**FILED**
**May 26, 2022**
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

# STATE OF WEST VIRGINIA
# SUPREME COURT OF APPEALS

**Jackie N.,**
**Petitioner Below, Petitioner**

**vs.) No. 21-0037** (Putnam County 20-D-AP-2)

**Lori M.-N.,**
**Respondent Below, Respondent**

## MEMORANDUM DECISION

Petitioner Jackie N., by counsel Alan L. Pritt, appeals the Circuit Court of Putnam County's December 14, 2020, order denying his petition for appeal of a family court order that denied his petition to modify child support, found him in contempt of a prior family court order directing him to pay child support and other medical expenses for the children, and found him in arrears in child support and medical expenses.[1] Respondent Lori M.-N., self-represented litigant, filed a response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

The parties were divorced by final order entered on July 16, 2008. In their property settlement agreement, which was ratified by the family court and incorporated into its final order, the parties agreed in pertinent part as follows:

> 13. **Medical/Health Insurance:** [Petitioner] shall be responsible for payment of the health/medical insurance premiums for the children until such time as they reach the age of 18 and graduate from high school or until such later time as long as his health insurance will allow coverage. [Petitioner] and [respondent] shall divide on a prorated basis according to line 3 of the child support formula all non-covered costs for the children, including, but not limited to, co-pays,

[1] Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

> prescription costs, vision costs, dental and orthodontic costs, psychological costs and all other costs which are not covered by the health/medical insurance. [Respondent's] percentage to pay is 33% and [petitioner's] percentage to pay for such is 67%.
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> . . . .
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> 15. **Child Support:** [Petitioner] agrees to pay [respondent] child support in the amount of $2,250 per month beginning Aug[ust] 1, 2008, with the full payment to occur on or before the last day of that month and thereafter. Both parties agree this is contractual in nature and not to seek any modification of this amount. This is in the best interest of the minor children. Both parties understand that a child support obligation will be due and owing until such time as both children reach the age of 18 and graduate from high school.

On January 7, 2020, petitioner filed a petition for modification of child support. The family court directed the parties to mediate, which was unsuccessful, and, thereafter, scheduled a final hearing on the petition for modification for September 1, 2020.

While petitioner's petition for modification was under consideration, and before the parties appeared for a final hearing on that petition, respondent filed a petition for contempt on April 3, 2020. Respondent alleged that petitioner had failed to make child support payments for January, February, and March of 2020. Respondent asserted that petitioner owed $3,500 for each month, for a total due of $10,500. Petitioner countered that because the parties' property settlement agreement specified child support in the amount of $2,250, and because he had been paying $3,500, he had overpaid $1,250 per month.

On September 1, 2020, the parties appeared for a final hearing on petitioner's petition for modification of child support and respondent's petition for contempt. The family court denied petitioner's petition for modification, finding that the parties were competent, had competent counsel when they entered into their property settlement agreement, and, therefore, knowingly and intelligently waived their right to seek a modification of child support. *See* Syl. Pt. 2, *Grijalva v. Grijalva*, 172 W. Va. 676, 310 S.E.2d 193 (1983) ("If explicit contractual provisions in a divorce settlement bar modification of all its provisions, both parents are estopped from seeking modification of an agreed-to child support award except when the reason for seeking such modification directly concerns the welfare of the child.").

Regarding respondent's petition for contempt, the family court first recounted petitioner's contractual obligations to pay child support to respondent in the amount of $2,250 per month, maintain medical insurance for the children, and pay 67% of the children's non-covered medical costs. "At some point after the Final Order was entered," the court observed, "the parties agreed that [respondent] would purchase medical insurance for the children, pay all copays and deductibles and [petitioner] would increase his payment to [respondent] from $2,250 a month to $3,500 per month." But because "[a] decretal child support obligation may not be modified, suspended, or terminated by an agreement between the parties to the divorce decree," Syl. Pt. 2, *Kimble v. Kimble*, 176 W. Va. 45, 341 S.E.2d 420 (1986), the family court declined to recognize the parties' modification of their earlier agreement. Then, relying on *Bowen v. Bowen*, No. 14-

1283, 2016 WL 143908 (W. Va. Jan. 11, 2016)(memorandum decision), in which this Court found that certain additional payments made by the former husband to his former wife were "separate and apart from the installment payments of spousal support ordered by the family court" and, therefore, that there was "no merit to [the former husband's] argument that his additional payments . . . should be credited toward his total spousal support obligation," the family court further declined to credit the amounts paid by petitioner over $2,250 against his arrearages.[2] The family court concluded that it was in the children's best interests to receive regular payments in accordance with the court's final order, and it observed that "to give [petitioner] credit for additional child support payments and not give [respondent] credit for the medical insurance, copays and deductibles would be unfair to [respondent]." The court, therefore, found petitioner in contempt of its order for failing to pay child support, maintain medical insurance, and pay copays and deductibles as previously ordered, and it found him "in arrears in child support and medical expenses no less than $10,000."

Petitioner appealed to the circuit court the family court's order denying his petition for modification and finding him in contempt. In its December 14, 2020, order denying petitioner's petition, the circuit court noted that West Virginia has no controlling authority on the voluntary overpayment of child support and found no error in the family court's consequent reliance on *Bowen* or on out-of-state authority holding that such voluntary overpayments do not create a credit against or otherwise diminish the amount of subsequent child support obligations. The circuit court also found no reversible error in the family court's refusal to recognize the parties' apparent out-of-court modification of the court-ordered child support due to the parties' inclusion of a provision in their property settlement agreement barring modification.

Petitioner appeals from the circuit court's order denying his petition for appeal from the family court's order. Our review is guided by the following standard:

> 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., *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004). In addition, "[q]uestions relating . . . to the maintenance . . . of the children are within the sound discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused." Syl., *Nichols v. Nichols*, 160 W. Va. 514, 236 S.E.2d 36 (1977).

In his lone assignment of error, petitioner asserts that the lower courts erred in applying *Bowen*, and he argues that "[t]he facts of *Bowen* and the case at hand are easily distinguishable."

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[2] The family court also considered caselaw from outside this jurisdiction holding that voluntary overpayments of child support should not be applied as a credit against future obligations. *See, e.g.*, *Wicker v. Hallman*, 245 So. 3d 627, 630 (Ala. Civ. App 2017) (concluding, following a review of decisions from other jurisdictions, that "the prevailing rule is that a parent who has voluntarily exceeded the amount of payments owed on his or her child-support obligation is not entitled to a credit or setoff against future child-support payments").

Petitioner highlights that the parties here agreed to modify their child support agreement whereas the parties in *Bowen* had not agreed to any spousal support modification. Petitioner argues that, as a result, the finding in *Bowen* that the additional payments were "separate and apart" from the alimony obligation does not apply to the situation here. He concludes that the additional payments "were always considered child support payments."

Though petitioner argues that the parties modified their agreement on child support and that the family court made a finding that the parties agreed to modify their child support agreement, we have held that "[a] decretal child support obligation may not be modified, suspended, or terminated by an agreement between the parties to the divorce decree." *Kimble*, 176 W. Va. at 47, 341 S.E.2d at 422, Syl. Pt. 2. So, whatever modification the parties may have attempted was not valid, and, irrespective of the family court's acknowledgment of the fact that the parties may have attempted a modification, the lower courts correctly refused to recognize any such modification. Without a valid child support modification, we find further that the family court did not err in looking to *Bowen* in denying petitioner's request to credit the additional payments he made to respondent against his child support obligation. Under the terms of the final divorce order, petitioner was required not only to pay $2,250 in monthly child support but also to pay the children's health insurance premiums and, basically, two-thirds of their non-covered medical costs. Petitioner skirted his obligations to obtain health insurance and pay non-covered medical costs by paying respondent an additional $1,250 per month. Thus, the additional monthly payments of $1,250 were "separate and apart" from his child support obligation, and the family court did not err in refusing to credit those separate amounts against later arrearages in his child support obligation.

Moreover, we note that petitioner's argument is that the family court abused its discretion in "find[ing] *Bowen* controlling." He does not directly challenge the family court's decision to hold him in contempt for his failures to pay child support, maintain medical insurance, and pay non-covered medical costs, nor does he challenge the court's finding that "it is in the children's best interest to receive regular [child support] payments in accordance with the court's order." Instead, he challenges only the family court's reliance on *Bowen* in reaching its decisions. Without a meaningful challenge to the lower courts' ultimate rulings—and without citation to any law so much as hinting that the family court erred in holding him in contempt and finding him in arrears—petitioner has failed to demonstrate that the family court abused its discretion in resolving the child support issue before it.

For the foregoing reasons, we affirm.

Affirmed.

**ISSUED:** May 26, 2022

**CONCURRED IN BY:**

Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton

**DISSENTING:**

Chief Justice John A. Hutchison

I dissent to the majority's resolution of this case. I would have set this case for oral argument to thoroughly address the error alleged in this appeal. Having reviewed the parties' briefs and the issues raised therein, I believe a formal opinion of this Court was warranted—not a memorandum decision. Accordingly, I respectfully dissent.

**NOT PARTICIPATING:**

Justice C. Haley Bunn