Workman, C.J., Dissenting Opinion, Case No.23679 Karen Pearson v. Roger Pearson

No. 23679 - Karen Pearson v. Roger Pearson

Workman, C. J., dissenting:

I must respectfully dissent from the majority's decision. The Defendant in this case failed to file a cross-appeal regarding the issue of alimony; yet the majority remands the case back to the circuit court to address an issue not only not raised in the petition for appeal in this Court, but in fact not even raised below. In so doing, the majority violates our long-established rule of deciding cases based on the record before us. By remanding this case based solely on allegations of a change in circumstance made for the first time in Defendant's brief, and thereby providing Appellant an opportunity to revisit the issue of alimony on remand, the majority has acted in complete disregard of established modification procedures. If Appellee wished to seek a reduction of the alimony award based on the fact that the wife's employment subsequent to the proceedings below constituted an unanticipated change of circumstances, the proper procedure would be to follow the procedures set forth in West Virginia Code § 48-2-15(e) (1996) and file a petition for modification. In this case, upon bare allegations made for the first time on appeal, the majority sets the stage for an alteration of Plaintiff's alimony award. While I am not suggesting that Plaintiff's income be disregarded, it is not for this Court to short-circuit the legislatively-established procedures for addressing issues of modification.

The precedent relied upon by the majority to grant a remand on the issue of alimony is Hinerman v. Hinerman, 194 W. Va. 256, 460 S.E.2d 71 (1995). In that decision, a remand was already determined to be warranted on the issue of rehabilitative versus permanent alimony because of the circuit court's failure to properly consider the factors set forth in syllabus point three of

Molnar v. Molnar, 173 W. Va. 200, 314 S.E.2d 73 (1984). After stating that a remand was in order, this Court in Hinerman referenced the need to develop below the assertion of the ex-wife's employment. 194 W. Va. at 261, 460 S.E.2d at 76. We did not, however, premise the remand of that decision on the issue of the ex-wife's alleged newfound employment. Moreover, the statement in Hinerman that this issue should be developed below did not excuse the ex-husband in that case from the statutory requirement of first filing a motion to modify the prior award of alimony pursuant to West Virginia Code § 48-2-15(e). The majority now uses what was at best dicta, the mention that an allegation of a change of circumstances could be considered on remand (since it was being remanded for other reasons), and essentially invites all domestic litigants to assert changes of circumstances on appeal. All things both good and bad must have a beginning and an ending, but this policy suggests that domestic matters may never be ripe for appellate review so long as one party alleges (albeit for the first time on appeal) a change of circumstances.

Given the lack of any procedural challenge by Appellant, the majority was wrong to remand, thus permitting Defendant an opportunity to relitigate the issue of alimony based solely on an ex parte representation. Characterizing mere representations in a party's appeal brief as "[t]he record on appeal," the majority fallaciously reaches its conclusion that the circuit court's findings of fact were "clearly erroneous." Contrary to the majority's characterization, representations in an appellate brief do not constitute a part of the record on appeal. See Wilkinson v. Bowser, No. 23295, 1996 WL 731867, at *2, ___ W. Va. ___, ___ S.E.2d ___ (Dec. 19. 1996). One can only imagine the devastating effects on the appellate process if this Court were to accord evidentiary weight to unsupported and unproven allegations made for the first time in appellate briefs. In this case, the well-established review process for domestic decisions has been annihilated by the majority's reliance on the Defendant's mere representations.

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Although the majority reaches the conclusion that a mutual restraining order was wrongly issued by the circuit court pursuant to West Virginia Code § 48-2-15(b)(9) (1996) based on the absence of a finding of abuse, such an order was temporarily in place during the pendency of the proceedings below generally. The restraining order may be of no great moment to the instant case now, but it is an important enough issue in the larger domestic violence arena that I take this opportunity to address it. Mutual restraining orders are a common but very bad practice. On first glance, they seem harmless, and perhaps even effective in dealing with allegations of domestic violence. Whereas the language of West Virginia Code § 48-2-15(b)(9) requires enjoinment of "the offending party," all too often magistrates are issuing mutual restraining orders without regard to the evidence. That practice is generally harmful and ineffective.

The first requirement for issuance of a family violence protective order is evidence of abuse. Although the language of West Virginia Code § 48-2-15(b)(9) requires enjoining of "the offending party," all too often magistrates, family law masters, and circuit judges are issuing mutual restraining orders without a proper evidentiary foundation. This practice of mutual restraining orders, while perhaps well-intentioned, causes more problems than it attempts to solve. It hinders rather than assists the enforcement of domestic violence laws. Judicial officers may believe they are addressing the issue of family violence, but mutual restraining orders can actually endanger, rather than protect, the victim. Boilerplate mutual restraining orders also diminish the principal goal of a restraining order, which is to provide protection from domestic violence to one who has been subjected to it. When a law enforcement officer at the scene of domestic violence learns of mutual restraining orders, confusion obviously results, and the officer often resolves the dilemma by arresting both. This confusion was never intended by our Legislature.

Mutual restraining orders should not be issued except upon petition and only upon a specific finding of abuse by the restrained party. West Virginia law prohibits the issuance of restraining orders without the filing of a petition by a victim and evidence supporting that petition: Mutual protective orders should not be granted unless both parties have filed a petition under section four [W. Va. Code § 48-2A-4] of this article and have proven the allegations of abuse by a preponderance of the evidence. W. Va. Code § 48-2A-6(e).

The issuance of a restraining order without a petition and supporting evidence trivializes the complaint of the individual who has filed such a petition and has provided evidence in support thereof. According to the Model Code on Domestic and Family Violence, published by the National Council of Juvenile and Family Court Judges, "A court shall not grant a mutual order for protection to opposing parties." Sec. 310, at 30. An overview to chapter 3 of the Model Code outlines the problems:

Mutual orders undermine the safeguards contemplated by civil protection order statutes. Mutual orders minimize a perpetrator's exposure to sanctions for violation of an order. Mutual orders rarely provide comprehensive relief to safeguard the victim. The diluted and mixed messages of mutual orders result in unpredictable police response. Often police refuse to enforce mutual orders. When a mutual order is violated, law enforcement officers have no way to determine who needs to be arrested and may arrest both parties, further victimizing the real victim. The consequences of arrest for victims who have committed no violence or criminal act, but who are bound by a mutual order are profound; victims may suffer a loss of good reputation, lose custody of children, find employment endangered, require burdensome fees for defense counsel and be unable to make bail.

The commentary on section 310 of the Model Code explains further:

The Model Code explicitly prohibits the issuance of mutual protection orders. Mutual orders create due process problems as they are issued without prior notice, written application, or finding of good cause. Mutual orders are difficult for law enforcement officers to enforce, and ineffective in preventing further abuse. However, the Code does not preclude the issuance of separate

orders for protection restraining each opposing party where each party has properly filed and served petitions for protection orders, each party has committed domestic or family violence as defined by the Code, each poses a continuing risk of violence to the other, each has otherwise satisfied all prerequisites for the type of order and remedies sought, and each has complied with the provisions of this chapter.

Model Code at 30 (cmt. to Sec. 310).

In addressing requests for restraining orders, courts should make explicit findings of fact regarding violent conduct and only such findings as are supported by the evidence. Where separate orders for protection are awarded, the relief contained in each should be tailored individually to address the risk and prevent the abusive conduct of the other, and each order should be constructed in a manner so as not to jeopardize the safety requirements that the evidence demonstrates exists.

Unjustified mutual restraining orders denigrate the very purpose of domestic violence restraining orders. It is vital that the judicial system treat domestic violence as a serious problem, and that we work to create a system more responsive to those who seek protection.