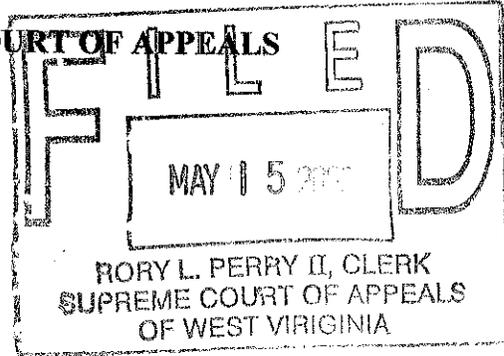


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



SHELIA D. ALLEN,
now known as
SHELIA D. ELIAS
Appellee,

vs.

Appeal No. 34628

MICHAEL L. ALLEN,
Appellant

APPELLANT'S REPLY BRIEF

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TABLE OF AUTHORITIES

A. Statutes

West Virginia State Code 11-10-5

West Virginia Supreme Court's Rules of Practice and Procedure
for Family Court

West Virginia Code 48-1-228

West Virginia Code 51-2A-14

West Virginia Code 48-1-205

B. Cases

Carr v. Hancock, 216 W. Va. 474, 607 S.E.2d 803 (2004)

Evans v. Evans No. 33045 (2006)

Hinkle v. Bauer Lumber & Home Building Center, Inc., 158 W. Va. 492,
211 S.E.2d 705 (1975)

Lucas V. Lucas 215 W. Va. 1, 592 W.Va. 1, 592 S.E.2d 646 (2003)

Ray v. Ray W. Va. No. 31674 (2004)

Staton v. Staton, 218 W. Va. 201; 624 S.E.2d 548 (2005)

APPELLANT'S REPLY BRIEF

The pro se Appellant, Michael L. Allen, pursuant to Rule 10(c) of the rules of Appellate Procedure for the West Virginia Supreme Court of Appeals and in accordance with this Court's order denying Appellant's motion to strike Appellee's brief, said order which granted leave to the Appellant to file his reply brief within fifteen days of receipt of said order, offers his reply brief. The Court's order was received by the Appellant on Saturday, May 2, 2009.

THE ROANE COUNTY CIRCUIT COURT ERRED WHEN IT FOUND THAT THE FAMILY COURT'S JURISDICTION WAS AUTOMATICALLY RESTORED UPON APPEAL PETITION RESOLUTION BY THE WEST VIRGINIA SUPREME COURT OF APPEALS

The first assignment of error briefed by the Appellant is the family court's jurisdiction to hear the February 28, 2006 petition to modify the child support order of November 6, 2002, while there is pending an appeal petition (filed February 6, 2006) to modify the same November 6, 2002 support order. The Appellee refers to the jurisdiction question in her nature of proceedings section and attempts to distinguish the two filings by claiming they were filed for two different periods of time. However, both filings were for the same purpose; to modify the existing child support order of November 6, 2002. Two different courts were being asked to modify the same support order at essentially the same time. This court has previously clearly addressed court jurisdiction in Hinkle v. Bauer Lumber & Home Building Center, Inc., 158 W. Va.

492, 211 S.E.2d 705 (1975), and in *Ray v. Ray* No. 31674, finding that the court without jurisdiction can only take action to dismiss the matter.

The Appellee further claims she only filed her petition to modify child support as she was required to do so by court order as she began a new job on February 6, 2006. However, the Appellee was under no such obligation and the job the Appellee refers to was her third job since the support order of November 6, 2002 and she never filed any such petition when she began the other two jobs. It is the Appellant's belief, while represented by counsel, the Appellee was attempting to "hedge her bet" regarding support modification. The Appellee, while represented by counsel, was implementing a legal strategy by seeking an appeal to this Court of the circuit court's Rule 60(b) order overturning the family court, which modified the November 6, 2002 support order and then filed a petition to modify the same November 6, 2002 support order with the family court on February 28, 2006. She took the additional step of claiming the reason for her family court filed petition was she began a new job. This step was unnecessary and the Appellant believes she was attempting to create a diversion by providing the family court an opportunity to overcome legitimate jurisdictional questions.

THE ROANE COUNTY CIRCUIT COURT ERRED WHEN IT FAILED TO CONSIDER THE PETITIONER'S APPEAL OF THE FAMILY COURT'S CHILD SUPPORT CALCULATION AS THE FAMILY COURT FAILED TO FOLLOW APPLICABLE LAW

West Virginia Code requires the calculations of child support in accordance with precise and accurate rules. The family court did not follow these rules, nor did it find

reason to deviate from the rules. West Virginia Code 48-1-228 section (7):

Income from self-employment or the operation of a business, minus ordinary and necessary expenses which are not reimbursable, and which are lawfully deductible in computing taxable income under applicable income tax laws, and minus FICA and medicare contributions made in excess of the amount that would be paid on an equal amount of income if the parent was not self-employed: Provided, That the amount of monthly income to be included in gross income shall be (emphasis added) determined by averaging the income from such employment during the previous thirty-six-month period or during a period beginning with the month in which the parent first received such income, whichever period is shorter;

The Appellee claims that the Appellant agreed to the family court ignoring this correct method for calculating child support. The Appellant denies and further offers he objected and called the family court's attention to the correct code and requested income averaging be used to set child support in accordance with the law. The Appellant made his objections known to the family court; continuing to object, disagree and be uncooperative after the court had made its decision would have only aggravated the presiding judge and could have led to further erroneous and detrimental rulings.

The Appellee never offered any supportable argument as to why West Virginia Code 48-1-228 section (7): should not be applied to this assignment of error before the Court. However, she does make many unsupported, untrue and libelous accusations which are difficult to respond to as they appear to violate appellate procedure. However, the Appellant will attempt to do so without straying to far from the error assignments. The Appellant offers that he has

provided complete and accurate income information and income tax returns to the Appellee. Between August of 2000 and September of 2002, the parties' minor children resided with the Appellant and the support order and parenting plan in effect did not require the exchange of income tax returns by the parties.

Therefore, the Appellee did not supply hers, nor did the Appellant. But, as the parties have been in litigation almost none stop; all of the Appellant's income tax returns have subsequently been provided to the Appellee and the family court.

However, the Appellee has not provided hers. The family court has permitted the Appellant to be questioned extensively regarding each and every item of income and most deductions on his income tax returns, on three different occasions. The Appellee has previously subpoenaed the Appellants' employer to testify about the authenticity of income and benefit information. With the exception of the order entered January 31, 2005 and overturned on appeal, the family court has never made any finding regarding the unreasonableness, incompleteness or omission of income records by the Appellant.

The Appellee makes erroneous and incorrect statements regarding the Appellant's mortgage and personal property; admitting that she questions the minor children regarding the Appellant's life and most disturbingly is the level of attention she focuses on the Appellant's financial and business matters and his spouse, preventing him from enjoying a life separate from the Appellee. The Appellant has not purchased an automobile since 2002, nor has he made any loan

or insurance payments on any automobile other than his 2000 Mercury Sable and he neither owns nor leases any other vehicles jointly or otherwise.

The Appellant denies he is underemployed. The family court heard testimony and other independent evidence regarding the Appellant's attempt to obtain comparable employment. After which, the family court judge stated that the Appellant herein, was not underemployed, had made good faith efforts to find comparable employment, specifically told the Appellee herein that a comparable job would be difficult for the Appellant to find and that it appeared the Appellant's former employer had harmed the Appellant's reputation and ability to find work within his profession. Amazingly and illogically, two days afterwards, the Appellee contacted three employees of the Appellant's former employer; the employer's president, the president's son and the president's personal secretary, for the purpose of disclosing the Appellant's testimony in family court regarding his former employer and the court's observations regarding harming the Appellant's reputation. The Appellee disclosed that information received from these contacts formed the basis for her Rule 60(b) filing of December 9, 2006. Furthermore, it is the Appellant's belief that the Appellee's actions, in collusion with representatives of his former employer, as well as her slanderous statements, has resulted in extensive damage to his employability, reputation and business opportunities; all to the detriment of the parties' children and his wife and eleven year old child.

The Appellee submits information regarding the Appellant's 2001 income and the remodeling of his jointly owned marital home. With regard to the 2001 income; in January 2001, the Appellant disclosed to the Appellee his new monthly income. Subsequently, without cause his employment was terminated effective May 31, 2001 and titled as an "at will termination". The Appellant was thirty-nine years of age and the employer's president, subsequently disclosed his desire to initiate the "at will" termination prior to the Appellant reaching age forty and becoming eligible for additional discrimination protection. There were no prior difficulties or performance issues cited, just a straight forward at will termination brought forth by bank president's insecurities and paranoia. The Appellant and the employer's board of directors, in spite of the president's strenuous objections, entered into a severance agreement regarding salary continuation, on-going consultation, vacation payments, automobile usage, other miscellaneous employee benefits and the non-qualified executive salary deferral program. The entire severance agreement was provided to the family court and counsel for the Appellee. As a result of the agreement the Appellant's 2001 income was significantly higher than in 2000. However, the majority of the increase was the lump-sum payment of the balance paid from the non-qualified executive salary deferral program. This program balance was an asset at the time of the Appellant and Appellee's divorce and the entire salary deferral agreement was supplied to the Appellee during those proceedings and property settlement. At property settlement, the salary deferral balance was divided between the parties and one-half the asset was allocated to the Appellant without income tax

consideration. As the asset was non-qualified, when it was paid to the Appellant in 2001, at employment termination, he incurred significant federal and state income taxes as a result of the distribution. The Appellee received her portion income tax free and the Appellant paid income taxes on the entire balance. Also in 2001, the parties' minor children resided with the Appellant. The Appellant herein was questioned at length in family court regarding his 2001 income, sources and income tax return. The Appellee was not questioned regarding her 2001 income tax return even though it reports a one hundred thousand dollar prize from the West Virginia Lottery. Information with the return shows the prize was claimed by the Appellee's spouse, however, no evidence was ever offered to validate and establish this income as non-marital property and excludable from child support calculations. The Appellee's income tax return was not supplied to the Appellant in advance of the hearing, but rather as the parties took their seats in the court room counsel representing the Appellee handed the income tax return to the Appellant just as the hearing began. Having not been notified otherwise, the Appellant did not expect any changes from the prior year regarding the Appellee's income. The Appellant did not, nor could he review the return during the hearing. The family court judge did not review her provided copy either and allowed the Appellee to verbally represent that she had zero income. Even though the Appellee was voluntarily unemployed and was not looking for employment and the parties' children were enrolled full time in school, the court, in violation of state law, did not attribute income to the Appellee. West Virginia 48-1-205.

In early 2001, the Appellant, while employed in his seventeenth year with his employer and with the parties' children properly residing with him, did contract for a remodeling project of his approximate thirty-five year old martial home. Upon employment termination, in May of 2001, the scope and size of the project was, where feasible, reduced and some portions of the project were left unfinished.

THE ROANE COUNTY CIRCUIT COURT ERRED WHEN IT FOUND THE FAMILY COURT HAD CONSIDERED THE MERITS OF THE FILING FOR SANCTIONS AGAINST ATTORNEY H. BETH SEARS FOR VIOLATION OF RULES OF PRACTICE AND PROCEDURE

The Appellee claims that the Appellant's income tax returns are not confidential information and therefore, no violation of the court rules occurred. West Virginia Code 11-10-5, recognizes the confidentiality of income tax records by making it illegal for the State Tax Department to release said records. The Appellee states that the Appellant had not supplied income tax information to her in July of 2005, when the state tax department was issued the subpoena. This statement is absolutely false. The Appellee then states that her request for income tax records was made in support of her created theory that false income tax information had been supplied to her by the Appellant. The Appellee wants the Court to believe she did not have the income tax returns, therefore, she requested them from the State Tax Department and disingenuously that she had the income tax returns, but she believed them to be false and different than the tax returns filed with the state tax department. The Appellee had the Appellant's 2000

through 2004 federal and state income tax returns provided by him and copies provided by the state tax department in her possession from July 2005 until October of 2006. And even though she was on an illegal and disallowed “witch hunt” to prove an unsupported theory, she had the opportunity for fifteen months to compare the records and disclose any irregularity, but she did not discover any as her improper actions did not provide evidence to support her theory. The Appellee’s actions violated the West Virginia Supreme Court of Appeals Rules of Practice and Procedure for Family Court, resulting in the violation of state law, the disciplining of a state tax department employee and harassment, embarrassment and humiliation to the Appellant and his spouse. This matter should be heard and considered on its merits and the offending parties should be held accountable for their abusive and illegal acts.

The Appellee briefed the Court on the matter of medical expenses; however, this matter was not petitioned for appeal from the Circuit Court of Roane County by either party by the Appellant nor was it counter petitioned by the Appellee. The Appellant offers at a hearing held on June 16, 2008, the family court heard the complaints of the Appellee regarding unreimbursed medical expenses. The court noted it could not address the matter as the issue was not properly before the court. The Appellant explained he had communicated in writing with the Appellee attempting to resolve the issue. The Appellee denied receiving the correspondence. The judge asked the Appellant to provide a copy of the letter to the Appellee and for the parties to attempt resolution of the issue, as

they should have an expectation of how the family court would rule on the evidence. The Appellant immediately provided a copy of the correspondence to the Appellee with and did not receive a response. He has subsequently contacted the Appellee in writing on seven other occasions attempting to resolve the matter, with never a response from the Appellee. It is completely irresponsible that the Appellee refuses to acknowledge the multiple letters and settle this straight forward issue while continuing to falsely blame the Appellant for the dispute and including this dispute in ever filing before the courts.

The Appellee, in what appears to be a violation of appellate procedure, alleges many other matters in her brief and the Appellant hereby replies to some of those as follows:

1. The Appellee clings to the family court's Rule 60(b) order entered January 31, 2005, from the November 6, 2002 family court filing. In the order, the family court makes findings that the Appellant did not make a proper income disclosure in January of 2000 and thereby was attempting to confuse the Appellee. The order was overturned on appeal, but it makes the Appellant appear to be at fault regarding income disclosure. However, that it is not the case! The parties had just completed multiple days of hearings in late December 1999 on the Appellant's petition to change custody of the parties' minor children. During which the Appellee focused considerable time examining income evidence, subpoenaing employer pay records and questioning the Appellant concerning his

income and assets. In early January 2000, the Appellant was notified by his employer that his monthly income would increase slightly in 2000. The amount of the increase was significantly less than fifteen percent of his gross income and the increased amount would not have resulted in a new support order increasing child support by at least fifteen percent from the prior amount. However, before ever receiving a pay check with the increased pay amount, the Appellant notified the Appellee in writing of his pay increase. The letter written by the Appellant in early January 2000 was considered by the family court during the hearing on the Appellee's Rule 60(b) petition filed November 6, 2002. The family court made erroneous findings regarding this letter and the findings formed the basis for all of its adverse rulings against the Appellant. The family court actually reviewed a letter written by the Appellee to the Appellant and found it to be confusing and misleading, but the court mistakenly found the Appellant had written the letter, even though the evidence was clear and convincing that it was written and signed by the Appellee. Furthermore, until August 2000, the family law master was considering the evidence regarding child custody from the December 1999 hearing. During this time, the Appellant filed his 1999 federal income tax return and the Appellant's attorney provided a copy to the Appellee's counsel. Properly, the family court's January 31, 2005 Rule 60(b) order was overturned on appeal by the circuit court, but the initial erroneous findings by the family court have been solidified with the Appellee and she clings to them as vindication of her claims of Appellant deception.

2. The Appellee, in violation of appellate procedure, references a bankruptcy case in which the Appellant's former employer was sued and the judge's opinion found the Appellant's testimony "not to be credible". The Appellee provides a newspaper article copy written by the brother of the attorney representing the moving party in the matter. Certainly, the bankruptcy court's findings and rulings are disturbing and embarrassing. The Appellant is informed his former employer, Traders Bank, appealed the order to federal district court and ultimately the matter was settled by the parties without further litigation. The Appellant herein was not named as a defendant in the lawsuit. He was asked by bank attorneys to cooperate and assist in establishing the facts as they prepared their defense. Regarding his actions concerning the transaction, he met with the seller and the buyer and secured information from them regarding their sales agreement and an application for a mortgage application. The board of directors of the bank reviewed and approved the transaction and the loan was closed by an executive officer off the bank, other than the Appellant herein. During his testimony, completed over two days, he was asked questions regarding the transaction, subsequent events and to speculate as to what might have occurred after he left employment with Traders Bank. The reason for the speculation was the loan closed in early 2001 and most of the file documentation was outstanding at the time he left employment with the bank in May of 2001. Therefore, he was asked to speculate on how file documentation would have been handled in this matter. According to bank counsel, the testimony of the Appellant and the seller, Vivian Fadlevich, were essential the same corroborating the events leading up to the loan

being approved by the board of directors, but the bankruptcy court only found fault with the Appellant's testimony. The only evidence offered by the moving party, Deborah Kollar, was her uncorroborated testimony. Bank counsel informed the Appellant that any causal observer listening to the three witnesses' testimony would conclude Ms. Kollar to be untruthful, not the Appellant or Mrs. Fadelvich. After the Appellant's employment was terminated he had no influence, involvement or was consulted regarding the events surrounding the bank's relationship with Ms. Kollar. However, Ms. Kollar did twice contact the Appellant seeking his advice regarding her relationship with the bank and what strategies she might implement to achieve her goals.

Although embarrassed and disappointed by the bankruptcy court's decision, the Appellant stands by his testimony and cites counsel for the bank as characterizing his cooperation with the bank, (an organization whose executives have inflicted harm on him and his family), as being helpful, professional and ethical. The Appellee, in violation of appellate procedure, briefs this matter in a transparent attempt to further embarrass, harass and discredit the Appellant, while not addressing the significant legal assignments of error pending before this Court.

3. The Appellee, what appears to be a violation of appellate procedure, briefs the court and falsely claims that the Appellant has never supplied his 2002 income tax return to her. The Appellant and Appellee agreed to exchange income tax

returns in the original (1997) parenting agreement. Subsequently, the Appellee ceased working and stopped sending her income tax return copies. The residential custodial parent of the parties' minor children was properly changed from the Appellee to the Appellant in August of 2000. As a result, a new child support order and parenting plan were ordered and neither required the exchange of income tax returns. Therefore, neither party exchanged income tax returns with one another, but as the matter of child custody remained in dispute before the courts during the time the children resided with the Appellant, complete and accurate income tax returns were always provided by the Appellant to the court. Written documentation clearly establishes the submission of the Appellant's 2002 complete federal and state income tax returns to the family court and twice to the Appellee's attorney. The Appellee has been notified of this on numerous occasions, but she desires to continually raise this false acquisition in court filings. The Appellee continues to falsely make this claim and has briefed it to this Court even after being repeatedly informed of the facts.

4. The Appellee, in what appears to be a violation of appellate procedure, as the matter is not before the court as an assignment of error, claims she has never received complete income tax returns from the Appellant and briefs new information not having occurred prior to or considered at the underlying hearing nor considered by the lower courts. In other sections of her brief, the Appellee acknowledges the improper receipt of the Appellant's state income tax returns for the years 2000-2004, which she had in her possession for over fifteen months, but

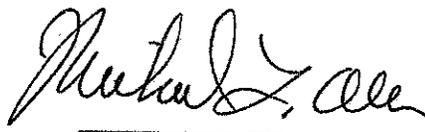
then she claims does not have complete copies. She further claims three others have reviewed this confidential information and informed her she does not have complete copies. This is inaccurate and not information considered by the courts below. The Appellee has complete and accurate copies and when the Appellant recently supplied his 2008 income tax returns and all supporting schedules, he attached an acknowledgment itemizing the information provided and requested the Appellee to return the acknowledgment as proof of her receipt of all the documents. In spite of two requests, the Appellee refuses to sign and return the acknowledgement, thereby, creating an opportunity for her to continue to make false statements to the court regarding this matter.

5. The Appellant further offers when he began his affiliation as a sales associate with AXA Advisors, LLC he promptly notified the Appellee of the affiliation and that his income would fluctuate depending upon his sales commissions. He further states he provided the Appellee monthly statements of income received during his first year of affiliation with AXA. The Appellant further states that after the children's primary custodial parent was changed from him to the Appellee he has enjoyed extended visitation and has accordingly provided significant direct financial support to the parties children; including providing at least ninety percent of their annual clothing costs, camp fees, vacations, extracurricular activities, food, education costs, medical, spending money and other miscellaneous payments.

The Appellee appears to violate Appellate Procedure by attaching to the brief exhibits that were not designated as a part of the record for consideration and the exhibits do not appear in the court record.

CONCLUSION

The Appellant respectfully requests this honorable court to find that the family court did not have subject matter jurisdiction to hear the Appellee's February 28, 2006 petition to modify the November 6, 2002 support order as there existed an appeal petition before this court to modify the same order and therefore, overrule the circuit court and family court orders. He further respectfully requests this court to find that the calculations of child support was not computed in accordance with state code and require self-employment income to be averaged during the time frames he has been self-employed and overturn the circuit and family court's orders. Finally, he respectfully requests this court to overturn the circuit court and family court on the matter of sanctions against counsel for violation of this court's rules of practice and procedure.

A handwritten signature in cursive script, reading "Michael L. Allen". The signature is written in black ink and is positioned above a horizontal line.

Michael L. Allen,
Appellant pro se