

STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS

**FILED**  
**April 14, 2011**

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

IN RE: THE MARRIAGE OF  
JOHN G. CHAPMAN,  
Petitioner Below, Appellee

v. No. 35665 (Hardy County 06-D-82)

LOUISE G. MILLIKAN,  
Respondent Below, Appellant

MEMORANDUM DECISION

This appeal arises from an Order entered in the Circuit Court of Hardy County on August 11, 2009, affirming the decision of the family court to deny appellant's motion for reconsideration<sup>1</sup> on the issues of her entitlement to a former spouse survivor annuity under appellee's federal pension<sup>2</sup> and the calculation of appellant's interest in appellee's federal pension benefits in view of the tax consequences to each of the parties. After carefully reviewing the record provided, the briefs and oral arguments of the parties, and taking into consideration the relevant standard of review, the Court determines that the circuit court committed no error. Based on our decision that this case does not present a new question of law, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

At issue in this appeal is whether the family court correctly determined that appellant's failure to take an appeal from the final order of divorce on the issue of her entitlement to a former spouse survivor annuity precluded her current attempt to modify the

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<sup>1</sup>See R. Prac. Proc. Fam. Ct. 25.

<sup>2</sup>Appellant's retirement is through the Civil Service Retirement system.

previous disposition of this issue.<sup>3</sup> The only time the issue of survivorship benefits was addressed by any court was in a letter ruling prepared by the family court following the final divorce hearing. By letter ruling, entered on August 28, 2007, the family court opined:

Currently the parties have a very good health insurance plan at low cost. Ms. Millikan may remain on the plan if she receives a portion of Mr. Chapman's pension and she remains the survivor on the pension. The Court orders that Ms. Millikan remain as the survivor on the pension until she becomes qualified for Medicare at age 65.

When the final order of divorce was entered in the family court, there was no provision for or discussion of appellant's right to survivorship benefits. And, despite the fact that appellant filed an appeal from the final order of divorce, her entitlement to survivorship benefits as a former spouse was not one of the three issues she raised on appeal.

Looking to the letter opinion as the only ruling on this issue, the family court determined that the COAP<sup>4</sup> required for processing the division of pension benefits that appellant and appellee had agreed to under the final order of divorce<sup>5</sup> was to be "drafted in accordance with the family court's ruling in the letter opinion . . . [which was] not modified by the Final Order of Divorce . . . ." Accordingly, an amended<sup>6</sup> COAP was entered by the family court on May 22, 2009, which gave appellant a 100% former spouse survivor annuity

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<sup>3</sup>Appellant argued that between the time of the issuance of the family court's letter opinion with regard to the final divorce hearing and the final order of divorce, appellee had agreed to allow her to receive full survivorship benefits until her death. As support for this alleged agreement, appellant cites to the absence of language in the final order of divorce limiting her survivorship benefits to age 65 in contrast to the language in the previously issued letter opinion to that effect.

<sup>4</sup>"COAP" stands for a court order acceptable for processing.

<sup>5</sup>Under the final order of divorce it was provided that "Petitioner [Appellee] should pay one-half of the Petitioner's Federal Retirement directly to the Respondent [Appellant] until such time as the Office of Personnel Management commences paying the Respondent her half."

<sup>6</sup>The previously entered COAP was rejected by the Plan Administrator for technical reasons—the lack of the parties' full social security numbers and appellee's retirement plan number.

benefit until she turns 65 on April 7, 2011.

When the circuit court considered the family court's ruling on this issue, it focused on the fact that appellant had failed to identify any evidence in the record substantiating the alleged agreement to her entitlement to full survivorship benefits until her death. The circuit court elaborated: "There is no written agreement of the parties, or any verbal agreement stated upon the record by the parties or their counsel. Moreover, whether there was an agreement of the parties is a factual determination, and the family court did not find that there was an agreement of the parties." Recognizing that appellant had the burden of proving that the family court's decision was based upon erroneous findings of fact, W.Va. Code § 51-2A-14(c) (2008), the circuit court determined that the family court ruling at issue was not clearly erroneous and was supported by substantial evidence.

In an attempt to get around the failure to effect a timely appeal of the final order of divorce on the survivorship benefits issue, appellant suggests that Rule 25 of the Rules of Practice and Procedure for Family Court, which operates in tandem with W.Va. Code § 51-2A-10, was designed to take care of the situation presented here. While that rule clearly permits, similar to Rule 60(b) of the Rules of Civil Procedure, the correction of orders for reasons such as mistake, inadvertence, surprise, excusable neglect, fraud, and clerical deficiencies, we find no basis for the application of Rule 25 under the facts of this case. Like the circuit court, we are constrained by the evidence submitted in this case and we find no evidence that supports appellant's assertion of an agreement that she was to receive a full survivor annuity for the remainder of her life. *See* W.Va. Code § 51-2A-14(b) (limiting circuit court's review on appeal to record of family court proceeding). Accordingly, we find no error in the circuit court's decision affirming the family court's denial of appellant's motion for reconsideration on the issue of survivorship benefits.

As a secondary matter, appellant argues that the circuit court erred in affirming the family court's ruling which resolved the previously unaddressed issue of the tax consequences of the federal pension payments.<sup>7</sup> Because the final order of divorce did not designate whether appellee was required to make the pension payments on a gross or a net basis, an issue arose when appellant complained about receiving pension payments calculated by means of a net basis.<sup>8</sup> By order of July 8, 2008, the family court determined that appellee

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<sup>7</sup>Appellee filed a motion for modification to gain a ruling from the family court on the tax consequences of the pension payments he was making to appellant pursuant to the final order of divorce.

<sup>8</sup>Appellee's gross pension was \$4,485 per month but after deducting amounts for  
(continued...)

was required to make the pension payments on a gross basis. To make up for the improper deductions previously taken by appellee,<sup>9</sup> the family court directed that appellee pay appellant the amount of \$588.65<sup>10</sup> from September 1, 2007 to July 1, 2008.<sup>11</sup>

When the issue of the tax consequences of the federal pension payments was finally brought to the attention of the family court, the court directed that appellee pay one-half of the gross monthly federal pension amount and take a spousal support deduction for the full amount paid to appellant. By designating these payments that would be made directly to appellant prior to the implementation of the amended COAP as temporary spousal support, the family court sought to ensure that each party would bear the appropriate tax consequences on their receipt of one-half of the federal pension benefits. To account for the time period prior to April 1, 2009, the date on which the family court's ruling was to take effect, the family court provided that appellee was to bear the tax consequences on the gross amount of the pension up to that time since he had previously paid appellant on a net basis.

With regard to the family court's decision on the tax consequences of the pension payments, appellant takes issue with the "implied" forgiveness of the earlier order of the family court<sup>12</sup> which required appellee to pay appellant the amount of \$588.65 for the designated period to account for the "net" rather than "gross" pension payments. What the second family court judge determined, after considering the testimony of a CPA on the issue of the tax consequences of the pension payments, was that paying on a net basis was "one of the ways to resolve it to make sure the taxes were paid on it." In light of this determination, the family court decided that appellee did not have to make the previously-ordered payments of \$588.65.

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<sup>8</sup>(...continued)

health insurance; federal and state taxes; and life insurance, he was paying appellant \$1,653.85, which was one-half of the net amount of the pension payment.

<sup>9</sup>The family court refused to find appellee in contempt as requested by appellant for paying the net rather than the gross amount of the pension payment.

<sup>10</sup>The difference between the gross and net amount of the pension payment.

<sup>11</sup>From July 1, 2008, forward appellee was to pay appellant the gross amount of the pension payment.

<sup>12</sup>Due to the passage of time and intervening elections, a second family court judge heard evidence and issued rulings on the issues that are the subject of this appeal and two different circuit court judges issued rulings in this matter.

As the circuit court acknowledged, the family court “was confronted with the task of rendering a decision on an issue which had simply been ignored by the previous family court judge.” And with regard to the detailed findings of fact on how to address the tax consequences of the federal pension payments, the circuit court concluded that it could not identify any error with regard to those determinations. As appellee observes, appellant objects to the “forgiveness” of the payments but never identifies any specific misapplication of the law or error with regard to the factual determinations made by the family court on this issue. Accordingly, we find no error in the circuit court’s determination that the family court’s findings were not clearly erroneous and that the family court did not abuse its discretion in applying the law to its findings of facts. *See* Syl. Pt. 1, *Robinson v. Coppala*, 212 W.Va. 632, 575 S.E.2d 242 (2002) (requiring that circuit court review findings of fact made by family court judge under clearly erroneous standard and application of law to facts under abuse of discretion standard); W.Va. Code § 51-2A-14(c).

For the foregoing reasons, we find no error in the decision of the circuit court to affirm the family court’s rulings on the issue of appellant’s right to a survivorship annuity and the calculation of pension benefits.

Affirmed.

**ISSUED:** April 14, 2011

**CONCURRED IN BY:**

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