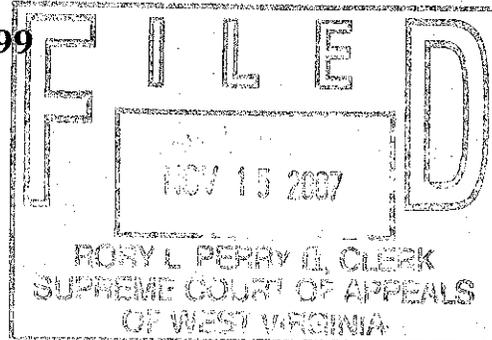


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 33599



KENDRA M. GUIDO (now GRAY)
Plaintiff below/Appellee,

v.

Circuit Court of Marion County
Honorable Judge David R. Janes
Civil Action No. 94-D-404

JOHN SAMUEL GUIDO,
Defendant below/Appellant,

WV DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
BUREAU FOR CHILD SUPPORT ENFORCEMENT,
Appellee.

RESPONSE OF THE BUREAU FOR CHILD SUPPORT ENFORCEMENT
TO BRIEF OF APPELLANT, JOHN GUIDO

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Statement of Facts and Proceedings Below

The docketing statement and the statement of facts by the Appellant, John Guido, fail to mention several significant events in the history of this case which may have influenced the factual determinations of the lower court. Therefore, the BCSE has included a more extensive statement of the facts.

At the hearing for the parties' divorce on February 28, 1995, John Guido testified that he was attending nursing school at Davis and Elkins College and had received no income from workers' compensation but for one expense reimbursement of \$1,064.00. Thus, the Family Law Master held that John Guido would not be attributed income due to attending full time schooling and that John Guido would pay Zero child support.

Kendra Guido filed a petition for reconsideration after obtaining contrary information from workers' compensation regarding John Guido's benefits. By Order of May 30, 1995, John Guido was ordered to pay support to Kendra Guido in the amount of \$464.70 per month for the support of the parties' two children.¹ At the hearing, the Family Law Master found that John Guido had offered false testimony at the prior hearing. Accordingly, John Guido was prosecuted and found guilty of false swearing at the hearing of February 28, 1995.

John Guido accumulated arrears of support. In October 1995, the BCSE contacted several financial institutions for information on accounts owed by John

¹ This Order was appealed by John Guido to the West Virginia Supreme Court of Appeals. However, his petition for appeal was denied on February 5, 1997, and its rehearing was denied on February 19, 1997.

Guido. In response to information received from One Valley Bank, the BCSE filed an affidavit of accrued support, then requested a writ of execution and writ of suggestion. Thereafter, the BCSE filed a contempt petition against John Guido on April 18, 1996, which also sought a constructive trust against this account.

At the hearing on May 20, 1996, the BCSE moved the Circuit Court to impose a constructive trust upon the One Valley Bank funds received by John Guido and deposited in the name of Josephine Guido or John Guido dba East Side Floor and Wall. The Circuit Court found that, though John Guido was failing to pay his support, he had been depositing his workers' compensation checks in this bank account belonging to the parents, Josephine Guido and John Guido. By Order of June 14, 1996, the Circuit Court froze the account and required the parties to brief the issues.

The Circuit Court issued a letter opinion on September 26, 1996. On October 24, 1996, the Circuit Court granted the BCSE's motion; ordered that an equitable or constructive trust be imposed; and directed the parents, Josephine Guido or John Guido, to pay said funds of \$4,800.00 to the BCSE. Although the Court had previously found significant income from workers' compensation and rental property, the Order specifically held that the sanction for John Guido's contempt would be reserved until John Guido completed his criminal sentence for false swearing.

John Guido appealed the Order of October 24, 1996. On February 23, 1997, he appealed to the West Virginia Supreme Court of Appeals regarding the constructive trust. The petition for appeal was accepted and briefs were submitted. On May 15, 1998, this Court ruled that the appealed order was not a "final" order and that John Guido lacked standing to raise issues relating to his parents' involvement in the case.

Guido v. Guido, 503 S.E.2d 511 (W. Va. 1998).

In December 1998, the Circuit Court again heard the case and ordered the payment of \$3,500.00 from Appellant, John Guido. Again, this was not paid by John Guido. Thus, a Petition for Contempt was filed on February 23, 1999, resulting in the Order of Contempt entered April 30, 1999. This Order yet again required John Guido to make the payment of \$3,500.00 by June 1, 1999, or the Sheriff would be commanded to incarcerate Josephine Guido and John Guido. On May 25, 1999, John Guido finally paid the funds which were frozen in June 1996.

In 1998, John Guido petitioned the Court for modification of his support obligation. It was heard on December 21, 1998, before Family Law Master Born. However, the Order was not entered by Judge Fox until October 12, 1999. This Order reduced his obligation to \$50.00 per month retroactive to March 1, 1997. John Guido again petitioned for modification in 2002. This petition was denied by FLM Born.

The BCSE filed a Motion for Decretal Judgment in October 2006, requesting judgment for arrears owed by John Guido. The Family Court granted the judgment for the period of January 1, 1995, to October 31, 2006, holding that the statute of limitation was tolled by the contempt Order of October 24, 1996.

John Guido attempted to file a timely appeal from the Family Court's Order to the Marion County Circuit Court on January 2, 2007. John Guido stated the following as his grounds for appeal: 1) his previous attorney did not endorse the Order of October 24, 1996; 2) the judgment included payments more than ten years old; 3) arrearages were incorrect; 4) constructive trust order was incorrect; and 5) Judge Born should be recused due to his testimony in the false swearing trial.

On January 23, 2007, Circuit Court Judge Janes issued an Order which denied John Guido's petition for appeal due to his failure to serve his petition for appeal upon Kendra Guido and the BCSE. By counsel, John Guido filed a motion to reconsider or reinstate the petition for appeal. This motion was premised on John Guido's mistaken belief that the Circuit Clerk would serve Kendra Guido and the BCSE. In his Order of April 12, 2007, Circuit Court Judge Janes ruled that John Guido is not entitled to the relief sought and denied the motion.

The instant appeal was filed on this Order entered April 12, 2007.

Standard of Review

The Supreme Court of Appeals of West Virginia reviews the Circuit Court's final order and ultimate disposition under an abuse of discretion standard. Challenges to findings of fact are reviewed under a clearly erroneous standard. Conclusions of law are reviewed *de novo*. Shrader v. Shrader, 474 S.E.2d 579 (W. Va. 1996); Burgess v. Potterfield, 469 S.E.2d 114 (W. Va. 1996). *See also* Burnside v. Burnside, 460 S.E.2d 264 (W. Va. 1995).

Statement Regarding Alleged Errors

The Bureau for Child Support Enforcement assigns no error to the Order entered April 12, 2007, by Marion County Circuit Court.

Points and Authorities

West Virginia Rules of Civil Procedure Rule 5

West Virginia Rules of Civil Procedure Rule 61

West Virginia Rules of Civil Procedure Rule 80

West Virginia Rules for Practice and Procedure in Family Court Rule 28

West Virginia Code § 51-2A-11 (2006)

Burgess v. Potterfield, 469 S.E.2d 114 (W. Va. 1996)

Burnside v. Burnside, 460 S.E.2d 264 (W. Va. 1995)

Guido v. Guido, 503 S.E.2d 511 (W. Va. 1998)

Shrader v. Shrader, 474 S.E.2d 579 (W. Va. 1996)

Talkington v. Barnhart, 264 S.E.2d 450 (W. Va. 1980)

ARGUMENT REGARDING APPELLANT'S ASSIGNMENTS OF ERROR

- I. **Whether the inadvertent failure by John Guido to serve the other parties with copies of his Petition for Appeal deprived the Circuit Court of jurisdiction to hear his appeal?**

John Guido asserts that the Circuit Court implied that the lack of service caused the Circuit Court to be deprived of jurisdiction. In his discussion of West Virginia Code § 51-2A-11 (b), John Guido states, “[t]he intent of the statute that is the subject of this appeal is obviously to extend due process protection to parties subject to those actions within the jurisdiction of the family courts by providing them with an opportunity to seek redress from erroneous decisions by family court judges. While it is true that under West Virginia Code § 51-2A-11 (b), a respondent to a petition for appeal has the right to file a reply to a petition for appeal, this right can be sufficiently protected by a less draconian measure....” Appellant’s Brief, page 8.

However, John Guido proposes no solution or "less draconian measure" which would rectify this fatal error.

An improperly filed petition for appeal does indeed deprive the Circuit Court of jurisdiction. It is the equivalent of an appeal which was not filed – no appeal, no jurisdiction. The Circuit Court's application of the Rules of Civil Procedure and the Rules for Practice and Procedure in Family Courts are not discretionary; accordingly, the enforcement of these rules is not an abuse of its discretion by the Circuit Court.

II. Whether the Circuit Court's dismissal of John Guido's Petition for Appeal due to inadvertent failure to serve the other parties with copies of his Petition for Appeal constituted an abuse of discretion?

The Bureau for Child Support Enforcement asserts that the Circuit Court correctly denied the Petition for Appeal filed by John Guido. In his affidavit, John Guido acknowledges the requirement to serve Kendra Guido and the BCSE and that the certificate of service was blank. However, he is requesting this Court to reverse the Circuit Court's Order because he did not take any further action; that the Clerk was going to fill out the certificate of service. In any event, Rule 28 (d) of the Rules of Practice and Procedure for Family Court requires service in accordance with Rule 5 of the Rules of Civil Procedure. As the Appellant acknowledges, this violated the requirement of West Virginia Code § 51-2A-11 (b) (2006) which deprived the respondent of filing a reply.

The certificate of service appears on the same page as the verification, which John Guido admits. However, John Guido did not sign or complete the certificate of service. He does not aver that he was advised by the Marion County Circuit Clerk that the Clerk would affect service of his petition.

John Guido presented the petition for appeal to the Clerk without completing the name and address of the Respondent, Kendra Gray. According to Josephine Guido, the Clerk asked the address and it was handwritten on the front of the petition by the Clerk. The Clerk asked for an address and John Guido assumed that the service would be made.

The affidavits of John Guido and his mother, Josephine Guido, should be given little, if any, credibility based upon the prior acts of these individuals before the lower courts in the instant case. John Guido was convicted of false swearing based upon his false testimony at the divorce hearing with Kendra Guido. He lied to the Court about his income in order to reduce his support obligation. He hid his money and refused to pay. Now, John Guido asserts that his failure to serve notice was an "honest mistake." However, John Guido has shown to the Court that he will say whatever benefits him, regardless of the truth of the matter.

Josephine Guido has also displayed her deceit and blatant refusal to abide by the Court's Orders. She hid the money belonging to John Guido to assist him in defrauding the Court and Kendra Guido. The Circuit Court believed that Josephine Guido committed fraud. Opinion letter, September 26, 1996. Almost three years after the Court's initial Order, the Guidos finally surrendered the money, but only under threat of incarceration. Josephine Guido's affidavit says "it was our understanding" and "it was my belief" that service would be made by the Clerk. She makes no assertions of being advised that service would be affected by the Clerk.

John Guido asserts that no prejudice will result to the parties if the petition for appeal is reinstated. In his petition, he refers to the *Talkington* case regarding a failure to notify the opposing party of the filing of a transcript. *Talkington v. Barnhart*, 264

S.E.2d 450 (W. Va. 1980). He argues that it is somehow similar to the failure to serve the opposing party with a substantive pleading requiring a response. The *Talkington* Court cited Rule 61 of the West Virginia Rules of Civil Procedure which requires the court to disregard errors or defects which do *not* affect the substantial rights of the parties.

The instant facts are not akin to the minor infraction of Rule 80 (c) of the West Virginia Rules of Civil Procedure in *Talkington*. No response or other action is required for the filing of a transcript. Moreover, the filing of a transcript from the lower court is required for an appeal. In such a situation, the opposing party is aware of the appeal and is participating. Because there is no restriction of time to correct errors of the transcript, failed notification of its filing is merely an inconvenience.

On the other hand, the failure to serve a party with a petition for appeal, an adversarial pleading, prohibits the opposing party from presenting his defenses, his entire side of the story being ignored. The failure to serve a petition for appeal greatly affects the substantive rights of the opposing party – the party is deprived of his right to respond. John Guido states this Court has held an opposing party can “...establish that he or she has sustained such prejudice by means of filing a motion to dismiss the appeal.” Appellant’s Brief, page 9. However, there is no way for an opposing party to file a motion to dismiss the appeal *if he or she has not been served with the filing of an appeal*. This is the circumstance in this case.

Rule 61 of the West Virginia Rules of Civil Procedure states that, “[n]o error...by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, *unless refusal to take such action appears to the court inconsistent with substantial justice*. The court at every stage of the

proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” (emphasis added). The Circuit Court found that John Guido was “not entitled to the relief sought...and no hearing...is warranted.” It is obvious that the Circuit Court determined that “substantial justice” would not be served by allowing the faulty appeal to proceed. Obviously, the Circuit Court correctly believed that a lack of the opportunity to respond did prejudice Kendra Guido and the BCSE.

Conclusion

John Guido has appealed most, if not all, Orders in this case, either *pro se* or by counsel. This appeal by John Guido appears to be yet another attempt to thwart collection of his support by asserting frivolous claims. Although John Guido is now represented by counsel, he has acted as a *pro se* litigant in the past and has sufficient experience with the Court to know that the opposing party must be noticed when filing motions and appeals.

Appellant, John Guido, and his mother, Josephine Guido, have shown themselves to be dishonest. As evidenced by his conviction for false swearing, John Guido has proven his inability to state the truth to the Court. His mother, Josephine Guido, assisted John Guido to hide his income and refused to pay John Guido’s money to the Court without delay and threat of incarceration. Moreover, the Circuit Court found that she had committed a fraud upon the Court.

There is no law or credible evidence upon which to reverse the decision of the Marion County Circuit Court. The only evidence presented by Appellant John Guido is the affidavit of his mother and his affidavit regarding his failure to serve Kendra Guido. Thus, the Bureau for Child Support Enforcement asserts that John Guido’s appeal is

without merit and the rulings of the Marion County Circuit Court should be upheld for the reasons herein.

WHEREFORE, the Bureau for Child Support Enforcement prays that the Order of April 12, 2007, be AFFIRMED in its entirety.

**Bureau for Child Support Enforcement,
By Counsel**


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