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FILED

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

FILED
FEB 25 2010
DAVID S. GIBSON, CLERK
CIRCUIT COURT

IN RE THE MARRIAGE OF:

Judith King,

Petitioner,

vs.

Civil Action No. 01-D-1553

Charles E. King, Jr.,

Respondent,

and

Phyllis Slack King,

Intervenor.

ORDER DENYING APPEAL

THIS MATTER came on for a decision this 25th day of February, 2010, upon the papers and proceedings formerly read and had herein; upon the Respondent and Intervenor's Petition for Appeal from a December 18, 2009 Order of The Family Court of Kanawha County, West Virginia, the Honorable Ronald E. Anderson presiding, together with an accompanying Memorandum of Law; upon the Petitioner's Response (Memorandum) to Petition for Appeal; upon the Court's review of the foregoing and a DVD of certain hearings held herein before Judge Anderson.

The Court notes that within the context of the appeal, Respondent and Intervenor are the Appellants, and Petitioner is the Appellee.

It appears that this matter is now mature for a decision.

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This decision relates solely to the question of whether the Circuit Court should grant or refuse the appeal.

The standard of review for this initial, narrow question: Is there reason to believe that the Family Court Judge may have made a clearly erroneous material finding of fact or that the Family Court Judge may have abused his discretion in the application of the law to the facts?

With regard to the decisions of the Family Court Judge, from which this appeal is taken, this Court notes that the Family Court Judge made the following pertinent findings of fact and conclusions of law:

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 pre-existing 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 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 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.

This appeal is further taken from the Family Court Judge's summary denial of Respondent and Intervenor's Motion to Reconsider, wherein the Appellants had asked the Family Court Judge to consider an alternative "curing" device.

This Court now turns to the specific assignments of error.

Appellants first assert that the Family Law Court abused its discretion by refusing to construe the Settlement Agreement and QDRO against Appellee even though her counsel drafted them and the rules of construction require they be construed in Respondent Appellant's favor. Appellants argue that although the Family Court acknowledged that the Settlement Agreement and QDRO were drafted by Petitioner's counsel, he refused to construe them against her, citing that Respondent was represented by counsel and was and is, himself, a judicial officer. In response, Appellee notes that the Circuit Court, by previous Order of June 26, 2009 herein, ruled that the Settlement Agreement was clear and unambiguous, which ruling was not appealed; therefore, Appellee argues, rendering the conclusion *res judicata*. Appellee further argues that it necessarily follows that there would be no legal basis for applying rules of construction to the same, but, rather, that the same should be given its plain meaning. This Court notes that while it does not agree that different standards ought to apply to circuit court judges than to members of the wider community, that, nevertheless, given the lack of ambiguity on the material portion of the Settlement Agreement, which was incorporated into the divorce decree, that there is no legal basis for applying rules of construction, except those relating to plain meaning.

Upon consideration of which, this Court concludes that there is no basis to grant the appeal on this ground.

Appellants next assert that the Family Law Court abused its discretion by refusing to apply the plain language of the QDRO which expressly leaves to the Respondent Appellant's election the form of benefit taken upon his retirement, but instead ordered a 50% election. Appellants argue that although the QDRO states, "The [Petitioner] shall be entitled to 50% of the marital portion of the [Respondent'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 the [Respondent] or, if a joint and survivor...is elected...at the same time as paid to the [Respondent] and the [Respondent's] beneficiary," the Family Court ruled that Respondent was bound to make a 50%, rather than a 100% annuity, even though both the QDRO and West Virginia law leaves such election up to the Respondent, who elected a 100% annuity. In response, Appellee again cites the Circuit Court's June 26, 2009 as *res judicata* where the same, *inter alia*, states "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 of the Qualified Domestic Relations Orders. Therefore there is no basis for clarification."

Upon consideration of which, this Court concludes that there is no basis to grant the appeal on this ground.

Appellants next assert that the Family Law Court abused its discretion by refusing to defer to the Retirement Board's calculations which were based upon the QDRO and the applicable statutes and regulations. Appellants argue that the Retirement Board calculated Appellant Respondent's benefits based on the plain language of the QDRO and upon the applicable statutes and regulations, but that the Family Court effectively rewrote the QDRO, and has ordered that the Retirement Board should have divined, despite no language in the QDRO regarding such election, that Appellant Respondent was obligated to elect a 50%, rather than a 100% annuity, even though both the QDRO and West Virginia law leaves such election up to the Respondent, who elected a 100% annuity. Appellee characterizes this argument as subterfuge and argues that the issue before the Family Court was whether Respondent Appellant had failed to comply with the Settlement Agreement and Divorce Order when he elected the option upon retirement to place his second wife as 100 percent joint survivor, when he was required to elect the option to designate Appellee the 50 percent joint and survivor.

Upon consideration of which, this Court concludes that there is no basis to grant the appeal on this ground.

Appellants' final assertion is that the Family Court abused its discretion by ordering Respondent Appellant to purchase an annuity even though it is probable that Appellants will not both predecease Appellee and, in denying his Motion to Reconsider which offered the alternative of purchasing a life insurance policy on the life of Intervenor with the Appellee as beneficiary. In this connection, Appellants do not contest the right of the Petitioner to continue to receive 50% of her marital share of Respondent Appellant's retirement benefits in the event of his death, but in the event that the death of the Respondent and the Intervenor might terminate such right, the Family Court should have allowed him to purchase a life insurance policy on the Intervenor, rather than dictating that an annuity be purchased. Appellee argues that this argument is unsupported by any evidence presented to the Family Court (such as life expectancy tables or similar evidence) and that it is simply speculative. 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.

Upon consideration of which, this Court concludes that there is no basis to grant the appeal on this ground.

Upon consideration of all of which, the Circuit Court doth make the following conclusion of law: That there is no appropriate basis to justify the granting of this appeal.

Accordingly, it is ORDERED and ADJUDGED that the Court doth refuse this Petition for Appeal and the same is hereby dismissed.

The Court notes the timely exception of all parties to any and all adverse rulings herein contained.

The Clerk shall enter the foregoing as and for the day and date first above written and forward certified copies hereof to all counsel of record

and to the Honorable Ronald E. Anderson.



Thomas W. Steptoe, Jr., Senior Status Judge
Sitting by Designation of the Chief Justice

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY OF THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 15th
DAY OF March, 2010
Cathy S. Gatson, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA