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ROY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**IN THE WEST VIRGINIA
SUPREME COURT OF APPEALS**

SHAWN ROMANO,

Petitioner,

v.

WENDY GREVE,

Respondent.

**On Appeal from a November 22, 2010
Order of the Circuit Court of
Kanawha County; 05-D-1563**

DOCKET NO. _____

**RESPONSE OF WENDY GREVE TO PETITION FOR APPEAL
FILED ON OR ABOUT MARCH 21, 2011**

**Mark A. Swartz, WVSN 4807
Allyson H. Griffith, WVSN 9345**

SWARTZ LAW OFFICES PLLC

P.O. Box 1808

Saint Albans, WV 25177-1808

304.729.9000

Counsel for Wendy Greve

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KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Comes now, Wendy Greve, (hereinafter "Mother") by counsel, Mark A. Swartz and Allyson H. Griffith of Swartz Law Offices, PLLC, in response to Shawn Romano's (hereinafter "Father") Petition for Appeal from a *Final Order* entered by the Honorable Paul Zakaib on the 22nd day of November, 2010.

In January of 2006, the parties to this proceeding settled an ongoing dispute over the liquidation of income and expenses, *i.e.* child care, health insurance premiums, *etc.*, to be used/inserted in the child support formula. That agreement is reflected in an *Order Regarding Modification of Child Support* entered by the Family Court on October 30, 2006.

The Mother did not agree, as Father now claims, to waive the application of the Child Support Guidelines promulgated as W. Va. Code § 48-13-101. The Mother had proposed and she agreed, to avoid continued, interminable squabbling over income and expenses on a *current* basis, that it made sense to use the *last* calendar year's Form 1040 income and the actual historical child care and health premium costs for the prior calendar year. These past numbers would presumably be easier to quantify as opposed to anticipated, estimated future income and expenses. In theory, the Mother thought the agreement to look to the past instead of the future had the advantage of giving these parents one less thing to fight about. So much for Mother's misguided optimism.

The January 28, 2010 Family Court Order actually quotes the following term from the 2006 Order, which the Family Court later concluded constituted a waiver of the guidelines:

After such exchange of data [read 2006 income tax returns] . . . Respondent's (or Petitioner's, as the case may be) child support obligation for 2007, **using the Guidelines for Child Support Awards** . . . shall be calculated based upon the parties' respective incomes for 2006. [Emphasis added.]

On Appeal, the Circuit Court properly concluded that "there is no factual basis in the record, including the several Orders entered by the family court, to support a finding or conclusion the parties reached an agreement not to use the guidelines when calculating child support."¹ The 2006 Family Court Order literally says that the guidelines shall be applied to the prior year's income. Nowhere in that 2006 Order, or anywhere else in the record below, is there any indication that there was an agreement to waive the guidelines/formula application.

The Family Court properly determined that the child support modification be retroactive to April 1, 2009, and the Circuit Court affirmed the finding/conclusion. The Family Court's 2010 Order provided the opportunity to obtain retroactive relief if certain conditions were met. The Father dropped this ball. Indeed, there is no claim that he did not. Both Courts determined that because Father failed to provide his disclosures by the date stated in the 2010 Court Order,² which reflected the parties' agreement pertaining to retroactive relief (*i.e.* prior to filing a petition), that child support be retroactive pursuant to Rule 23 of the *Rules of Practice and Procedure for Family Court* to April 1 instead of January 1.³

The Circuit Court did not err or abuse its discretion. Father's Petition for Appeal to this Court is without merit and should be refused in its entirety.

¹ See *Order on Petitions for Appeal and For Cross Appeal*; November 22, 2010 at page 1.

² See *Family Court Final Order*, December 28, 2008 at page 4; paragraph 7.

³ See *Family Court Order Regarding Respondent's Motion to Modify Child Support*; January 28, 2010 at page 7; paragraph 18.

STANDARD OF REVIEW

In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*." Syllabus, *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004).

STATEMENT OF THE FACTS OF THE CASE

Mother and Father are both practicing attorneys. They were divorced in 2005. They share an equal allocation of custodial time with their two minor children. At the time of their divorce Father was employed as an associate at Daniels Law Firm in Charleston, West Virginia. Mother was and is a partner/member of the firm Pullin, Fowler, Flanagan, Brown & Poe, PLLC in Charleston, West Virginia.

In 2005, Father left his employment with Daniels Law Firm and accepted a position with the law firm of Ray, Winton & Kelley, PLLC. Father's salary decreased when he accepted a position with Ray, Winton & Kelley, PLLC. He filed a motion seeking to reduce his child support obligation. Mother argued that the Family Court should attribute income/earning capacity at compensation he enjoyed while at Daniels Law Firm.

On January 31, 2006 a hearing was held on Father's motion. Prior to the hearing, the parties negotiated a settlement which was later placed on the record and, subsequently, reduced to a written *Order Regarding Modification of Child Support*

entered by the Family Court on October 30, 2006. Relevant to this Appeal, the parties agreed to the following:

Both parties' income fluctuate. Accordingly, the Court finds that the parties' agreement as set forth below which determines the manner and method of establishing child support is fair and equitable and is in the best interests of the parties' minor children. In addition, the Court finds that, in entering into such agreement, *the parties have made a knowing, intelligent and voluntary waiver of the strict application of the West Virginia Child Support formula.*⁴

It is, accordingly, **ORDERED, ADJUDGED, AND DECREED** as follows:

- ... 2. On or before February 15, 2007 and on February 15 of each subsequent year, the parties shall exchange all pertinent financial information, including W-2s, K-1s, 1099s, quarterly documents, and any other financial documents which reflect income earned by the parties in 2006.⁵
3. After such exchange of data, Respondent's [Father's] (or Petitioner's, [Mother's] as the case may be) child support obligation for 2007, **using the Guidelines for Child Support Awards promulgated as W. Va. Code § 48-13-101**, shall be calculated based upon the parties' respective incomes for 2006. . . Once that number is determined, that number shall be the fixed amount of child support for the year⁶ 2007, and will not be subject to modification, retroactive or otherwise, for the year 2007.⁷
4. Until further Order of the Court, **the parties shall in subsequent years calculate child support in accordance with this method.** . . .⁸

The parties did not agree to waive the application of the Child Support Guidelines promulgated at *W. Va. Code § 48-13-101, et seq.* They simply agreed to look back when determining income and expenses to calculate support, instead of looking forward. This was the part about waiving the *strict* application of the formula.

Using the look back agreement, the 2006 *Order* required Father to pay child support in the amount of \$550 per month effective January 1, 2006. At this point in

⁴ See Family Court; *Order Regarding Modification of Child Support*; at page 2; paragraph 4.

⁵ See Family Court; *Order Regarding Modification of Child Support*; at pages 2 & 3; paragraph 2.

⁶ As opposed to "income for the year."

⁷ See Family Court *Order Regarding Modification of Child Support*; at page 3; paragraph 3.

⁸ See Family Court *Order Regarding Modification of Child Support*; at page 3; paragraph 4.

time, (calendar years 2005 and 2006), both parties were W-2 wage earners. Accordingly, the parties utilized the Guidelines for Child Support awards, specifically, *W. Va. Code* § 48-1-228(b)(1) which provides that gross income includes, “[e]arnings in the form of salaries, wages,”

Three months later in January of 2007, Father left the law firm of Ray, Winton & Kelley, PLLC and became a member in a newly-formed law firm, Romano & Olivio, PLLC. When it came time to establish the child support obligation for calendar year 2007, the parties looked back to 2006 for income and expenses. The parties agreed at the October 28, 2008 hearing that Mother’s total calendar year 2007 child support obligation was \$1,600.⁹ As noted above, both parties were both W-2 wage earners in 2006, and they applied the Guidelines to their W-2 and other income and expenses for 2006 to fix 2007 support.

An October 28, 2008 hearing addressed child support for the calendar year 2008. 2007 income and expenses were considered as follows: Mother had W-2 wages of \$95,945.75; Father’s W-2 wages were \$32,665.00, his interest income was \$4,893.00, his dividends were \$2,010.00; capital gains \$3,677.00, his 2007 K-1 disclosed self-employment income of \$274,838.00. Once again, the parties looked back for income and expenses to determine calendar year 2008 child support obligations. Father’s self-employment income was also utilized pursuant to the Guidelines for Child Support awards, *i.e.*, *W. Va. Code* § 48-1-228(b)(7).¹⁰

⁹ See Family Court *Final Order* entered on December 28, 2008; at page 2; paragraph 2.

¹⁰ *W. Va. Code* § 48-1-228(b)(7) Income from self-employment or the operation of a business, minus ordinary and necessary expenses which are not reimbursable, and which are lawfully deductible in computing taxable income under applicable income tax laws, and minus FICA and Medicare contributions made in excess of the amount that would be paid on an equal amount of income if the parent was not self-employed: Provided, That the amount of monthly income to be

The Court *using the Guidelines for Child Support awards* (the ones that were supposedly waived in their entirety in the 2006 Order) entered a Final Order on December 28, 2008. Relevant to this Appeal, the Final Order states as follows:

4. That on or before November 28, 2008, Respondent[Father] shall pay to Petitioner[Mother] \$18,813.51 representing his net, as noted above, child support due for the 2008 calendar year. This amount is inclusive of all medical co-pays and other expenses that the parties may owe to each other through October 31, 2008.
6. That commencing January 1, 2009, and continuing thereafter after [sic] on the first of each following month, Respondent[Father] shall pay to Petitioner[Mother] the sum of \$1,825.73 per month as child support, until further order of the Court above named.
7. That, by agreement of the parties, a motion to modify child support which is filed with the requisite financial disclosures, including without limitation, W-2's, complete 1040's and K-1's before March 31, 2009, shall be retroactive in effect to January 1, 2009.

On March 26, 2009 Father filed a *Motion to Modify Child Support*, but he did not file the items required at paragraph 7, quoted immediately above. He provided these items to the Court and Mother after the deadline of March 31st. Having failed to take the steps necessary to make the adjustment sought retroactive to January 1, 2011, and pursuant to Rule 23 of the *Rules of Practice and Procedure for Family Court*, both the family and circuits courts determined that the modification, subsequently determined, would be retroactive to April 1, 2011.¹¹

The Family Court ordered the parties to submit briefs on the contested issues; they did. On November 23, 2009, the Family Court convened a telephonic hearing to

included in gross income shall be determined by averaging the income from such employment during the previous thirty-six-month period or during a period beginning with the month in which the parent first received such income, whichever period is shorter.

¹¹ "Except for good cause shown, orders granting relief in the form of spousal support or child support shall make such relief retroactive to the date of service of the motion for relief." Father's Motion was filed on March 29, 2009 and served shortly thereafter; thus, making April 1, 2009 the proper retroactive date.

announce its rulings which were reduced to the *Order Regarding Respondent's/[Father's] Motion to Modify Child Support* and entered on January 28, 2010.

In the Family Court's January 28, 2010 *Order*, the Family Court erred (i) when it found/concluded that the parties had agreed not to apply the Child Support Guidelines to their respective income and expense data and (ii) had "agreed to deviate from the application of the child support guidelines." These were the grounds for appeal set forth at page 2 of Mother's March 1, 2010 *Petition for Appeal from Family Court Order* to the Circuit Court.

On March 19, 2010 Father filed his *Reply to Petition for Appeal and Cross-Petition for Appeal*. On March 30, 2010 the Circuit Court entered an *Order Granting Petition for Appeal*. On May 5, 2010, the Circuit Court held a hearing. On November 22, 2010, the Circuit Court entered a *Final Order*. It is from this *Order* that Father now appeals.

POINTS & AUTHORITIES RELIED UPON; DISCUSSION OF LAW

A. NEITHER THE FIRST ISSUE RAISED ON APPEAL IN THE DOCKETING STATEMENT NOR ITS RECHARACTERIZATION AT "DISCUSSION OF LAW VI.A." STATE A BASIS FOR AN APPEAL HERE.

The first issue framed in the Docketing Statement was: "Whether there was factual support in the record for the Family Court's decision to uphold *a prior agreement of the parties regarding the determination of the parties' incomes* for child support purposes." Discussion of Law Point A. at page 13 of Appellant's Petition says the issue on appeal is *error that occurred when the Circuit Court concluded, contrary to the evidence, that there was no factual support in the record for the Family Court's decision*

to uphold a prior agreement of the parties regarding the determination of the parties' incomes.

The Circuit Court decision actually determined that:

It is clear from the record and the admissions of the parties in this Court that the parties agreed to use historical income and expense data when calculating child support. They agreed not to argue about current or projected income and expenses; they agreed to use tax return/historical numbers.

As Father frames the issue in his Petition, Father argues that the Circuit Court ruled against them on a question that was essentially stipulated to below, when as noted, the Circuit Court accepted the "admissions" of the parties that they had made this agreement regarding income and expenses.

B. THE CIRCUIT COURT PROPERLY CONCLUDED THAT THERE WAS NO FACTUAL BASIS IN THE RECORD TO SUPPORT A CONCLUSION THAT THE PARTIES REACHED AN AGREEMENT NOT TO CONTINUE TO USE THE GUIDELINES FOR CHILD SUPPORT AWARDS PROMULGATED AS W. VA. CODE § 48-13-101, et seq.

As indicated in the 2006 Order, the parties agreed in relevant part as follows:

2. On or before February 15, 2007 and on February 15 of each subsequent year, the parties shall exchange all pertinent financial information, including W-2s, K-1s, 1099s, quarterly documents, and any other financial documents which reflect income earned by the parties in 2006.¹²
3. After such exchange of data, Respondent's [Father's] (or Petitioner's, [Mother's] as the case may be) child support obligation for 2007, *using the Guidelines* for Child Support Awards promulgated as *W. Va. Code § 48-13-101*, shall be calculated based upon the parties' respective incomes for 2006. . . Once that number is determined, that number shall be the fixed amount of child support for the year¹³ 2007, and will not be subject to modification, retroactive or otherwise, for the year 2007.¹⁴

¹² See Family Court; *Order Regarding Modification of Child Support*; at pages 2 & 3; paragraph 2.

¹³ As opposed to "income for the year."

¹⁴ See Family Court *Order Regarding Modification of Child Support*; at page 3; paragraph 3.

No one argues that this agreement only applied to support calculations for 2007. The agreement to use past incomes and expenses was for all subsequent years. It was a common sense way to avoid bickering about income and expenses on a going forward basis. It was an agreement to deviate from the Guidelines which typically focus on current events and agree to look back. It was, however, a very limited agreement.

Counsel for the Father [Petitioner herein] drafted the 2006 Order ultimately entered by the Family Court. The Circuit Court examined that Order and the record to ascertain the terms of the alleged agreement, as in what were the terms on which there was a meeting of the minds; very few, specifically, last years' income and expenses.

We can scour the 2006 Order and the record for the answers to questions like: Do we use the 2008, 2009, 2010 and 2011 versions of the official child support program or are we stuck in 2007? Do we put self-employment income in the W-2 wages blank? What do we do with self-employment income? If either of the parties remarry, and have another child do we adjust for that? If someone takes a year off to hike the Appalachian Trail, do we attribute income to the hiker, or zero out child support? There are no answers to these questions and many others in this record.

The simple but really important point here is if these parties had an agreement to trash the Guidelines, what was it? The Order says figure out income and expenses on an historical basis and use the Guidelines (and that is what the Family Court did in 2008). If Father had something else on his mind in 2006, then he should have spread it on the record and described it in his Order. He did not.

"A meeting of the minds of the parties is the *sine qua non* of all contracts." *Triad Energy v. Barbara Trunk Renner, et al.*, Syl. Pt. 2, 215 W.Va. 573, 600 S.E.2d 285

(2004). “[A] definite meeting of the minds of the parties is *essential* to a valid compromise, since a settlement cannot be predicated upon equivocal actions of the parties.” *Burdette v. Burdette Realty*, 214 W.Va. 448, 452, 590 S.E.2d 641 (2003).

In the January 28, 2010 Family Court Order, the court in sum and substance erroneously held that Mother waived the guideline requirement that self-employment income be averaged. Whether we are talking about waiver of the Guidelines or an agreement to deviate, *the waiver or the agreement must be proven*.

The duty of a parent to support a child is a basic duty owed by the parent to the child, and a parent cannot waive or contract away the child’s right to support.

Syl. Pt. 3. *Wyatt v. Wyatt*, 185 W.Va. 472, 408 S.E.2d 51 (1991).

The *Wyatt* case was decided before *W.Va. Code* § 48A-2-8(a)(1) was repealed. When *Wyatt* was decided, § 48A-2-8(a)(1) allowed for a limited waiver if the “safeguards” outlined in the referenced Code provision were followed. Specifically, it required that the actual guideline amount be disclosed and then “knowingly and intelligently waived.” This Code provision went away in 2000, but *Wyatt* Syl. Pt. 3 did not.

Again, a review the of 2006 Order in order to determine what the parties agreed to do is necessary: “[T]he parties have made a knowing, intelligent and voluntary waiver of the strict application of the West Virginia Child Support formula.” Not very helpful; so the next question is: what piece, or pieces, of the guidelines is/are not to be strictly applied. Truly, it was/is one piece. That piece was the agreement to use the prior year’s income and relevant expenses instead of the current year’s/current period’s numbers. This had the advantage of giving these parties one less thing to fight about.

The January 28, 2010 Family Court Order actually quotes the following term from the 2006 Order, which it later concludes constituted a waiver of the guidelines

After such exchange of data [read 2006 income tax returns] . . . Respondent's (or Petitioner's, as the case may be) child support obligation for 2007, **using the Guidelines for Child Support Awards** . . . shall be calculated based upon the parties' respective incomes for 2006. [Emphasis added.]

The parties agreed to apply the Guidelines to the prior year's income; nothing more, nothing less.

Given the fact that the 2006 Order does not mention self-employment income or attribution, and actually says that child support will be calculated "*using the Guidelines for Child Support awards,*" the outcome here in the family court was incredible. To press from the ridiculous to the sublime to illustrate this point: the Family Court in effect determined that:

- If the Mother quit her job tomorrow and worked summers as a lifeguard at a neighborhood pool for a total of \$2,500.00 a year—no income could be attributed to her for child support purposes; or
- If Father has self-employment income of \$250,000 in one year followed by a year in which he has \$25,000 of self-employment income, there is no averaging under the guidelines; or
- If either party, or both, just quits working and lives off family money or charity, no child support would be payable.

There is nothing at all in the record that would support a conclusion that the parties made an agreement to do anything other than look to the past for the gross income numbers and expense numbers to be used when the guidelines were applied. If they made the agreement the Family Court imagined (and the Circuit Court rejected), it

would be unenforceable because it could never be defended as being in the best interests of these children. The Circuit Court did not err, nor did it abuse its discretion in its November 22, 2010 Order.

C. THE MOTHER DID NOT CHANGE COURSE REGARDING THE NATURE AND SCOPE OF THE AGREEMENT.

The Father, as noted at A. above, has reinvented the issues raised on appeal to the Circuit Court so he can claim a change of course and argue estoppel.

First, Mother does not claim that there was no agreement to look to the past for income and expenses, indeed as noted by the circuit court the parties essentially stipulated that this was the case. Second, how is income averaging of past self-employment income a change of position? Third, this issue, judicial estoppel was not raised below in the circuit court. Father's judicial estoppel argument is noticeably misplaced and was included at the tail end of his "**Reply** to the Petition for Appeal" filed by Mother. This argument did *not* find its way it into Father's Cross-Petition for Appeal to the Circuit Court; thus, he is not at liberty at this juncture to raise this issue.

"Our general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered." *Shaffer v. Acme Limestone Co., Inc.*, 206 W.Va. 333, 349 n.20, 524 S.E.2d 688, 704 n.20 (1999). *See also, Whitlow v. Board of Education*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993) ("Our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal."); *Konchesky v. S.J. Groves & Sons Co., Inc.*, 148 W.Va. 411, 414, 135 S.E.2d 299, 302 (1964) ("[I]t has always been necessary for a party to object or except in some manner to the ruling of a trial court, in order to give said court an opportunity to rule on such objection before this

Court will consider such matter on appeal."). Further, if a party fails to properly raise a nonjurisdictional "defense during [a] administrative proceeding, that party waives the defense and may not raise it on appeal." *Hoover v. West Virginia Bd. of Medicine*, 216 W.Va. 23, 26, 602 S.E.2d 466, 469 (2004), quoting *Fruehauf Trailer Corp. v. W.C.A.B.*, 784 A.2d 874, 877 (Pa.Cmwlt. 2001).

D. THE FAMILY COURT PROPERLY ORDERED AND CIRCUIT COURT PROPERLY AFFIRMED THAT CHILD SUPPORT BE RETROACTIVE TO APRIL 1, 2009.

As indicated above, the Family Court entered a Final Order on December 28, 2008. Relevant to this Appeal, the Final Order states as follows:

7. That, by agreement of the parties, a motion to modify child support which is filed ***with the requisite financial disclosures***, including without limitation, W-2's, complete 1040's and K-1's ***before March 31, 2009, shall be retroactive in effect to January 1, 2009.***¹⁵

As stated above, on March 26, 2009 Father filed a *Motion to Modify Child Support*, but failed to file the requisite financial disclosures. In relevant part, the Family Court's January 28, 2010 Order reads as follows:

18. The Court further finds that Respondent[/Father] did not disclose his income tax return on or before March 31, 2009. Accordingly, based upon the language of the *Final Order* entered on December 23, 2008, this modification shall not be retroactive to January 1, 2009 but instead, pursuant to Rule 23 of the *Rules of Practice and Procedure for Family Court*, shall be effective April 1, 2009, the month following service of the motion to modify.¹⁶

The Circuit Court properly affirmed the Family Court's determination and held that "Respondent[/Father] in his cross petition has not demonstrated that the Family Court's determination that the recalculation of child support be retroactive to April 1,

¹⁵ See Family Court *Final Order*, December 28, 2008 at page 4; paragraph 7.

¹⁶ See Family Court *Order Regarding Respondent's Motion to Modify Child Support*, January 28, 2010 at page 7; paragraph 18.

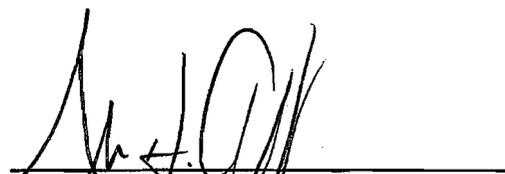
2010, rather than January 1, 2010 was either clearly erroneous or an abuse of discretion.”¹⁷

The Circuit Court did not err or abuse any discretionary powers and Father’s Petition for Appeal should be refused, in its entirety.

WHEREFORE, for the reasons set forth above, Mother respectfully requests that this Court refuse Father’s Petition for Appeal.

Dated at St. Albans, West Virginia, this 14th day of April, 2011.

WENDY GREVE
By counsel



Mark A. Swartz, WVSBN 4807
Allyson H. Griffith, WVSBN 9345

 **SWARTZ** LAW OFFICES PLLC
P.O. Box 1808
Saint Albans, WV 25177-1808
304.729.9000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response was served on the following via U.S. Mail:

Mark W. Kelley, Esq.
Ray, Winton & Kelley, PLLC
109 Capitol Street; Suite 700
Charleston, WV 25301

this 14th day of April, 2011



Allyson H. Griffith

¹⁷ See Circuit Court Order on Petitions for Appeal and For Cross Appeal; November 22, 2010 at page 3; first paragraph 3.