

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

In re the Marriage/Children of

Dana C. Zerkel n/k/a Leech, Respondent

vs.) No. 101192 (Monongalia County 04-D-28)

Gregory Allen Zerkel, Petitioner

FILED

February 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Gregory Allan Zerkel appeals the portion of the circuit court's order of April 22, 2010, that affirmed the family court's order of November 30, 2009, modifying his child support obligation.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Pursuant to a prior order, beginning in approximately June of 2006 Mr. Zerkel paid his ex-wife Dana C. Leech \$15,000 per month in child support for their four children. By Order of November 30, 2009, over Mr. Zerkel's objection, the family court granted Ms. Leech's motion to increase the child support award based upon a substantial increase in Mr. Zerkel's income. The family court awarded \$31,974.50 per month, retroactive to the date Ms. Leech filed her motion to modify in April 2007. This amount was calculated by application of the Child Support Guidelines. The family court granted Mr. Zerkel's separate motion that any amounts that exceed the children's day-to-day needs be placed in trust pursuant to West Virginia Code § 48-13-802. The family court ordered that the award in excess of \$15,000 per month be placed in trust.

Mr. Zerkel argues that there should be a downward adjustment in the child support award, or that the Guidelines should be disregarded, when a parent has an extraordinarily high income and the award greatly exceeds the children's needs. He asserts, *inter alia*, that the high award in this case robs him of his ability to effectively parent his children by regulating their discretionary spending, and that

the award is essentially a premature inheritance over which he has no control.

This Court applies the following standard of review:

In reviewing a final order entered by a circuit 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., *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004). West Virginia Code § 48-13-701 provides a rebuttable presumption that a child support award calculated pursuant to the Guidelines is correct. West Virginia Code § 48-13-702(a) provides:

If the court finds that the guidelines are inappropriate in a specific case, the court may either disregard the guidelines or adjust the guidelines-based award to accommodate the needs of the child or children or the circumstances of the parent or parents. . . .

In this statute, the use of the word “may” indicates that the decision to disregard or adjust a Guidelines-based award is discretionary with the family court. In this case, the family court chose not to deviate from the Guidelines. This decision is supported by West Virginia Code § 48-13-802, where the Legislature made provisions for large child support awards by allowing a court to require investment of the amount of the award in excess of the child’s day-to-day needs. We find that the family court did not abuse its discretion in following the Guidelines and requiring investment pursuant to § 48-13-802, and that the circuit court did not err in affirming the family court on these issues.

Accordingly, we affirm the circuit court.

Affirmed.

ISSUED: February 25, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Menis E. Ketchum

NOT PARTICIPATING:

Justice Brent D. Benjamin
Justice Thomas E. McHugh