No. 24028--Larry K. Williams v. Stella Lynn (Williams) Miles

Workman, Chief Justice (dissenting):

The majority has seriously erred in its approach to this case. Contrary to the lower court's and the majority's characterization, Appellant did not seek to modify[1] the property settlement agreement. Procedurally, Appellant sought to require Appellee to account for a marital asset[2] that was earned during the course of the marriage, but not acquired by Appellee until after the divorce was finalized, and had not been included as a potential asset by Appellee in his financial disclosure during the divorce proceedings. The majority makes much of the fact that five years passed before Mrs. Miles made her claim. However, within one month of it coming to Appellee's attention that her former husband had become entitled to the

[1]A petition for modification is a special breed of pleading in domestic law, based on West Virginia Code § 48-2-15(e)(1996), and a whole line of case law. It carries with it more legal import than simply changing or altering an order. Modification in the domestic arena refers to a petition to change a final divorce order based on a change of circumstances. See Gardner v. Gardner, 184 W. Va. 260, 400 S.E.2d 268 (1990); Lambert v. Lambert, 178 W. Va.224, 358 S.E.2d 785 (1987).

[2]The pleading that Appellant filed was styled "Motion for Accounting of Marital Asset."

back pay award, Appellant filed her motion, not to modify the prior settlement agreement but to require her ex-husband to disclose to the court the amount of this after-acquired asset and to seek her half of the back pay award.[3]

The petition filed by Appellant was not styled as a petition for modification, nor did it sound in modification. Instead, Appellant sought to bring to the court's attention the fact that Appellee provided inaccurate information in his financial disclosure.

The majority wrongly relies on Segal v. Beard, 181 W. Va. 92, 380 S.E.2d 444 (1989), to conclude that the formerly approved property settlement agreement cannot be set aside. While Segal clearly stands for the proposition that a circuit court lacks jurisdiction to modify a divorce decree involving a property settlement when the modification proceeding does not involve alimony, child support, or child custody, it does not bar the circuit court from addressing division of an asset when there is evidence of mistake, coercion, fraud, or any other ground which would ordinarily permit the vacation of a court order to prevent the operation of an injustice.

[3]The decision was reached awarding the back pay in January 1995 and

In Segal one party sought to modify the previously agreed upon usage schedule of a condominium and to address certain tax liabilities associated with that marital asset. For the majority to rely on Segal to resolve this case simply defies logic, especially when the marital asset at issue here was never considered below.

The law is clear that a property settlement agreement should be set aside if it was entered into based on fraud. See Gangopadhyay v. Gangopadhyay, 184 W. Va. 695, 699, 403 S.E.2d 712, 716 (1991); see also Buckler v. Buckler, 195 W. Va. 705, 466 S.E.2d 556 (1995) (recognizing circuit court's obligation arising under West Virginia Code §§ 48-2-33 and 48-2-16(a) "to investigate the financial resources or circumstances of the parties"). Even if the representations were true at the time made, there remains a continuing obligation to supplement with accurate information. Furthermore, West Virginia Code § 48-2-33(2) provides:

> If any party deliberately or negligently fails to disclose information which is required by this section and in consequence thereof any asset or assets with a fair market value of five hundred

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Appellant filed her motion seeking an accounting on February 10, 1995.

> dollars or more is omitted from the final distribution of property, the party aggrieved by such nondisclosure may at any time petition a court of competent jurisdiction to declare the creation of a constructive trust as to all undisclosed assets, for the benefit of the parties and their minor or dependent children. . . .

The record in this case certainly suggests that Appellee may have at minimum been negligent in failing to disclose his potential entitlement to the overtime back pay award that resulted from the Cordle[4] ruling. Accordingly, the circuit court had jurisdiction under West Virginia Code §48-2-33(2) to address the asset at issue here.

The majority has presented Appellee with a major windfall. Even more alarming, however, is the possibility that the majority's opinion will have the undesired effect of fostering false financial disclosures and discouraging parties from supplementing the information they provide in financial disclosures. If a party provides false (or even mistakenly

[4]The majority opinion recites that "it was some 5 years after the final [divorce] decree was entered that the state troopers' case became a 'class action' and Larry K. Williams automatically became a member of the class." Majority opinion at 3 n.3. The Cordle case was in fact a class action from the very beginning, long prior to the conclusion of this divorce.

erroneous information) and they can just let enough time pass, it appears the wrongdoer once again gets rewarded.

For the foregoing reasons, I respectfully dissent.