STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Maria Michelle Bock,
Respondent Below, Petitioner

vs) No. 16-0817 (Cabell County 15-D-20)

John Robert Bock,
Petitioner Below, Respondent

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Maria Michelle Bock (hereinafter "petitioner"), by counsel Amy M. Herrenkohl, appeals the June 28, 2016, order of the Circuit Court of Cabell County affirming the February 19, 2016, final order of the Family Court of Cabell County. In its February 29, 2016, final order, the family court: 1) declined to consider a student loan and certain wages associated with repayment of the student loan for purposes of equitable distribution; 2) divided a federal retirement account utilizing the deferred distribution method; and 3) awarded no alimony to petitioner. Respondent John Robert Bock by counsel, Jennifer Dickens Ransbottom, filed a summary response in support of both the family and circuit court orders.

This Court has considered the parties' briefs, oral arguments, and the appendix record on appeal. Under the limited circumstances presented in this case, we find a memorandum decision affirming in part and reversing and remanding in part for further proceedings appropriate under Rule 21 of the West Virginia Rules of Appellate Procedure. As explained below, we affirm the family court's refusal to award alimony to petitioner. However, we find that the family court abused its discretion in refusing to properly divide the $13,020.00 student loan and therefore reverse and remand for equitable distribution thereof. We further affirm in part the family court's use of the deferred distribution method with regard to the federal retirement account, but reverse and remand in part for its failure to comply fully with the requirements of Syllabus Point 6 of *McGee v. McGee*, 214 W. Va. 36, 585 S.E.2d 36 (2003).

I. Factual and Procedural History

The parties were married on September 3, 1993 and have one emancipated child; the parties separated on or about January 4, 2015. Both parties work for the Army Corps of Engineers. At the time of the final hearing, petitioner was earning approximately $72,000.00 per year and respondent was earning approximately $130,000.00 per year. The parties likewise had certain pension and retirement accounts through their work with the Army Corps of Engineers: a Thrift Savings Plan ("TSP") and a Federal Employee Retirement Savings Plan ("FERS"). The TSP is a defined contribution plan, whereas the FERS plan is a pension plan which pays out a monthly benefit upon retirement based on length of service and a "high-3" average salary.

During the marriage, in 2012, petitioner entered into a deployment contract which required a one-year minimum deployment and two-year maximum deployment over a four-year

period. Petitioner served fifteen months in Afghanistan as a result. In exchange for this deployment, petitioner became eligible to enter into a "Student Loan Repayment Service Agreement," which would provide an additional $10,000.00/year for the exclusive purpose of repaying student loans. The Service Agreement states that such payments are "considered as taxable wages and tax withholding will be made on a biweekly basis as appropriate." Petitioner entered into this Service Agreement for four consecutive years commencing in 2012. In anticipation of receipt of these funds, petitioner took out a Parents' Loan for Undergraduate Students ("PLUS") for the use of their emancipated son. Further, petitioner herself began taking classes in the fall of 2014, thereby incurring her own student loans.

In its final order,[1] the family court granted the parties a divorce and distributed the parties' property and debts pursuant to an attached schedule. With respect to the PLUS loan, the family court found that the loan was received "as a benefit of [petitioner's] employment" in that petitioner was "eligible for a pass through amount from her employer" for purposes of repaying the loan. Accordingly, the family court declined to consider the loan and the amounts received from petitioner's employment for repayment for equitable distribution purposes. The family court further made the TSP and FERS subject to a qualified domestic relations order. Finally, the family court found that the parties were each in the prime of their careers for purposes of earnings, that petitioner had sufficient resources to meet her needs, and that any alleged inadequacy in petitioner's monthly income was a natural result of the separation of the household. Accordingly, the family court refused petitioner's request for alimony. The circuit court affirmed the family court's findings of fact and conclusions of law. This appeal followed.

II. Standard of Review

It is well-established that

> [i]n reviewing challenges to findings made by a family [court judge] that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review.

Syl. Pt. 1, *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995). With these standards in mind we proceed to the assignments of error presented.

III. Discussion

Petitioner raises three assignments of error: 1) that the family court erred in failing to include the student loan debt incurred for the parties' son in the equitable distribution of the parties' property and debts; 2) that the family court erred in failing to value the FERS

[1] No transcript or recording of the proceedings below was included in the appendix record.

pension to permit an offset; and 3) that the family court erred in refusing to award her alimony. We will examine each in turn.

First, petitioner asserts that the family court erred by characterizing the $13,020.00 PLUS loan obtained for the parties' son as a so-called "pass through" debt and failing to equitably distribute the debt between the parties. The family court found that because the debt was eligible for repayment with monies from petitioner's employer, neither the debt nor the amount received for repayment should be characterized as marital in nature for purpose of equitable distribution. Respondent argues in support of the family court's ostensible conclusion that by excluding both the debt and the repayment monies from equitable distribution, there is no net effect to either party. Respondent further suggests that by treating the PLUS loan and repayment monies in this manner, petitioner realizes the benefit of any funds payable under the Service Agreement which exceed the PLUS loan balance.

Upon review, we find that the family court abused its discretion in failing to characterize the $13,020.00 student loan as a marital debt and excluding this obligation from its equitable distribution of the parties' assets and liabilities. Both parties agree that the PLUS loan was obtained with their joint consent for purposes of providing financing for their son's education. Before this Court, respondent does not challenge the characterization of the student loan as a "marital debt."[2] Accordingly, we conclude that the PLUS loan is marital debt. *See Oliver v. Oliver*, 894 N.Y.S.2d 287 (N. Y. App. Div. 2010) (credit card debt incurred by wife to support children in college was marital obligation which should be divided equally, where both parties agreed to use wife's credit card to cover expenses); *Kehoe v. Kehoe*, 974 N.E.2d 1229 (Ohio Ct. App. 2012) (debts incurred during marriage to pay children's college expenses, with full consent of both parties, were marital debts); *cf. Sellitti v. Sellitti*, 192 W. Va. 546, 453 S.E.2d 380 (1994) (finding debt incurred by wife unbeknownst to husband for benefit of adult son non-marital debt). As a marital debt, therefore, the PLUS loan balance outstanding at the time of the parties' separation is properly included in the calculation of the equitable distribution of the parties' property and liabilities. Inasmuch as the family court failed to include this marital debt in its equitable distribution order, we find that it abused its discretion and therefore reverse and remand for equitable division of the $13,020.00 PLUS loan.[3]

Next, with respect to the FERS pension, petitioner argues that the family court erred in ordering the FERS plan to be divided by deferred distribution via a qualified domestic relations order ("QDRO") and maintains that to "disentangle" the parties an immediate offset is required. In that regard, petitioner further asserts that the family court's refusal to allow her to present an expert to testify regarding the present value of the FERS benefits was erroneous. Respondent maintains that reduction to present value is far too speculative to lend itself to

[2] While respondent suggests that the PLUS loan was obtained solely for the purpose of securing and applying the repayment funds pursuant to the Service Agreement and would not otherwise have been obtained, he does not assert that this contention alters the "marital" status of the debt.

[3] Consequently, any marital earnings which were likewise excluded from the equitable distribution should be properly applied to offset this indebtedness.

immediate offset or even payment over time given the variables of retirement date, salary, interest rates, and life expectancy.

We begin by noting this Court's admonition that "trial courts must be provided with discretion regarding the method of distribution most appropriate in any given set of factual circumstances." *McGee*, 214 W. Va. at 45, 585 S.E.2d at 45. With that understanding, the parties correctly note the controlling hierarchy for division of pension rights, as follows:

> When a court is required to divide vested pension rights that have not yet matured as an incident to the equitable distribution of marital property at divorce, the court should be guided in the selection of a method of division by the desirability of disentangling parties from one another as quickly and cleanly as possible. Consequently, a court should look to the following methods of dividing pension rights in this descending order of preference unless peculiar facts and circumstances dictate otherwise: (1) lump sum payment through a cash settlement or off-set from other available marital assets; (2) payment over time of the present value of the pension rights at the time of divorce to the non-working spouse; (3) a court order requiring that the non-working spouse share in the benefits on a proportional basis when and if they mature.

Syl. Pt. 5, *Cross v. Cross*, 178 W.Va. 563, 363 S.E.2d 449 (1987). The family court's order indicates only that the FERS plan would be divided by QDRO; however, the circuit court's order discusses both *McGee* and the aspects of the FERS plan which necessitate use of the deferred distribution method. Finding specifically that the FERS plan is contingent on speculative future events, the circuit court concluded that the deferred distribution method was properly utilized by the family court. We agree.

Based upon our understanding of the FERS plan as represented by the parties, sums ultimately paid out under FERS are based upon periods of creditable service and the highest average basic pay earned during any three consecutive years of service. How much creditable service or average basic pay respondent will achieve is unreliably speculative such as to make use of the deferred distribution method appropriate in this case, as determined by the family court and affirmed by the circuit court. As this Court acknowledged in *McGee*, "[i]f [] the circumstances do not warrant immediate distribution because there are insufficient assets in the estate to permit offset, or the present value of the future benefit is too difficult to ascertain, the trial court may find it necessary to utilize [] the deferred distribution [method]." 214 W. Va. at 45, 585 S.E.2d at 45 (quoting *In re Marriage of Hunt*, 909 P.2d 525, 540 (Colo. 1995)). We therefore affirm the family and circuit court's conclusions in this regard.

Notwithstanding the family court's proper use of the deferred distribution method for division of the FERS plan, however, we find that the family court's order fails to include a determination of the coverture fraction required for proper division of the plan assets as required by our caselaw. As this Court set forth in *McGee*,

> Where retirement benefits are allocated utilizing the deferred distribution method, the non-employee spouse is awarded a fixed percentage of retirement benefits to be distributed when such benefits mature.
>
> To achieve the final division of retirement benefits when utilizing the deferred distribution method, post-separation enhancements are allocated between the employee spouse and the non-employee spouse. The amount of benefits to which the non-employee spouse is entitled is calculated by multiplying the fixed percentage of retirement benefits by the coverture fraction.
>
> The coverture fraction is the ratio of the number of years of employment during the marriage prior to the separation of the parties to the total number of years the employee spouse has been employed under the pension plan being addressed.

Syl. Pts. 5, 6, and 7, *McGee*, 214 W. Va. at 39, 585 S.E.2d at 39. Inasmuch as the family court's order and the appendix record are silent as to the coverture fraction, we find it appropriate to reverse the circuit and family court's orders in that regard and remand for determination of the coverture fraction as required by *McGee*.

Finally, the petitioner contends that the family court erred in failing to award alimony to her. Petitioner primarily asserts that her current income is insufficient to contribute to her retirement plan in the manner which she and respondent had previously planned while meeting her other monthly obligations.[4] The family court found that petitioner had "sufficient resources to meet her needs" and that "the realities of divorce and the need to maintain two households" should necessarily affect the parties' expectations regarding their expenditures and retirement planning. The circuit court found that the family court "went into great detail to justify" the refusal of alimony and affirmed, finding no error.

This Court has held that "[q]uestions relating to alimony and to the maintenance and custody 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). Moreover, the parties recognize and acknowledge that this Court has stated that "alimony may not be awarded solely for the purpose of equalizing the income between spouses." *Stone v. Stone*, 200 W. Va. 15, 19, 488 S.E.2d 15, 19 (1997).

[4] Petitioner also briefly alludes to respondent maintaining a higher standard of living by reference to his more expensive home. Respondent counters that although his home was more expensive, its location in Louisville, Kentucky and commensurate higher cost of living adequately explains any disparity. Respondent further notes that it is approximately 500 square feet smaller than petitioner's home.

Like the circuit court, we discern no error with respect to the family court's refusal to award spousal support to petitioner. The family court specifically discussed the parties' individual incomes, plainly examined petitioner's stated monthly expenses, and evaluated petitioner's specific bases for an award of alimony including retirement supplementation and support for her mother. While petitioner bemoans the lack of an exhaustive iteration of the statutory spousal support factors, we have stated that with respect to the statutory spousal support factors, "'it is not necessary to make specific findings as to each statutory factor recited but only those applicable and appropriate to the case.'" *Banker v. Banker*, 196 W. Va. 535, 549, 474 S.E.2d 465, 479 (1996) (quoting *Burnside v. Burnside*, 194 W. Va. 263, 275 n.30, 460 S.E.2d 264, 276 n.30 (1995)). While we may agree that the family court's order on all fronts could have included greater detail, we find that those findings included in its final order regarding spousal support reflect consideration of the applicable and relevant factors contained in West Virginia Code § 48-6-301 (Repl. Vol. 2015) and, based upon the information contained in the record before us, cannot conclude that the family court abused its discretion in this regard.

IV. Conclusion

Therefore, upon our review, based on the facts and circumstances of this case, we affirm the June 28, 2016, order of the circuit court upholding the family court's refusal to award alimony to petitioner. However, with respect to that aspect of the June 28, 2016, order pertaining to the $13,020.00 PLUS student loan, we reverse and remand for equitable distribution thereof. Finally, as to that portion of the June 28, 2016, order pertaining to the FERS retirement plan, we affirm the use of the deferred distribution method, but reverse and remand for calculation of the coverture fraction as set forth more particularly herein.

Affirmed in part and reversed and remanded in part.

ISSUED: June 8, 2017

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Elizabeth D. Walker

CONCURRING IN PART AND DISSENTING IN PART:

Chief Justice Allen H. Loughry, II

LOUGHRY, Chief Justice, concurring, in part, and dissenting, in part:

The majority nonsensically reverses and remands this case for "correction" of technicalities that have no appreciable impact on the ultimate outcome. Elevating form over substance in this fashion is a huge waste of judicial resources. The majority's decision to remand in order to have Judge Keller recognize both a marital debt and a fully offsetting marital

asset, given the unique circumstances of this case, has literally no net effect on the equitable distribution in this matter. Further, the majority's decision to remand for the coverture fraction which is undoubtedly set forth in the QDRO is pointless. I do, however, agree that no error was made with respect to alimony and therefore, I concur, in part, and dissent, in part.

It is undisputed that the student loans obtained by the parties during their marriage are marital debt. The record reflects that prior to their separation, the parties decided to take advantage of an additional benefit–a form of compensation– made available to the petitioner through her deployment contract. That benefit, which is afforded to certain federal employees pursuant to 5 U.S.C. § 5379 (2012), provides for the repayment of student loans by the federal government through the employing agency. In this instance, the petitioner was eligible to have student loans repaid at the rate of $10,000 per year for four years. Accordingly, the parties obtained a parent plus loan[1] to pay for a portion of their son's college expenses. Because the federal statute provides for direct payment of a student loan on behalf of the employee,[2] the loan documents were executed only in the petitioner's name.

At the time of separation, the balance of the parties' student loan debt was $13,020. This amount included $10,270 in loans for the parties' son and $2,750 in loans which had been obtained for the petitioner to take classes at Mountwest Community and Technical College. Judge Keller did not consider the loans for purposes of equitable distribution because the federal government was repaying the debt. As she explained in her final order:

> The parties' son received a student loan as a benefit of his mother's employment. She was eligible to get a parent plus loan that provided money for his education. While it is loan and requires repayment, she is eligible for a pass through amount from her employer that covers the costs of the loan. Therefore the loan repayment, and that amount she received from her employer, are not being considered for equitable distribution purposes.

When the parties separated, the petitioner had yet to receive $20,000 of direct loan payments by the government. Accordingly, the $13,020 debt was going be repaid by the federal government, leaving the petitioner with approximately $6,980.00[3] available for payment of additional student loans she could obtain to further her own education.[4]

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[1] According to the petitioner, a parent plus loan is a traditional federally insured student loan obtained by parents for a child. The parents are personally obligated to repay the debt.

[2] *See* 5 USC 5379(b)(1).

[3] These stated amounts are approximations because the loan repayments are taxable income.

[4] The parties' son had graduated from college and did not need any additional student loans.

Critically however, in this case, the marital earnings at issue–the loan payments–were never directly received by the petitioner. Rather, *direct* payments were made by the government *to the lender* on behalf of the petitioner.[5] Given these unique circumstances, Judge Keller's decision to exclude both the loans and the money to repay the loans from equitable distribution was not an abuse of her discretion. In fact, Judge Keller obviously recognized that excluding both the debt and the repayments was the most equitable and common-sensical method of resolving this issue. Remanding to divide both the loan and the income which will fully cover the loan, which income touched the hands of neither party, serves literally no purpose. Judge Keller unquestionably correctly characterized the loan and its offsetting repayment monies as "pass-through" and the entire effort on remand will result in a "wash."

Unsatisfied with this meaningless reversal, the majority likewise reverses Judge Keller's decision pertaining to the parties' FERS benefits and orders her to determine the coverture fracture as required by *McGee v. McGee*, 214 W.Va. 38, 585 S.E.2d 38 (2003). Because this issue was not raised by either party and because the record is completely silent on the matter,[6] there was no basis for the majority to *sua sponte* declare that Judge Keller failed to comply with *McGee*. Given the majority's recognition that Judge Keller properly utilized the deferred distribution method to divide the parties FERS benefits, there was no reason to disturb her decision on this issue. Furthermore, given her proper use of the methodology set forth in *McGee*, there is little question that the QDRO which directs the deferred distribution undoubtedly contains the coverture fraction as it would otherwise have no effect.

As indicated, I agree with the majority's conclusion that Judge Keller considered the relevant statutory spousal support factors and properly determined that no award of spousal support was warranted. However, for the reasons set forth above, I disagree with the majority's conclusions with respect to the parties' student loans and pension benefits. Remanding this case is simply a waste of time–the outcome will be the same. Accordingly, I concur, in part, and dissent, in part.

[5] 5 U.S.C. § 5379(b)(1).

[6] The appendix submitted by the parties did not include the qualified domestic relations orders or transcripts of the hearings held by Judge Keller.