

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35696

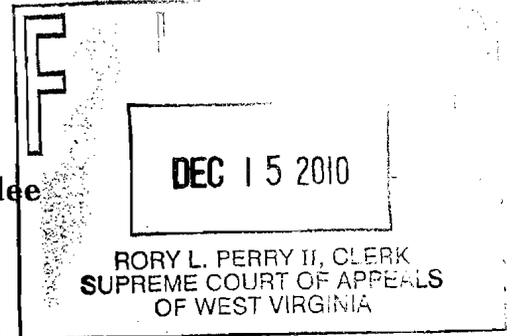
**JUDITH KING,
Petitioner Below, Appellee**

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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I. INTRODUCTION

There are so many misrepresentations, distortions, and ad hominem attacks in the brief of appellee, Judith King ("Ms. King"), that is difficult for the appellants, Charles E. King, Jr. [Judge King] and Phyllis Slack King [his wife], to know where to begin.

This appeal is not about whether Judge King, sarcastically referenced in Ms. King's brief as "Charles," Appellee's Brief at 1, "embarked on a mission to defeat [Ms. King] from receiving her share of retirement benefits, as he had previously agreed and as ordered," *id.*, but rather whether the 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, was contrary to the plain language of the QDRO and 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.

This appeal is not about an earlier proceeding in which Judge King advocated an interpretation of the QDRO so as to value the retirement benefits "as of the date of divorce," rather than "as of the date of distribution," *id.*, but rather whether 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.

Finally, this appeal is not about whether Judge King “intentionally violated the parties’ Separation Agreement . . . and . . . the remedies available to Appellee to restore her to status quo,” *id.* at 2,¹ but rather whether, 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.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

In contrast to appellants’ procedural history and statement of facts, which was faithful to the record, much of appellee’s procedural history and statement of facts contains few record references, but a great deal of advocacy.

First, appellee’s lengthy discussion of the earlier proceedings, which involved a dispute over the date of distribution, *id.* at 2-6, is inapposite and irrelevant as the question presented does not concern the date of distribution, but Judge King’s reservation of his right of election of retirement benefit. Specifically, the QDRO, dated November 7, 2003, which governs the allocation of any of Judge King’s retirement benefits, provides:

¹ Perhaps Judge King should take some solace in the fact that Ms. King only seeks an award of her attorney fees in her brief (an issue which the Family Judge decided to defer pending this appeal, but which Ms. King fails to mention, when she sought to have him “ordered confined to the Kanawha County Jail” in her Corrected Petition for Rule to Show Cause at 3.

- 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 A at 2-3 (emphasis supplied).

Second, noticeably absent from appellee's discussion of whatever forms Judge King did or did not file at the time of his retirement is a reference to any legal obligation to complete such forms. Appellee's Brief at 7. For example, there is

nothing in any order, statute, or regulation of which Judge King is aware that required him to “file a copy of the Final Divorce Decree,” *id.*, upon his retirement, nor does Ms. King cite any such requirement. Rather, she disparages Judge King for not doing something he was not required to do even though she does not dispute that the QDRO, which is the only document required by the Retirement Board, was on file and was interpreted by the Board consistently with Judge King’s interpretation of its terms.

Third, Ms. King asserts that she “received only \$961.83 for a monthly payment when it should have been \$2,547.97,” Appellee’s Brief at 7-8, but that figure would have been appropriate only if the QDRO had dictated Judge King’s form of election, which it clearly did not.

Fourth, Ms. King asserts “she could not get information for the Board . . . because [Judge King] refused to sign a release,” Appellee’s Brief at 8, but the Court will notice no record reference for this allegation. Indeed, Ms. King did not testify at the hearing in this matter. Tr., July 23, 2009. Moreover, nowhere in Ms. King’s verified petition, filed on May 19, 2009, did she make this allegation.² Finally, this allegation is obviously incorrect because attached to that very same petition as Exhibit A is the Benefit Option Form Judge King filed with the Retirement Board.

² In a motion filed on January 26, 2009, Ms. King did not allege that Judge King “refused to sign a release,” but that “he has not responded.” Motion to Compel or for Relief in the Alternative at 2. Moreover, attached to that motion as Exhibit A was a letter dated December 8, 2008, from the Retirement Board that stated that Ms. King’s “monthly Qualified Domestic Relations Order (QDRO) amount was calculated pursuant to the QDRO on file with the Consolidated Public Board (CPRB)(enclosed) and the statutory formula found at WV CSR 162-1.”

Petition for Rule to Show Cause, Exhibit A.³ In an effort to disparage Judge King, however, Ms. King makes this allegation without any reference to the record.

Fifth, although Ms. King asserts that Judge King “admitted he knew that the Settlement Agreement and Final Decree of Divorce **required** him to designate [Ms. King] as the survivor of one-half of the retirement annuity and that he did not so designate her,” Appellee’s Brief at 9 (emphasis in original), that was not his testimony. Rather, his testimony on the transcript pages referenced in Ms. King’s brief was as follows:

Q. And do you agree that part of the agreement included that Judith King would receive one-half of your pension as a survivor spouse?

A. The language I think was 50 percent as –

MR. LOCKWOOD: Your Honor, I’m going to object. The agreement speaks for itself.

THE COURT: Yes, the agreement is there. . . .

Tr., July 23, 2009, at 6-7. How this constituted an admission by Judge King that “he knew that the Settlement Agreement and Final Decree of Divorce required him to designate [Ms. King] as the survivor of one-half of the retirement annuity and that he did not so designate her,” is beyond comprehension or legitimate advocacy, *particularly when Judge King never spoke another word at the hearing. Id.* at 7-15.

Sixth, although Ms. King states that she “then presented Anne W. Lambright, Executive Director of the Consolidated Public Retirement Board

³ Moreover, in Ms. King’s own brief, she references getting additional information from the Retirement Board prior to filing her petition. Appellee’s Brief at 8.

(Board), who sponsored Movant's Exhibit No. 1, and confirmed that [Judge King] designated [Ms. King] as the '100 percent Joint and Survivor' of his retirement annuity," Appellee's Brief at 9, such statement is simply false as (1) Ms. Lambright was called as an adverse witness as the Board had already notified Ms. King, in writing, by letter dated December 8, 2008, stating that Ms. King's "monthly Qualified Domestic Relations Order (QDRO) amount was calculated pursuant to the QDRO on file with the Consolidated Public Board (CPRB)(enclosed) and the statutory formula found at WV CSR 162-1," Motion to Compel or for Relief in the Alternative, Exhibit A; (2) Ms. Lambright did not testify, as Ms. King advocates, that the Retirement Board must look beyond the QDRO, but specifically testified, "All I'm allowed to look at, Your Honor, is the QUADRO [sic]. *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);⁴ (3) Ms. Lambright did not testify, as Ms. King advocates, that Judge King was required to designate Ms. King as his survivor beneficiary, but specifically testified, "THE COURT: And apparently that QUADRO 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,* id. at 18 (emphasis supplied);" (4) Ms. Lambright did not testify, as Ms. King advocates, that Judge King had no choice with respect to the annuity chosen under the QDRO, but

⁴ See also Tr., July 23, 2009, at 21 ("[W]hen I do the training for Family Court judges, they are a little bit surprised at this . . . but the way the IRS works, only the administrator of the pension system has the ability to accept or reject a QUADRO [sic], which is why most people, including all the counsel at table here, send the QUADROs to the system to have it reviewed in draft form . . .").

specifically testified, “He has the *sole option* to choose what type of annuity he can take from the Public Employees Retirement System,” *id.* at 28 (emphasis supplied);⁵ (5) Ms. Lambright did not testify, as Ms. King advocates, that if Judge King dies but his wife survives him, Ms. King will be adversely affected, but specifically testified, “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,” *id.* at 28; and (6) Ms. Lambright did not verify Ms. King’s calculations of the benefits to which she now alleges entitlement, but rather made no calculations, “THE COURT: You’re [referencing Ms. King’s counsel] certainly not going to ask her to recalculate while she’s sitting here, are you? MS. POOL: No, I did not,” *id.* at 30. Again, how this testimony supports Ms. King’s assertion that she “then presented Anne W. Lambright, Executive Director of the Consolidated Public Retirement Board (Board), who sponsored Movant’s Exhibit No. 1, and confirmed that [Judge King] designated [Ms. King] as the ‘100 percent Joint and Survivor’ of his retirement annuity,” Appellee’s Brief at 9, is beyond comprehension and legitimate advocacy.

Seventh, Ms. King’s brief makes a number of other representations about Ms. Lambright’s testimony, Appellee’s Brief at 9-10, which can be seen from the foregoing, are simply false.

Finally, in a seemingly unending display of misrepresenting the record, Ms. King’s brief states, “At the completion of the hearing, the Family Court Judge

⁵ See also *id.* at 33 (“MR. LOCKWOOD: And Judge King simply exercised the option that was afforded to him? THE WITNESS: Absolutely, absolutely.”).

stated on the record that he found [Judge King] knew what he had signed in regard to the Settlement Agreement reached in the underlying divorce. (*Id.* at 10).” Appellee’s Brief at 10. First, the hearing concludes at page 43, not at page 10. Tr., July 23, 2009. Second, and more importantly, the Family Court Judge expressly reserved any ruling: “THE COURT: Okay, those are the two sides. . . . Now in the way I look at it, it’s my decision, is it not, which way I’m going to interpret it? MS. POOL: Of course, it’s your decision.” Again, how reserving a ruling constituted making a ruling is beyond comprehension and legitimate advocacy, particularly when Ms. King’s own brief acknowledges that the judge “requested each party to submit a memorandum of law on the issue.” Appellee’s Brief at 11.

Ms. King’s discussion of the procedural history and statement of facts departs so dramatically from the record that appellants submit that the only safe course is to disregard it.

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW.

At least both parties agree that, “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, appellants submit 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.⁶

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

⁶ In somewhat of a confusing fashion, Ms. King does not respond to appellants' individual assignments of error. In fact, Ms. King states, "Appellants do not make specific assignments of error in their brief." Appellee's Brief at 15. Certainly, a statement, "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," in appellants' view, constitutes a separate and discrete assignment of error. In any event, the organization of this reply brief remains consistent with the appellants' original brief.

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.

Alternatively, if his wife should predecease Judge King, 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 to Show Cause at 8, she should have placed that language in the QDRO her attorney drafted, but that language is absent.⁷

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.

⁷ 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.

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 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.

Ms. King's response to this assignment of error, quite bluntly, makes no sense. Appellee's Brief at 15-21.

First, she quotes W. Va. Code § 5-10-24, *id.* at 16, but never connects the quoted statutory language to the circumstances of this case, in which the Retirement Board and its Executive Director both maintain that Judge King's election and the calculation of Ms. King's benefits were done in accordance with the terms of the QDRO and with the terms of the statute and regulations.

Second, she complains about Judge King's failure to file certain documents, but the record is undisputed that Judge King met with Retirement Board officials and completed the forms required to make his election under the QDRO, statute, and regulations. The two sections quoted by Ms. King reference "Upon divorce" and "Upon remarriage," but Judge King was retiring – he was not changing anything as a result of divorce or remarriage. Thus, Ms. King's argument is non sequitur.

Third, she complains that the QDRO does not reflect the intent of the parties' settlement agreement, Appellee's Brief at 17-18, but her attorney drafted the QDRO and the Retirement Board, as indicated in the sworn testimony of its Executive Director, applied it as written in allowing Judge King to make his election, which is expressly reserved in the QDRO.

Finally, Ms. King spends over three pages of her response to the issue of whether the QDRO expressly served to Judge King the right to make alternative elections upon his retirement arguing that Judge King should be held in contempt.

Appellee's Brief at 18-21. Judge King agrees that there has been conduct in this case that is uncivil, unprofessional, and contemptible, but it is not his own.⁸

Rather, Judge King has simply exercised his right to have the QDRO, prepared by Ms. King's own attorney applied as it is written and as it has been interpreted by the Retirement Board. Conversely, 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.⁹

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

⁸ In a separate part of Ms. King's brief, she refers to a QDRO as a "tool" and ostensibly argues that even if the QDRO did not require it, Judge King is somehow bound by the terms of the Settlement Agreement to make the election advocated by Ms. King. Appellee's Brief at 29-30. First, as her own brief acknowledges, this Court held in *Chenault v. Chenault*, 224 W. Va. 141, 145-46, 680 S.E.2d 386, 390-91 (2009) that, "The 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." (footnote omitted). Second, as noted by appellants in their original brief, the language of the settlement agreement itself, drafted by Ms. King's counsel, does not clearly and unambiguously conflict with the language of the QDRO, also drafted by Ms. King's counsel. Certainly, appellants do not disagree that a QDRO that does not adequately reflect the agreement of the parties and give adequate direction to the plan administrator, relief can be awarded. Indeed, such was the holding in *Chenault*. Here, however, the QDRO, drafted by Ms. King's own attorney, accurately reflected the agreement of the parties and obviously gave adequate direction to the Retirement Board. Thus, *Chenault* and the other cases cited by Ms. King are simply inapposite.

⁹ Indeed, it is ironic that Ms. King has now benefited from an interpretation of the QDRO different that 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.

C. THE FAMILY COURT ERRED BY CONSTRUING THE QDRO IN A MANNER INCONSISTENT WITH THE RETIREMENT STATUTES AND ITS INTERPRETATION BY THE RETIREMENT BOARD.¹⁰

As noted in appellants' original brief, not only did Judge King interpret the QDRO to permit his election of the annuity and beneficiary selected, but so did the Retirement Board.

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, "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 Ms. King's benefits under the QDRO, Judge King's election, and the applicable statutes and regulations. 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.

¹⁰ Ms. King did not respond, seriatum, to appellants' assignments of error, but appellants maintain the order of presentation in their original brief.

Rather than citing any authority contradicting appellants' argument that the Family Court should have deferred to the Retirement Board's interpretation of the QDRO and the applicable statutes and regulations, Ms. King's brief engages in misdirection.

First, Ms. King states, "Appellants seem to rely on certain state regulations . . . which were not adopted until June 1, 2008, and do not apply retroactively to the subject QDROs, entered in 2003." Appellee's Brief at 26. As her own brief indicates, however, it was not the appellants who relied upon W. Va. CSR 162-2-1, but the Retirement Board, which referenced that regulation in its letter to Ms. King dated December 9, 2008. Moreover, as typifies her approach to legal argument, Ms. King cites no authority for the proposition that applying a 2008 regulation to a 2003 QDRO constitutes "retroactive" application of the regulation. The Retirement Board applied the regulation in effect at the time of Judge King's retirement and Ms. King cites no authority in support of any contention that such application was improper.

Second, Ms. King engages in her own calculations of what she asserts should be her retirement benefits, her losses, and financial impact upon her of various contingencies, Appellee's Brief at 27-28, but cites no legal authority or record evidence in support of her calculations, other than her arguments in the Family Court. What any of this has to do with the failure to accord deference to the Retirement Board is unclear.

Finally, using words like “manipulate,” “defeat,” “vested rights,” “subterfuge,” “divert,” “deliberate wrongdoing,” and “manipulation,” Ms. King continues her ad hominem attack on Judge King, Appellee’s Brief at 28, none of which again have anything to do with the legal issues at hand.

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.

In response to appellants’ complaint that the Family Court erred by failing to construe the QDRO and Settlement Agreement against the party whose counsel drafted the documents, Ms. King makes several unpersuasive arguments.

First, she argues that it has already been judicially-determined that these documents are “clear and unambiguous,” Appellee’s Brief at 21, but the previous ruling did not concern Judge King’s right to make a retirement election, but the date of calculation of the parties’ retirement benefits, whether as of the date of divorce or retirement,¹¹ and it is beyond dispute that documents can be clear as to one provision, but ambiguous as to another.

¹¹ Ms. King also argues that appellants’ argument should be barred by *res judicata*, Appellee’s Brief at 22-23, but “Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either *must be identical* to the cause of action determined in the

Second, she argues that the documents, independently of the previous litigation, are clear and unambiguous, Appellee's Brief at 22, but even the Family Court had to go outside their language to reach its ruling. Specifically, 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." Order at 2.

Of course, as noted in appellants' original brief, 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 draft 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.

prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997)(emphasis supplied), but the issues in the previous case and in this case are obviously not "identical."

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. See *Croft v. TBR, Inc.*, 222 W. Va. 224, 228, 664 S.E.2d 109, 113 (2009). Other courts have construed settlement agreements, one of the documents at issue in this case, against the drafter. See *Stone v. Metropolitan Life Ins. Co.*, 184 Fed. Appx. 584 at *3 (8th Cir. 2006); *Lexicon, Inc. v. Safeco Ins. Co. of America, Inc.*, 436 F.3d 662, 672 (6th Cir. 2006); *Erdman v. Cochise County*, 926 F.2d 877, 880 (9th Cir. 1991).

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.¹² Moreover, as the QDRO was drafted by Ms. King's attorney after the Settlement Agreement,

¹² See *Federated Rural Electric Insurance Exchange v. R.D. Mooney & Associates, Inc.*, 2008 WL 2554380 at *2 (11th 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 (7th 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 (7th 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 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").

the Family Court's decision to use the Settlement Agreement to discern the meaning of the QDRO violated the merger doctrine.¹³

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]." Order at 4. (emphasis supplied). In other words, Judge King has been order to purchase an uncertain annuity, under uncertain terms, in an uncertain amount because of the mere possibility that the Judge King and his wife should predecease Ms. King.

Like so much of her brief, Ms. King's response to this assignment of error is non-responsive.

¹³ 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).")

First, she conclusively asserts, "To be sure, [Ms. King] is entitled to compensation and remedial sanctions against [Judge King] as a result of his contemptuous conduct." Appellee's Brief at 23. Of course, no legal authority is supported for the apparent argument that a party is entitled to "damages" in the form of an economic remedy to which the party would otherwise not be entitled.

Second, she attacks not only Judge King, whose hide should be relatively thick by now, but also his wife: "He (and apparently Phyllis) have attempted to manipulate [Judge King's] retirement benefit every possible way to defeat [Ms. King's] vested rights" Appellee's Brief at 24. Again, what this has to do with the ordered purchase of an annuity for a contingency that may never occur is beyond comprehension and legitimate advocacy.

Finally, she argues that the appellants' argument is "specious at best because no life expectancy tables or similar evidence were submitted . . . as to the probability of whom would outlive whom." Appellee's Brief at 24. In addition to the temptation to say, "Mr. Kettle, meet Mr. Black," the evidence was undisputed that 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 reply brief, Judge King's present wife is 48 years old, Ms. King is 62 years old, and Judge King is 63 years old. Respectfully, it does not take an actuarial table to note that a

62 year old female and a 63 year old male have shorter life expectancies than a 48 year old female.

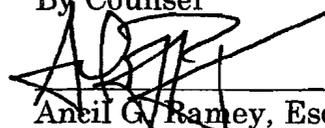
This Court has reversed orders, like the one entered in this case, where a family court has abused its discretion. See, e.g., *Arneault v. Arneault*, 219 W. Va. 628, 643, 639 S.E.2d 720, 735 (2006) (“we find that the circuit court abused its discretion in affirming the family court’s final equitable 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.

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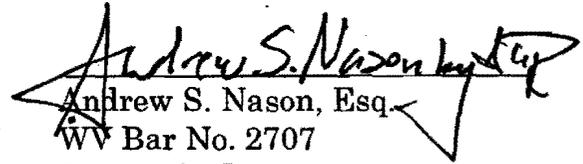
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A handwritten signature in black ink that reads "Andrew S. Nason" with a stylized flourish at the end. The signature is written over the printed name and bar number of Andrew S. Nason.

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EXHIBITS

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