pt. 4, *Blake v. Parker*, 685 S.E.2d 895 (W.Va. 2009), which states: “The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court.” (citing Syl. Pt. 1, *Berkeley County Pub. Serv. Distr. v. Vitro Corp. of America*, 162 S.E.2d 189 (W.Va. 1968)). As discussed above, Judge Steptoe has already ruled in this case that the parties’ agreement is “clear and unambiguous.”

The decision upon which Appellants rely herein, *Croft v. TBR, Inc.*, 664 S.E.2d 109 (W.Va. 2008), is inapplicable to the instant matter, as it involves the limited issue whether certain “offers of judgment were inclusive of attorney fees and costs or whether it is incumbent on the circuit court to include in its judgment an additional amount sufficient to cover the attorney fees and costs.” *Croft* and the other cases cited by Appellants in brief are neither probative nor relevant to the case *sub judice*. Again, Appellants’ argument is fatally flawed in that it ignores Judge Steptoe’s ruling that the parties’ agreement “is clear and unambiguous as set forth in the Decree of Divorce and the Qualified Domestic Relations Orders entered November 5, 2003.”

Clearly, Judge Steptoe’s ruling pursuant to the “Order on Remand from the Supreme Court of Appeals of West Virginia, Reversing Order of Family Court” is *res judicata* with regard to the issues herein. In *Nancy Darlene M. v. James Lee M., Jr.*, 400 S.E.2d 882 (W.Va. 1990), this Court confirmed

that the doctrine of *res judicata* “guards the finality of a court’s decision,” quoting *Cook v. Cook*, 359 S.E.2d 342, 344 (W.Va. 1987). The Court further provided in *Nancy Darlene M.* as follows:

‘An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata*.’ Point 1, Syllabus, *Sayre’s Adm’r v. Harpold et al.*, 33 W.Va. 553 [11 S.E. 16 (1890)]

C. THE FAMILY COURT PROPERLY REQUIRED APPELLANT KING TO PURCHASE AN ANNUITY TO PLACE HIS FIRST SPOUSE IN A COMPARABLE RETIREMENT BENEFIT STATUS IN THAT APPELLANT’S WILFULLY ERRONEOUS DESIGNATION OF HIS SECOND SPOUSE (INTERVENOR) AS RETIREMENT BENEFICIARY VIOLATED THE TERMS OF A FINAL DECREE OF DIVORCE AND SETTLEMENT AGREEMENT AND IS INVALID *AB INITIO*, A FRAUD UPON THE STATE, AS WELL AS AN UNLAWFUL TAKING OF A RIGHT PREVIOUSLY AWARDED TO JUDITH KING.

Appellants’ “Argument E” – that the family court erred in ordering Charles to purchase an annuity to address a contingency that may never arise, resulting in a “windfall” to Judith – is clearly without merit and seeks to avoid his clear legal duty to Judith.

To be sure, Judith is entitled to compensation and remedial sanctions against Charles as a result of his contemptuous conduct. It is obvious that Charles had planned to defeat the agreement he originally made, even before he retired. This is evidenced by the ill-fated motion that he filed in March, 2008 to modify the QDROs (entered November 5, 2003) to change the calculation date. Although he was initially successful in his desire to prevent Judith from the benefits they had agreed to by describing them as a

“windfall,” he ultimately failed in this pursuit. Thus, the order of the Family Court that clarified the Final Decree of Divorce, as Charles sought, was stayed. At the time Charles retired, the divorce decree was still in full effect.

Appellants’ argument that Charles’ designation of Phyllis as “100 percent Joint and Survivor” somehow “benefits” Judith is absurd. He (and apparently Phyllis) have attempted to manipulate Charles’ retirement benefit every possible way to defeat Judith’s vested rights under the QDRO and Final Decree of Divorce. Charles argues that the Family Court erred by ordering him to purchase an annuity “because of the mere possibility that the Judge and his wife should predecease Ms. King.” This assertion of error is specious at best because no life expectancy tables or similar evidence were submitted to the Family Court as to probability of whom would outlive whom. This assignment of error is a poorly disguised effort to avoid the fact that Charles had a clear legal duty to designate the “50 percent Joint and Survivor” option for Judith when he retired and that he knowingly and intentionally failed to do so.

Further, Charles asserts his “belief that nothing further is necessary for the Retirement Board to continue paying benefits to Ms. King upon his death should he predecease her” and “that nothing further is necessary for the Retirement Board to continue paying benefits to Ms. King upon his death and his wife’s death.” Charles’ “belief” is not relevant as to the reality that his election not only reduced the value of Judith’s current share of his retirement, but also reduces her share of the retirement if he predeceases her. Charles does not dispute the Family Court’s finding that Phyllis’ rights are not relevant and do not elevate her over Judith’s rights. Therefore, it makes no sense to provide Judith a life insurance policy on the second wife’s life. Judith’s rights to Charles’ retirement funds are determined solely by the parties’ Settlement Agreement and the Final Decree of Divorce, and Charles’ life and death span. If Charles predeceases his

former wife, Judith, then her benefit from the retirement plan would have increased and continued for her lifetime had Charles made the election he agreed to make and was ordered to make! Phyllis' life and death span are irrelevant. The Family Court clearly understood this when it required Charles to purchase an annuity for Judith if he cannot revise his prior benefit choice with the Consolidated Retirement Board, as that is the only other way to make Judith whole.

D. THE FAMILY COURT DID NOT ERR BY REFUSING TO DEFER TO CALCULATIONS OF THE CONSOLIDATED PUBLIC RETIREMENT BOARD IN THAT THE BOARD'S NARROW, RIGID INTERPRETATION OF STATUTES AND REGULATIONS IS CLEARLY WRONG AND ARBITRARILY PREVENTS A CORRECTION OF ACTS OF FRAUD WHICH IS NOT IN THE BEST INTERESTS OF STATE MEMBERS.

Appellants' "Argument C" – that the Family Court erred "by construing the QDRO in a manner inconsistent with the Retirement Statutes and its interpretation by the Retirement Board" – is without merit. The issue before the Family Court was whether Charles had failed to comply with the Settlement Agreement and Final Decree of Divorce when he wilfully elected the option upon retirement to place his **second** wife as 100 percent joint survivor. By operation of the Final Decree of Divorce, Charles was required to elect the option to designate Judith the "50 percent Joint and Survivor" on his retirement. The Family Court found that Charles had violated the Court Order because he failed to so designate Judith.

The Order entered on appeal by the Honorable Thomas W. Steptoe, Jr. was unequivocal that "each party retained one half the pension benefit of the other as surviving spouse." (See Order on Remand from the Supreme Court of Appeals of West Virginia, Reversing Order of Family Court, ¶ 6) The Order was also clear that the Family Court's finding that the parties did "not contemplate actions which may take place subsequent thereto" was clearly wrong. (*Id.*, Conclusions of Law, ¶ 5.)

Appellants still seem to rely on certain state regulations, 162 C.S.R. §1-6, which were not adopted until June 1, 2008, and do not apply retroactively to the subject QDROs, entered in 2003. *See* Brief of Appellants, Footnote 1, which states:

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 162-2-1.*" 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 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."

Moreover, in their Brief, Appellants assert that "the Family Court rejected the Retirement Board's interpretation of the QDRO and the applicable statute and regulations, and simply substituted its own." (Id. at 25) Certainly, the prospective application of 162 C.S.R. § 1-6 forecloses retroactive adjustment of the parties' retirement benefits herein. Charles' arguments implicitly seek to have institutional forms that ostensibly were prepared pursuant to 162 C.S.R. § 1-6 be held applicable herein as a way to exculpate himself from his wilful failure to designate Judith King as the "50 percent Joint and Survivor" beneficiary of his retirement annuity, which, of course, he was obligated to do by virtue of the Settlement Agreement and Final Decree of Divorce. Because of the benefit form election made by Charles and because the Board was not informed by Charles of the true terms of the parties' settlement, the calculation of the payout benefit to Judith is wrong and has consigned her to a reduced benefit.

The gross value of the monthly retirement benefit before any annuity calculation is applied is \$6,943.81. (See "Recipient Information For Computer Input") The total number of months that the parties were married and of contribution service is 339.935.² This should be the numerator. The total number of months Charles worked is 428.00. If Judith had been designated as the "50 percent Joint and Survivor," the reduced value of the retirement benefit to pay for the cost of benefit election would be \$6,416.12. The marital property portion would be \$5,095.94. (.79424 of the \$6,416.12). Judith would then receive one-half that amount of \$2,547.97, during Charles' life time. Upon his death, Judith would receive an additional \$1,934.07 per month until her death, at which time it ceases. (See "Addendum," Exhibit 3, July 23, 2009.)

In contrast, because of Charles' wrongful conduct and the failure of the Board to calculate the full share of the months the parties were married, Judith is allocated only \$961.83 per month. She is losing \$1,586.14 per month, retroactive to November 1, 2008, and each and every month thereafter.

If Charles predeceases Judith, the reduced benefit allocation to Judith now in place does not change, but does remain in place under the terms of the QDRO. (See ¶ 6) However, had the correct benefit allocation been made ("50 percent Joint and Survivor"), then Judith would have an increased income benefit of an additional \$1,934.07 per month until her death. This currently calculates to a total potential loss of \$3,520.21 per month if Charles were to die now.

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Contribution Service is the number of years for which the member and employer make monetary contributions to the Public Employees Retirement System. See West Virginia Code § 5-10-2(9).

It is Judith's position that, in reality, because Charles failed to sign a benefit form pertaining to her under the QDRO entered November 5, 2003, he still should be required to do so and to designate her as the "50 percent Joint and Survivor," as she never waived her right to this benefit.

The benefit form that Charles did sign could only apply to the portion of the benefit which was his subject to the prior QDRO already entered and accepted by the Board and the Final Decree of Divorce which applied to vest in Judith "one-half of his pension as surviving spouse." Judith is aware of no administrative rule, statute or case law that makes a court's lawful order subservient to subsequent administrative rules. In the case at bar, a QDRO was in place at the date of retirement which required Charles to make an election of the benefit to the alternate payee for its calculation. This was never done.

The amounts to which Judith is entitled if Charles had designated her as the "50 percent Joint and Survivor" spouse are known and measurable. She is entitled to \$2,547.97 per month commencing retroactive to November 1, 2008; and if she survives Charles, the benefit increases to the sum of \$4,481.97 per month after his death until she dies at which time it ceases.

Charles has tried to manipulate this retirement benefit every possible way to defeat Judith's vested rights under the prior QDRO and Final Decree of Divorce. Appellants' argument is a subterfuge. Appellants are deliberately trying to divert the Court's attention from Charles' own deliberate wrongdoing to benefit and prefer his second wife, Phyllis, over his first wife, Judith. Such manipulation of the Court has not been tolerated and should not be tolerated now.

E. THE TERMS OF THE FORM QUALIFIED DOMESTIC RELATIONS ORDER, GIVING A PARTICIPANT THE GENERAL RIGHT TO SELECT THE TYPE OF HIS RETIREMENT BENEFIT ANNUITY, IS MERELY A TOOL TO IMPLEMENT THE FINAL DECREE OF DIVORCE AND DOES NOT EXCUSE APPELLANT KING FROM COMPLYING WITH THE SETTLEMENT AGREEMENT AND FINAL DECREE OF DIVORCE IN THAT A QDRO MAY NOT ENLARGE OR DIMINISH THE RELIEF A COURT GRANTS IN A DIVORCE DECREE.

Appellants argument at Page 23 (“Argument B”) is patently wrong. They argue that “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.” (Emphasis supplied) The Internal Revenue Code defines a Qualified Domestic Relations Order (QDRO) as a “domestic relations order which creates or recognizes the existence 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.” I.R.C. § 414(p)(1)(A)(i). This Court stated in *Chenault v. Chenault*, 680 S.E.2d 386, 390-391 (W.Va. 2008) that “[t]he requirements of a QDRO are defined by federal law. The plan administrator then follows the directions of the QDRO and takes such actions as are necessary to secure the other party’s interest in the pension or retirement.”

While there do not appear to be any other instructive West Virginia decisions on this issue, case law from other jurisdictions does **not** support Appellants’ fallacious assertion. Headnote 3, *Thompson v. Thompson*, 785 N.W.2d 159 (2010) states: “A qualified domestic relations order is merely an aid of execution on the property division ordered in the divorce or dissolution decree . . .” In *Wilson v. Wilson*,

878 N.E.2d 16, 19 (2007), the Supreme Court of Ohio quoted with approval *Lamb v. Lamb*, Paulding App. No. 11-98-09, 1998 Ohio App. LEXIS 6007, 1998 WL 833606, as follows:

The QDRO in this case does not affect a substantial right of the parties in that it merely mimics the order of the original divorce decree. The original divorce decree was the order which established the parties' property distribution and provided for an equitable pension division. This is the order which determined the rights of the parties. The QDRO in this case differs in no way from the divorce decree and is itself a ministerial tool used by the trial court in order to aid the relief that the court previously granted. **Indeed, a QDRO may not vary from, enlarge, or diminish the relief that the court granted in the divorce decree, since that order which provided for the QDRO has since become final.** (Emphasis added)

The Court further stated in *Wilson* that “[a] QDRO does not in any way constitute a further adjudication on the merits of the pension division, as its sole purpose is to implement the terms of the divorce decree. Therefore, it is the decree of divorce that constitutes the final determination of the court and determines the merits of the case. After a domestic relations court issues a divorce decree, there is nothing further for the court to determine.” *Id.*

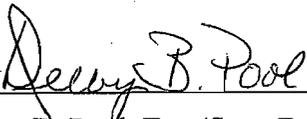
In *Eichholz v. Eichholz*, 2009 Ohio 1421, 2009 Ohio App. LEXIS 1242 (2009), the Ohio Court of Appeals (9th App. Cir.) provided: “A trial court may not . . . employ a QDRO to modify a property division set forth in a divorce decree.”

V. CONCLUSION

Therefore, based on the argument and authorities set forth above, Appellee Judith L. King respectfully requests that Appellants' appeal be denied and that she be awarded compensation and remedial sanctions, including attorney's fees and any other relief that this Court deems to be appropriate.

JUDITH L. KING

Appellee, By Counsel



Delby B. Pool, Esq.(State Bar ID #2938)

Delby B. Pool & Associates

230 Court Street

Clarksburg, West Virginia 26301

(304) 623-9711

Counsel for Appellee

EXHIBITS

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