

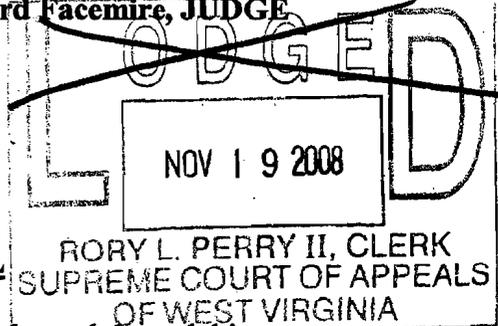
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DONNA SUE SKIDMORE
Petitioner/Appellee

VS.

WALTER BURKE SKIDMORE,
Respondent/Appellant

Circuit Court CASE # 98-D-18
Richard Faceaire, JUDGE



PETITION FOR APPEAL

Comes now the Appellant, Walter Burke Skidmore, by and through his attorney, Daniel R. Grindo, pursuant to the West Virginia Rules of Appellate Procedure and does make the following Petition for Appeal.

NATURE OF PROCEEDING

This matter arises from a Family Court proceeding initiated in the Family Court of Braxton County before the Hon. Robert Reed Sowa, Family Court Judge. The matter was appealed to the Circuit Court of Braxton County, but the appeal was refused without hearing. This Petition directly addresses the rulings of the Family Court as they were never addressed by the Circuit Court of Braxton County. The parties were involved in litigation stemming from a Petition to Modify Parenting Plan and Child Support filed by the wife/Appellee. The husband/Appellant filed an objection to the modification and the matter proceeded accordingly.

FACTS OF THE CASE

The wife/Appellee filed a Petition for Modification of Parenting Plan and Child Support based upon an asserted desire of the subject child, to which the

husband/Appellant objected. Thereafter the wife/Appellee filed a second Petition to Modify Child Support seeking retroactive modification of child support based upon an asserted failure of the Appellant to provide financial information. As is reflected in the Family Court Order, the parties utilized various forms of alternative dispute resolution and eventually arrived at an agreement for a modified parenting plan. Thereafter, the Court Granted the wife/Appellee's Petition to retroactively modify child support asserting that the husband/appellant had failed to disclose the appropriate financial statements to the wife for the years of 2003 through 2006. The record reflects that there were no petitions for contempt filed by the wife/appellee during that time period, nor did the wife/appellee provide the husband/appellant with the same information.

The Court then addressed the current support obligation considering the modification to the parenting plan. The Court found that based upon the income of the parties and the modification to the parenting plan that there would be a change in the husband/appellant's child support in excess of 15%. However, the Court found that because the appellant had not plead a modification of child support, the Court refused to grant the modification.

ASSIGNMENTS OF ERROR

1. That the Court erred in allowing a retroactive modification of child support.
2. That the Court erred in denying a modification of child support in conjunction with a modification to the parenting plan with a finding of a change in excess of 15%.

AUTHORITY

1. W.Va. Code Section 48-11-105 et seq.
2. Hayhurst v. Shepard, 219 W.Va. 327, 633 S.E.2d 272, (2006).
3. Goff v. Goff, 177 W.Va. 742, 356 S.E.2d 496 (1987)
4. Hudson v. Peck, 183 W.Va. 300, 395 S.E.2d 544 (1990)

DISCUSSION

RETROACTIVE MODIFICATION OF CHILD SUPPORT

In the instant case, the Court found that a retroactive modification of child support was warranted due to a failure of the father to disclose tax returns pursuant to a prior order of the court. It was also undisputed that the mother also failed to make the disclosures and no petitions to modify or petitions for contempt were filed on the issue until the instant case. In support of this position, the Court cited Goff v. Goff, 177 W.Va. 742, 356 S.E.2d 496 (1987) and Hudson v. Peck, 183 W.Va. 300, 395 S.E.2d 544 (1990), and quoting the proposition from Goff that "The authority of the circuit courts to modify alimony or child support awards is prospective only and, absent a showing of fraud or other judicially cognizable circumstance in procuring the original award, a circuit court is without authority to modify or cancel accrued alimony or child support installments." Syl. Pt. 2, Goffv. Goff.

In order for the Court to make this finding, it would have had to make the finding that the failure to disclose was fraudulent on the part of the father, however the Court makes no such finding. Further, the case of Hudson v. Peck, 183 W.Va. 300, 395 S.E.2d 544 (1990), which the court cites in support of its ruling actually states, after citing the ruling of Goff, that, "...even though the appellee waited some five years to enforce an existing order, this was still within the ten year statute of limitations as found in W.Va. Code § 38-3-18 (1931) and the lower court was without power to modify those support payments which had already accrued."

The Court again addressed this issue in Hayhurst v. Shepard, 219 W.Va. 327, 633 S.E.2d 272, (2006), in which it again upheld the proposition that without fraud on the part of a party, retroactive modification of child support is improper.

In light of this ruling, because the wife/appellee failed to file an appropriate motion for modification or contempt as the case may be, and that no fraud was found by the court, the Family Court cannot retroactively modify the child support.

DENIAL OF MODIFICATION OF CURRENT SUPPORT

In the instant case, the Court refused to modify the child support in conjunction with an agreed modification to the parenting plan because the husband/appellant had not plead the same, even though there was a finding that a change of more than 15% existed.

This matter began as a contested petition to modify the parenting plan. The husband/appellant objected to the modification filed by the wife/appellee and therefore sought no modification to his child support. After much litigation and alternative dispute resolution attempts, the parties arrived at an agreed modification to the parenting plan.

The Court calculated the child support obligation and found that as a result of the change in the parenting plan and considering the income of the parties that a change of more than 15% existed. The Court then approved the modification of the parenting plan, but denied the associated modification to the child support because the husband had not plead the same.

W.Va. Code 48-11-105(a) requires that a parent file a motion to modify child support before the Court may address a modification. However, it does not say which parent must file the petition. In the instant case, it is undisputed that the wife/appellee filed a petition to modify the parenting plan and to modify child support. It is also undisputed that the wife/appellee prevailed on the matter by agreement of the parties that was then ratified by the Court. Further, the Court went so far as to modify child support retroactively, which was addressed hereinabove. As such, there is can be no dispute that a parent filed a motion to modify child support.

It is also uncontroverted, pursuant to paragraph V of the Court's Findings of Fact and Conclusions of Law, that as a result of the modification there was a change in the obligation in excess of 15% over the period of time since the filing of the petition.

Therefore, because the Court found that a change of circumstances occurred through the granting of a modification to the parenting plan and that the change would cause a reduction of the obligation in excess of 15%, then the Court should have granted the accompanying modification whether the appellant had originally plead it or not.

PRAYER FOR RELIEF

In consideration of the argument contained hereinabove, Petitioner respectfully requests the following relief:

1. That this Court find that the lower court erred in retroactively modifying child support.
2. That this Court overturn the lower Court's award of \$7,915.76 in retroactive child support to the wife/appellee.
3. That this Court find that the lower court erred in refusing a modification of the current support obligation in conjunction with a modification to the parenting plan when a 15% change existed.
4. That this Court direct the lower Court to modify the current support obligation to the amount of \$186.51 per month for the period of time from the filing of the Petition to Modify through the present.

Respectfully Submitted:

Petitioner: By Counsel



Daniel R. Grindo
622 Elk St.
Gassaway, WV 26624
304-364-4178
304-364-4404 fax
WVSN 9131

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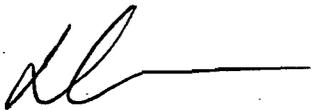
DESIGNATION OF THE RECORD

Comes now the Appellant, by and through his attorney, Daniel R. Grindo, pursuant to Rule 4(c) of the West Virginia Rules of Appellate Procedure and provides the following designation of the record.

- Two Orders of the Family Court of Braxton County, entered the 21st day of May, 2008
- Order of the Circuit Court of Braxton County refusing appeal entered the 19th day of June 2008.

Respectfully Submitted:

Petitioner: By Counsel

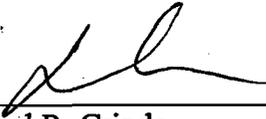


Daniel R. Grindo
622 Elk St.
Gassaway, WV 26624
304-364-4178
304-364-4404 fax
WVSNB 9131

CERTIFICATE OF SERVICE

I hereby certify that I have provided a true copy of the foregoing Petition for Appeal, Docketing Statement, and Designation of the Record upon the following individual, by regular mail on the 20th day of October 2008:

Donna Skidmore
415 Stony Creek Rd.
Sutton, WV 26601



Daniel R. Grindo
622 Elk St.
Gassaway, WV 26624
304-364-4178
304-364-4404 fax
WVSN 9131

VERIFICATION

State of West Virginia,
County of Braxton, to-wit:

I, Walter B. Skidmore, Petitioner in the foregoing action, being first duly sworn, deposes and says that the assertions contained within the foregoing Petition for Appeal are true except so far as they are therein stated to be on information, and that so far as they are upon information as he or she believes them to be true.

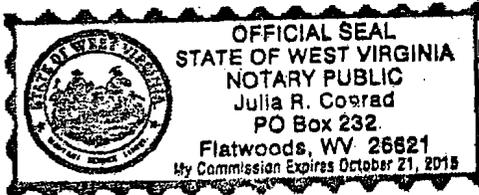
Walter B. Skidmore

Walter B. Skidmore

STATE OF WEST VIRGINIA,
COUNTY OF BRAXTON, to-wit:

I, Julia R. Conrad, a Notary Public in and for the State and County aforesaid, do hereby certify that personally appeared Walter B. Skidmore, known to me to be the person or persons who executed the within Verification, whose names are signed to the foregoing Verification and writing above, have each this day acknowledged the same before me in my said State and County.

Given under my hand the 30th day of June 2008.



Julia R. Conrad

NOTARY PUBLIC