

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

In re: The Marriage/Children of:

**Eldon J. H.,
Respondent Below, Petitioner**

vs.) No. 11-1134 (Ritchie County 04-D-8)

Mary J. H., Petitioner Below, Respondent.

FILED

October 25, 2012

released at 3:00 p.m.

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

MEMORANDUM DECISION

Pending before this Court is the appeal of the petitioner Eldon J. H.¹ filed by counsel Richard A. Bush and Michele L. Rusen, from the June 1, 2011, order of the Circuit Court of Ritchie County that denied his appeal from an order of the Family Court of Ritchie County as being untimely filed.² The petitioner filed his appeal of the family court order on December 22, 2008, thirty-two days after the family court order was entered. The circuit court found that the appeal was filed beyond the time constraints enumerated in Rule 28(a) of the West Virginia Rules of Practice and Procedure for Family Court. The petitioner argues that his petition for appeal from the family court to the circuit court was, in fact, timely filed. The respondent filed her response by counsel Berkeley L. Simmons. We agree and reverse the order of the Circuit Court of Ritchie County and remand this case for further proceedings regarding the petitioner's appeal.

Having thoroughly considered the parties' written submissions and oral arguments, the appendix record and the pertinent authorities, we find that this case presents no new or significant questions of law. Therefore, this case is appropriate for disposition through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.

A brief review of the procedural history is germane to this appeal. The parties were married to each other on August 30, 1957. They separated in October of 2003, and Mary M. H. filed a petition for legal separation several months later on January

¹ We follow our past practice in . . . cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dept. of Human Services v. Cheryl M.*, 177 W.Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987).

² The petitioner additionally cites as error the award of permanent spousal support in the monthly amount of \$3,000.

16, 2004. The action was later converted to a dissolution proceeding. The case remained active in family court for several years until a final order granting the divorce and other relief was entered on March 26, 2007. The petitioner's sole issue for appeal, other than the timeliness of his appeal, is the award of permanent spousal support in the monthly amount of \$3,000 to the respondent. The spousal support award was based upon a finding by the family court that the petitioner agreed to both the payment of support and the amount of the support. Both the petitioner and respondent filed motions to reconsider the order within thirty days of the order's entry. The respondent likewise filed an appeal to the circuit court within thirty days of the entry of the March, 2007, order of the family court.

On May 29, 2007, the circuit court entered an order that suspended all proceedings on the respondent's appeal to the circuit court until the family court ruled upon the motions for reconsideration, or until August 1, 2007, whichever date came earlier. No action was taken by the family court on the motions to reconsider, however, and on May 22, 2008, the circuit court dismissed the respondent's appeal, finding that the pending motions for reconsideration divested the circuit court of jurisdiction to hear the appeal. While the motions for reconsideration were pending in the family court, the respondent filed another appeal on September 11, 2008, alleging seventeen assignments of error.

On November 22, 2008, the family court entered an order denying both the petitioner's and respondent's motions for reconsideration. The petitioner filed an appeal to this order on December 22, 2008. There was no circuit court action on either appeal for the next year and a half. The circuit court entered an order on June 1, 2011, denying the respondent's appeal filed on September 11, 2008, and dismissing the petitioner's appeal as having been untimely filed. The petitioner's appeal of the order denying his appeal as being untimely to this Court followed.

In its factual findings and its application of law to the facts, this Court has held that a family court's order is entitled to deference:

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).

This question of law, which is reviewed de novo, is whether the petitioner's petition for appeal from the family court to the circuit court was timely filed. Our

analysis begins with two rules of procedure; one for the family courts that delineates the applicable time for appeal and another that gives direction on how to compute time deadlines.

The first applicable rule is Rule 28(a) of the West Virginia Rules of Practice and Procedure for Family Court. This rule states the deadline for the filing of an appeal of a family court order to the circuit court.

A party aggrieved by a final order of a family court may file a petition for appeal to the circuit court no later than thirty days after the family court final order was entered in the circuit clerk's office. If a motion for reconsideration has been filed within the time period to file an appeal, the time period for filing an appeal is suspended during the pendency of the motion for reconsideration.

This rule must be read in conjunction with Rule 6 of the West Virginia Rules of Civil Procedure, which provides as follows:

In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday.

We take judicial notice that December 20, 2008, the day that is thirty days after the entry of the family court order, fell on a Saturday. Because no filing could have taken place on a Saturday, the next possible day for filing would have been Monday, December 22, 2008. Thus, the petitioner's filing on December 22, 2008, complied with the directives of both Rule 6 of the Rules of Civil Procedure and Rule 28(a) of the family court procedures. As such, the circuit court erred when it dismissed the appeal of the petitioner to the family court's order for being untimely filed.

We therefore reverse the order of the Circuit Court of Ritchie County that dismissed the petitioner's appeal, and remand this case for consideration by the circuit court of the petitioner's appeal. Because of the length of time this case has been in litigation in the family and circuit courts, we direct that the mandate of this Court issue

immediately, and that the circuit court address the petitioner's appeal as soon as practicable.

Reversed and remanded.

ISSUED: October 25, 2012

CONCURRED IN BY:

**Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh**