

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 33661

DAVID SOULSBY

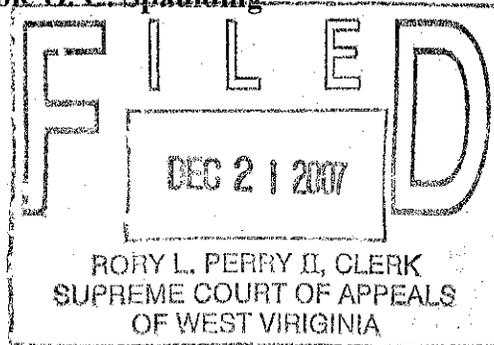
Appellant

v.

Putnam County Civil Action No. 00-D-402  
The Honorable O. C. Spaulding

DAWN SOULSBY (MARTINEZ)

Appellee



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BRIEF OF APPELLANT

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**TO THE HONORABLE SUPREME COURT OF APPEALS OF WEST VIRGINIA:**

**II. INTRODUCTION**

**COMES NOW** David Soulsby (the “Appellant”), pursuant to the West Virginia Rules of Appellate Procedure, and asks this honorable Court to grant his Petition for Appeal to reverse a portion of the final order of the Putnam County Circuit Court in the action below. For his Brief in support of said Petition, the Appellant states the following:

This is a case involving an error made by the Family Court of Putnam County (“Family Court”) when calculating the child support obligation for the two children of the parties below. The error, which the Putnam County Circuit Court failed to correct, is largely reducible to mathematical terms as will be discussed in further detail in this Brief. When running the child support calculation, the Family Court ran two separate calculations treating the parties as if they had only one child under different parenting scenarios. This resulted in an artificial increase of the support amount due to the fact that the calculation fails to recognize that the amount of support per child decreases as the number of children increases. In this particular case, the Family Court’s calculation results in an overpayment of child support in the approximate amount of at least \$1,500.00 per month.

The West Virginia Legislature has set up specific guidelines for child support in order to establish uniformity, consistency and non-discrimination in calculating child support awards. As part of those guidelines, the amount of support per child decreases as the number of children increases. See W. Va. Code § 48-13-301. The statutory obligation does not double when there is more than one child, but rather increases incrementally. In the instant action, the child support calculation fails to acknowledge that the parties have two children. This error not only results in a manifest injustice to the Appellant, but it is contrary to the very idea of uniformity of a child support

system. Guidelines for child support award amounts were established "so as to ensure greater uniformity by those persons who make child support recommendations and enter child support orders and to increase predictability for parents, children and other persons who are directly affected by child support orders." W. Va. Code § 48-13-101. The lower court's decision flies in the face of this legislative mandate and in fact results in random and unpredictable results for not only the Appellant, but all parents.

### **III. ASSIGNMENT OF ERROR**

The Circuit Court erred when it denied the Appellant's Petition for Appeal, thus in effect upholding the Family Court's miscalculation of child support.

### **IV. KIND OF PROCEEDING, STATEMENT OF FACTS AND NATURE OF RULING IN THE CIRCUIT COURT**

On July 31, 2002, the Family Court of Putnam County granted a divorce to the Appellant and the Appellee, Dawn Soulsby Martinez ("Appellee"). Subsequently, the Family Court addressed a modification of the calculation of child support. The parties have two children to which the calculation applies. The Appellee has primary caretaking responsibility for their daughter, while the parties have extended shared parenting for their son. On August 8, 2006, the Appellant was ordered by the Putnam County Family Court to pay five thousand five hundred and seventy-nine dollars (\$5,579.00) per month in child support for both children. See Exhibit A attached hereto. The Family Court arrived at this figure by performing two separate calculations, as is evident by the child support worksheets attached to his August 8, 2006 Order. The first calculation, for the parties' daughter, came from Worksheet A, which calculated the basic support obligation in basic shared parenting

cases provided by W. Va. Code § 48-13-403. The second calculation, for the parties' son, came from Worksheet B, which is the extended shared parenting worksheet provided by W. Va. Code § 48-13-502. The Family Court then proceeded to award the Appellee the sum of the two totals, \$5,579.00. Under both calculations, the Family Court treated the respective child as being an only child. The Family Court provided no basis in its Order for its calculation.

On October 11, 2006, the Appellant filed a Motion for Reconsideration of Child Support Due to Mistake in Calculations. See Exhibit B attached hereto. Specifically, the Appellant asserted that the Family Court erred by calculating the child support obligation as if there was only one child in two separate calculations. As part of his Motion for Reconsideration of Child Support, the Appellant included two calculations: (1) Worksheet A, a calculation equaling \$4,423.47, showing the Appellee with sole custody of both children and running a basic support obligation in basic shared parenting cases provided by W. Va. Code § 48-13-403, and (2) Worksheet B, a calculation equaling \$3,712.55, which is the extended shared parenting formula for both children under W. Va. Code § 48-13-502. The Appellant asserted that the Family Court's use of both worksheets as if each child was an only child was in error and that a recalculation of the child support formula was necessary. The Appellee did not file a response to the Motion for Reconsideration.

On November 21, 2006, without first holding a hearing, the Family Court denied the Appellant's Motion for Reconsideration. See Exhibit C attached hereto. On December 7, 2006, Appellant filed a Petition for Appeal from the Family Court Final Order, wherein Appellant appealed several issues in two Family Court orders entered on the 8<sup>th</sup> day and the 21<sup>st</sup> day of November 2006. See Exhibit D attached hereto. The Appellee did not file a response to the Appellant's appeal.

In an Order entered on January 12, 2007 (filed on January 16, 2007), the Circuit Court

refused to consider the appeal of the Appellant, finding that the Family Court had committed no reversible error. See Exhibit E attached hereto. The Circuit Court made its ruling without holding a hearing.

The Appellant appeals only that ruling of the Putnam County Circuit that the Family Court committed no reversible error in regard to the child support calculation. The ruling is contrary to the established child support guidelines, the legislative intent of the child support guidelines and is clearly an abuse of discretion by the lower court.

## VI. NOTE OF ARGUMENT

### A. STANDARD OF REVIEW

Under West Virginia Code § 51-2A-14(c), “The circuit court shall review the findings of fact made by the family court judge under the clearly erroneous standard and shall review the application of law to the facts under an abuse of discretion standard.” The West Virginia Supreme Court of Appeals has further held the following in regard to the applicable standard of review in such matters:

In reviewing a final order entered by a circuit 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.

Staton v. Staton, 218 W. Va. 201; 624 S.E.2d 548 (2005); Syl. Carr v. Hancock, 216 W. Va. 474, 607 S.E.2d 803 (2004). See also Syl. pt.2, Lucas v. Lucas, 215 W. Va. 1, 592 S.E.2d 646 (2003) (“In 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 de novo review.”)

**B. THE PUTNAM COUNTY CIRCUIT COURT ERRED WHEN IT REFUSED TO REVIEW THE PETITION FOR APPEAL BECAUSE THE FAMILY COURT CLEARLY MISCALCULATED THE CHILD SUPPORT OBLIGATION.**

The Supreme Court should reverse the Circuit Court’s Final Order wherein it erroneously refused to consider the Appellant’s appeal on the calculation of child support. The Family Court failed to take into account in its child support calculation that the West Virginia child support guidelines recognize, and the legislature clearly intended that when calculating support for two children, the amount for adding a second child is substantially less than the first child. This evident by a simple review of the child support income table. As an example, under W. Va. Code § 48-13-301, the child support obligation for a child whose parents’ monthly income is \$550.00 is \$127.00, while the child support obligation for two children is \$185.00. It is clear that the obligation does not double when there is more than one child, but rather increases incrementally. This methodology is carried on throughout the child support table and demonstrates the intent of the Legislature in establishing these guidelines.

In all of the West Virginia Code provisions pertaining to the calculation of child support, there is a clear acknowledgment that a child support obligation for a particular child is affected if the parent has more than one child. As another specific example, Line 1a of Child Support Worksheet A and Worksheet B provides an adjustment to each party’s gross income, by subtracting any pre-existing child support obligation. See W. Va. Code § 48-13-403 and § 48-13-502.

In her Response to the Petition for Appeal, the Appellee erroneously claims that the Family Court correctly followed the West Virginia child support statutes. The Appellee cites Phillips v. Larry's Drive-in Pharmacy, Inc., 647 S.E.2d 920, 2007 W. Va. LEXIS 58 (2007), for the principle that a statute may not be modified, revised, amended or rewritten. The Appellant overstates the ruling in Phillips. This Court limited the finding in the Phillips case to those statutes that are in derogation of common law. (Id. at 927-28 (court finding "statutes in derogation of common law are strictly construed.") The child support statutes are not in derogation of common law. Further, the Phillips case acknowledges that "the primary rule of statutory construction is to ascertain and give effect to the intention of the legislature." Id. at 927 (citing Syllabus Pt. 8, Vest v. Cobb, 138 W. Va. 660, 76 S.E.2d 885 (1953); Smith v. State Workmen's Comp. Comm'r, 159 W. Va. 1087, 219 S.E.2d 361(1975)). In this case, Appellant merely seeks to give effect to the clear intention of the Legislature in establishing child support guidelines, to give predictability and uniformity to the system.

In this instance, contrary to the Appellee's assertion in her Response, the West Virginia Child Support guidelines do not specifically address the situation where one parent has primary caretaking responsibility for one child, while both parents have extended shared parenting for their other child. Moreover, West Virginia Code § 48-13-204 states that "the calculation of the amount awarded by the support order requires the use of **one of two worksheets which must be completed for each case.**" (emphasis added). In this case, the Family Court utilized two separate worksheets for one case. Thus, an ambiguity is apparent. This Court in Phillips further stated "A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that

reasonable minds might be uncertain or disagree as to its meaning.” *Id.* at 927 . It is evident that interpretation of the Child Support statute is required because of an ambiguity.

A fundamental principle of statutory construction states that “Statutes which relate to the same subject matter should be read and applied together, i.e. *in pari materia*, so that the Legislature’s intention can be governed from the whole of the enactments.” State ex rel Campbell v. Wood, 151 W. Va. 807, 155 S.E.2d 893 (1967); see also In re Cesar L, 2007 W. Va. LEXIS 75 at 19-20 (October 25, 2007); Fruehauf Corp. V. Huntington Moving & Storage Co., 159 W. Va. 14, 217 S.E.2d 907 (1975). In reviewing all of the child support provisions together, the Family Court clearly erred in calculating the child support calculations with both children being considered an only child on each formula. This error becomes very apparent when reviewing the calculations prepared by the Appellee for his Motion for Reconsideration. Under Worksheet A attached to the Appellant’s Motion for Reconsideration, the calculation for child support for sole custody of both children is \$4,423.47, which is more than \$1,000 less than the Family Court’s current child support amount. See Exhibit B. The fact that the Appellant would pay less if the Appellee had sole custody of both children, when in actuality she only has sole custody of one child, is extremely relevant because it evidences the inconsistency and fundamental unfairness in the Family Court’s Order. By calculating the child support obligation for each child in a vacuum, rather than reading the code *in pari materia*, the Family Court not only created an overpayment of child support by the Appellant, it denied parents the predictability, uniformity and consistency that they are entitled to under the law.

## VI. CONCLUSION AND PRAYER

For all the foregoing reasons, the Appellant respectfully request that the Supreme Court grant the Petition for Appeal and reverse the Circuit Court of Putnam County’s erroneous denial of Appellant’s reconsideration of the appeal, thus upholding the Family Court of Putnam County’s

miscalculation of child support.

A handwritten signature in cursive script, appearing to read "Amanda M. Ream", is written over a horizontal line.

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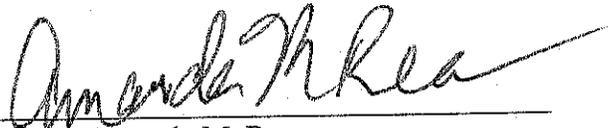
**DAWN SOULSBY (MARTINEZ)**

**Appellee**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 21st day of December, 2007, she served the foregoing "**BRIEF OF APPELLANT**" upon the following counsel by enclosing a true and accurate copy thereof in an envelope addressed to him at his last known address, shown below his name, and depositing the same, postage prepaid, in the regular United States Mail, provided below:

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