

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**at Charleston**

Appeal from the Circuit Court of Cabell County, West Virginia

SHARRON K. CHENAULT,  
Petitioner below – Appellee,

vs.

Supreme Court Case No. 34160  
Cabell County Civil Action No. 94-D-863  
Judge Alfred E. Ferguson

THOMAS D. CHENAULT,  
Respondent below - Appellant

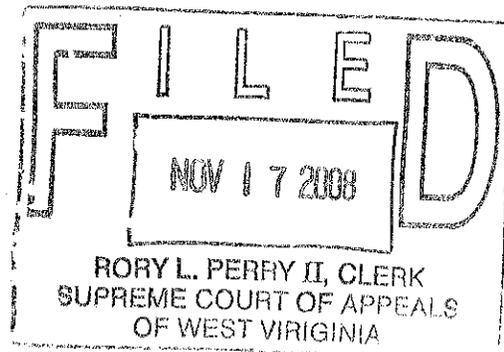
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**BRIEF OF APPELLANT**

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## QUESTIONS PRESENTED

- I. Did the Circuit Court of Cabell County commit error in refusing to grant Appellant's appeal from the Second Amended Qualified Domestic Relations Order as said Q.D.R.O., as drafted and submitted by the Appellee, allows Appellee to receive a benefit to which she is not legally entitled being an annuity and spousal survivor benefit?
  
- II. Did the Circuit Court of Cabell County commit error in refusing to grant Appellant's appeal from the Second Amended Qualified Domestic Relations Order as said Q.D.R.O., as drafted and submitted by the Appellee, allows Appellee to as said Q.D.R.O. allows Appellee to receive a 50% share of Appellant's retirement benefits, to which she is not legally entitled, specifically 50% of those retirement contributions made by the Appellant to his retirement plan after October 1, 1994, the date when the parties legally separated?

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## STATEMENT OF THE CASE

On October 1, 1994, Thomas D. Chenault and Sharron K. Chenault separated and did not live together again as husband and wife and were ultimately divorced in March 25, 2006 by Order entered by Cabell County Circuit Court Judge Dan O'Hanlon, Case No. 94-D-863, the remaining financial issues held in abeyance and bifurcated. In said final financial order granting the parties' divorce, the Appellee was awarded one-half of the accrued value of Appellant's Civil Service pension and one-half of the accrued value of his Army reserve pension which were subject to Qualified Domestic Orders (see page 8, paragraph 14 of the parties' final order of divorce entered January 15, 1998). This Order was prepared by trial counsel for the Appellee and said Order did not provide for the Appellee to receive any type of annuity benefit or spousal survivor benefit.

Pursuant to the final order of divorce, again prepared by Appellee's counsel, Appellee hired new counsel, assumedly to prepare for entry a Qualified Domestic Relations Order (Q.D.R.O.) whereby the Appellee would be awarded one-half of Appellant's Civil Service pension and one-half of his Army reserve pension which were subject to Qualified Domestic Orders as aforesaid. Subsequently, Appellee's counsel did submit a Q.D.R.O. which, however, was rejected by and through the United States Office of Personnel Management (O.P.M.) on behalf of Appellant's former federal employer (see Q.D.R.O. filed June 1, 2006).

Pursuant to O.P.M. rejecting the June 1, 2006 Q.D.R.O., Appellee's counsel prepared an amended Q.D.R.O. and the parties appeared before Cabell County Family Court Judge Ronald E. Anderson for hearing regarding entry of said amended Q.D.R.O. wherein Appellant's counsel argued that the amended Q.D.R.O., as drafted, would result in Appellee receiving a benefit to which she was not entitled, i.e. those financial contributions made by the Appellant to his retirement account with the federal government during the approximate ten year period after the parties separated in October 1994 until his retirement in 2004.

Pursuant to said March 1, 2007 hearing, Judge Anderson entered an Order on March 29, 2007 holding that the parties final divorce decree "did not provide for the Petitioner [Appellee] to receive any type of annuity or survivor benefit from either the Respondent's [Appellant's] Army retirement or his U.S. Marshal's Service retirement (see March 29, 2007 Family Court Order). The Court went on to rule that "The parties final divorce Order did provide, however, for the Petitioner [Appellee] to receive 1/2 of the accrued value of Respondent's [Appellant's] aforesaid retirement plans from November 1, 1972 through October 1994" (see March 29, 2007 Family Court Order). Counsel for the Appellee was further Ordered to "prepare an Amended Q.D.R.O. consistent with the terms of this Order and submit the same to the appropriate agency or agencies" (see March 29, 2007 Family Court Order).

Pursuant to said March 29, 2007 Family Court Order, counsel for the Appellee prepared and presented to the Court an Order styled "Second Amended Qualified Domestic Relations Order."

Pursuant to the preparation and submission of said Second Amended Q.D.R.O., counsel for the Appellant filed his objection to entry of the same on or about June 21, 2007.

Pursuant to said objection filed by Appellant, hearing was held whereby Judge Anderson ruled that the said second amended Q.D.R.O. might still pay Appellee an annuity and/or spousal survivor benefit to which she was not entitled, and he did proceed to make some modifications to the second amended Q.D.R.O. by striking the word "annuity" and replacing it with the word "benefit" in keeping with the Court's prior Order entered March 29, 2007. The Court failed, however, to amend all references to the word "annuity" before said Order was resubmitted to O.P.M. by Appellee's counsel.

Pursuant to the Family Court only correcting part of the Second Amended Q.D.R.O. as submitted by Appellee's counsel, counsel or the Appellant feared the Appellee may still receive a financial share of Appellant's retirement contributions from 1994 to 2004 and/or an annuity or spousal survivor benefit to which she was not entitled, and filed his Appeal to said Order with Judge Alfred E. Ferguson of the Cabell County Circuit Court. Further, said Order as drafted by the Appellee also being inconsistent with the direct Order of the Cabell County Family Court that counsel for the Appellee was to prepare an Order consistent with the terms of its March 29, 2007 Order.

On October 15, 2007, Judge Ferguson denied Appellant's Appeal, without hearing, thereby upholding the Second Amended Q.D.R.O. prepared by

Appellee's counsel and entered by Judge Anderson with the aforesaid incomplete modification(s).

Pursuant to the denial of Appellant's appeal the second amended Q.D.R.O. was submitted to O.P.M. and, via a letter dated January 15, 2008 from one Mildred West, Paralegal Specialist for O.P.M., Appellant was advised that O.P.M. intended to pay Appellee "50% of [Appellant's] gross annuity benefit of \$6,847.00, or \$3,423.50 per month." This letter further advised Appellant that O.P.M. intended to "honor the court's former spouse survivor annuity award," in contradiction of the specific language in the Orders entered by the Cabell County Circuit Court on January 15, 1998, the Order entered by the Cabell County Family Court on March 29, 2007 and even the Second Amended Q.D.R.O. prepared by Appellee's counsel and partially modified by Judge Anderson.

Pursuant to said letter, Appellant submitted a Motion to Judge Anderson requesting an emergency hearing. Judge Anderson refused to set an emergency hearing and advised Appellant's counsel he would have to file an injunction in Circuit Court to address whether or not O.P.M. incorrectly interpreted the Court's Prior Orders.

Pursuant to the statement of Judge Anderson, counsel for the Appellant did move Judge David M. Pancake for an injunction to prevent Appellee from receiving a monetary benefit to which she is not entitled, as aforesaid, which was taken under advisement and has not been ruled upon to the knowledge of Appellant's counsel as of the filing of this brief.

## ASSIGNMENT OF ERROR

1. THE CABELL COUNTY FAMILY COURT AND CABELL COUNTY CIRCUIT COURT COMMITTED ERROR BY ALLOWING THE SECOND AMENDED QUALIFIED DOMESTIC RELATIONS ORDER TO BE ENTERED OVER THE OBJECTION/APPEAL OF APPELLANT AS SAID Q.D.R.O. ALLOWS APPELLEE TO RECEIVE A BENEFIT TO WHICH SHE IS NOT LEGALLY ENTITLED BEING AN ANNUITY AND SPOUSAL SURVIVOR BENEFIT.

## ARGUMENT

In the case now before the Court, Appellant argues that the Cabell County Circuit Court should have granted Appellant's timely filed appeal as the Cabell County Family Court committed clear error in that the Second Amended Qualified Domestic Relations Order as entered by the Family Court on June 28, 2007 conflicted with its prior Order of March 29, 2007 as well as the final divorce Order entered by the Cabell County Circuit Court on January 15, 1998.

From the lengthy record entered in this case, it is clear, uncontroverted and agreed by both Appellant (see March 29, 2007 Family Court Order prepared by Appellant's counsel) and Appellee (see paragraphs G and N of the June 28, 2007 Second Amended Q.D.R.O. prepared by Appellee's counsel) that the Appellee is entitled to one-half of the accrued value of Appellant's U.S. Marshal's Service retirement and one-half of the accrued value of his Army reserve retirement accrued from November 6, 1972 through October 1, 1994. No order entered in this case, either by the Cabell County Family Court or the Cabell County Circuit Court, awards the Appellee any part of Appellant's CSRS Annuity and/or a Former Spouse Survivor Annuity and, actually, the Family Court

specifically denied the Appellee a martial share of Appellant's CSRS Annuity and or a Former Spouse Survivor Annuity (emphasis added).

Therefore, unless the Appellee is attempting to intentionally obtain a benefit to which she is not legally entitled, Appellee must agree that she is entitled only to one-half of the value accrued in Appellants said retirement plans from November 6, 1972 through October 1, 1994, as specifically shown in paragraph N of her Second Amended Q.D.R.O. entered by the Court on June 28, 2007, which states:

Pursuant to the equitable distribution as ordered by the Court in the Final Decree of divorce, the Court hereby ORDERS that the Alternate Payee be awarded Fifty Per Cent (50%) of the Participant's pension plan acquired as of October, 1994. The Alternate Payee shall be eligible to receive payment of the benefit awarded under this Order on the earliest date benefits could be paid to the Participant under the terms of the Plan. IT IS FURTHER ORDERED that from the benefits which would otherwise Be payable to the Participant under the Plan., [sic] The Plan shall pay to the Alternate Payee, and the Alternate Payee shall receive directly form The Plan, an amount equal to Fifty Per Cent (50%) of those assets held in Participant's plan from November 1972 through October 1994, together with interest thereon included therein. The Participant shall receive the remaining assets held in his plan, together with any interest thereon included therein.

At the parties' 1996 divorce trial, both Mr. and Mrs. Chenault were represented by competent and experienced counsel; Mr. William Beckett (now deceased) for the Appellee and Mr. David Lockwood for the Appellant. As a result of negotiations had between counsel and/or as ruled upon by then Family Law Master, Dee-Ann Burdette, the Appellee was not awarded any type of

annuity or spousal survivor benefit (see Page 8, paragraph 14 of the January 15, 1998 final divorce Order). Accordingly, the interpretation by O.P.M. (see the January 15, 2008 O.P.M. letter as contained in Appellant's Amended Petition for Injunction) that the language contained in the Second Amended Q.D.R.O. somehow directed and required O.P.M. to pay an annuity or spousal survivor benefit to the Appellee is clearly wrong in light of every Order entered by either the Cabell County Family Court and the Cabell County Circuit Court.

As is shown in Appellant's Amended Petition for Injunction which is a part of the record now before this Honorable Court, your Appellant tried to bring this potential (now real) problem to the attention of the Cabell County Family Court by requesting an emergency hearing upon Appellant receiving said letter from his former employer. Not only did the Family Court refuse to set a hearing on Appellant's emergency motion, both the Court and counsel for the Appellee refused to sign a proposed Agreed Order prepared by counsel for the Appellant (see Exhibit G attached to Appellant's Petition for Injunction) which he believes would have cleared up O.P.M.'s misinterpretation that Appellee was awarded an annuity and spousal survivor benefits. She is not.

As the Family Court was made aware of this incorrect and financially enormous error in interpreting its Order(s), Appellant argues that the Family Court committed clear error, or otherwise abused its discretion, in allowing a legally flawed Order to be presented to Appellant's former employer. As well, the Cabell County Circuit Court committed clear error, or otherwise abused its

discretion, in not granting Appellant's appeal from the flawed Family Court Order of June 28, 2008.

As this Court has previously held, "when 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." Syl. Pt. 1, *Carr, Sr. vs. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004). Without question, the actions of the Family Court Judge in allowing the flawed Second Amended Q.D.R.O. to be entered and then refusing to correct the incorrect interpretation of said Order by Appellant's former employer, and said former employer's apparent and obvious disregard of the Court's March 29, 2007 Order at the request of the Appellant, was clearly erroneous at worst, and an abuse of it discretion at best, and the Cabell County Circuit Court should have granted Appellant's July 2007 appeal and directed the Cabell County Family Court to modify, amend or supersede the Second Amended Q.D.R.O. as requested by the Appellant.

#### ASSIGNMENT OF ERROR

2. THE CABELL COUNTY FAMILY COURT AND CABELL COUNTY CIRCUIT COURT COMMITTED ERROR BY ALLOWING THE SECOND AMENDED QUALIFIED DOMESTIC RELATIONS ORDER TO BE ENTERED OVER THE OBJECTION/APPEAL OF APPELLANT AS SAID Q.D.R.O. ALLOWS APPELLEE TO RECEIVE A 50% SHARE OF APPELLANT'S RETIREMENT BENEFITS, TO WHICH SHE IS NOT LEGALLY ENTITLED, SPECIFICALLY 50% OF THOSE RETIREMENT CONTRIBUTIONS MADE BY THE APPELLANT TO HIS RETIREMENT PLAN AFTER OCTOBER 1, 1994 WHEN THE PARTIES LEGALLY SEPARATED.

## ARGUMENT

Turning to Appellant's second assignment of error, a similar argument is had concerning exactly how much money Appellee should legally receive.

Again, from the lengthy record entered in this case, it is clear, uncontroverted and agreed by both Appellant (see March 29, 2007 Family Court Order prepared by Appellant's counsel) and Appellee (see paragraphs G and N of the June 28, 2007 Second Amended Q.D.R.O. prepared by Appellee's counsel) that the Appellee is entitled to one-half of the accrued value of Appellant's U.S. Marshal's Service retirement and one-half of the accrued value of Appellant's Army reserve retirement as accrued from November 6, 1972 through October 1, 1994, and no order entered in this case, either by the Cabell County Family Court or the Cabell County Circuit Court, awards the Appellee any part of Appellant's retirement after October 1, 1994.

Appellant argues that the time period October 1, 1994, the date the parties separated and the date which both Appellant and Appellee agree is the last date for the Appellee to be entitled to a marital share of Appellant's retirements, through Appellants retirement from the U.S. Marshal's Service in 2004 is not marital property and Appellee is not legally entitled to those benefits Appellant earned during said post separation time period.

W.Va. Code §48-1-233 (1) defines marital property and states in pertinent part that marital property means "All property and earnings acquired by either spouse during a Marriage, including every valuable right and interest, corporeal or incorporeal, tangible or intangible, real or personal, regardless of the form of

ownership, whether legal or beneficial, whether individually held in trust . . .", etc. Because the amount of Appellant's retirement contributions, and the cash value of his retirement plan from his service as a Deputy U.S. Marshal were significantly increased after separation due to his progressively higher levels of income, it would be unjust and inequitable for Appellee to reap the benefit of Appellant's continued employment after the date of separation.

Any increases to Appellant's retirement plan with the federal government after the parties separated on October 1, 1994 would clearly be Appellant's separate property as defined in W.Va. Code §48-1-237 (5) which states that separate property means "any property acquired during a marriage after separation of the parties and before ordering an annulment, divorce or separate maintenance." Therefore, the period from October 1, 1994 until entry of the final divorce Order on January 15, 1998 is Appellant's separate property, as would those post-divorce contributions made to Appellant's federal retirement from January 15, 1998 until his retirement in 2004. To allow the Appellee to collect or receive any part of Appellant's separate property as proposed by his former employer through O.P.M. to be paid beginning March 1, 2008 would be contrary to the West Virginia Code, and prior decisions of this Court discussed below, and which would create a chilling effect on former spouses continuing to work post separation.

In the case at hand, Appellant's former employer improperly divided his "gross annuity benefit of \$6,647.00 or \$3,423.50 per month" and further improperly awarded Appellee a "former spouse's survivor annuity award" (see

Exhibit G attached to Appellant's Petition for Injunction). While Appellee is clearly not entitled to any annuity or spousal survivor benefit as shown in the preceding argument, Appellant's former employer should not pay Appellee one half of Appellant's gross retirement benefits either as such award improperly and artificially inflates the marital share of Appellant's U.S. Marshal's Service and Army reserve retirements.

Because Appellant's former employer simply took his total retirement benefit and divided it in half, Appellee will obtain an increased monetary benefit to which she is not legally entitled, and to which she would otherwise not be entitled to had O.P.M., the Cabell County Family Court and the Cabell County Circuit Court committed error.

Accordingly the actions of the Family Court Judge in allowing the flawed Second Amended Q.D.R.O. to be entered, having said problem(s) brought to his attention by Appellant's counsel via an Emergency Motion and then refusing to address the incorrect interpretation of said Order by Appellant's former employer that Appellee should receive 50% of Appellant's gross retirement annuity and a former spouse survivor award, or at the very least scheduling a hearing on said Emergency Motion, is clearly erroneous at worst, and an abuse of it discretion at best, and the Cabell County Circuit Court should have granted Appellant's July 2007 appeal and directed the Cabell County Family Court to modify, amend or supersede the Second Amended Q.D.R.O. as requested by the Appellant so that Appellee would not receive a benefit to which she is not legally entitled as said Appellant's former employer apparently, and obviously, disregarded the Court's

previous Orders directing it to use the dates November 6, 1972 through October 1, 1994, not simply divide in half Appellant's entire federal retirement.

### CONCLUSION

For the foregoing reasons, and upon such arguments to be made at oral hearing on this appeal and as may be contained in Appellant's yet to be filed response brief to Appellee's Reply Brief, your Appellant respectfully requests that this Honorable Court enter an Order directing Appellant's former employer to award Appellee no annuity or spousal survivor benefit, as neither an annuity nor spousal survivor benefit were ever ordered in this case, were specifically denied by Order and award Appellee one-half of the accrued value of Appellant's U.S. Marshal's Service and one half of the accrued value of Appellant's Army reserve retirement from November 6, 1972 through October 1, 1994, and grant the Appellant such other and further relief to which he may be entitled under the facts and circumstances of his case.

Respectfully Submitted,

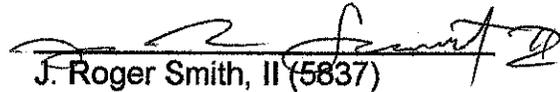
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CERIFICATE OF SERVICE

The undersigned attorney for the Appellant certifies that he served a true and accurate copy of the foregoing "BRIEF OF APPELLANT," upon Appellee's attorney, by mailing the same via regular U.S. Mail Service, postage prepaid, this 17<sup>th</sup> day of November, 2008 addressed as follows:

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