

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Beverly J. Mullins, Petitioner Below, Appellant

Vs.

No. 35324
Civil Action No. 99-D-816
Family Court of Kanawha County, WV
Judge Robert Montgomery
Circuit Court of Kanawha County, WV
Judge James C. Stucky

Richard R. Mullins, Respondent Below, Appellee

RESPONSE BRIEF OF APPELLEE, RICHARD R. MULLINS



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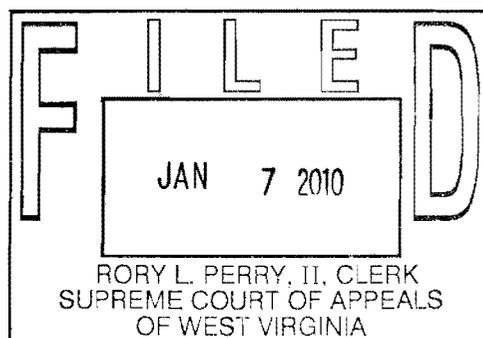


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I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This appeal is of the Order of the Family Court of Kanawha County, West Virginia, Judge Montgomery, which was entered September 12, 2008, addressing issues of child support arrears. This matter was litigated concerning issues, including issues of relocation of a parent and support, over several dates including but not limited to August 11, 2006, March 6, 2007, March 26, 2007, July 17, 2007, December 3, 2007, May 27, 2008 and September 12, 2008. The September 12, 2008 Order was appealed on October 10, 2008 to the Circuit Court of Kanawha County, West Virginia. Judge Stucky entered an Order December 10, 2008 denying the Petition for Appeal. Beverly Hemmings, Appellant, filed her Petition For Appeal on April 6, 2009.

II. APPELLEE'S STATEMENT OF FACTS OF THE CASE

The *pro se* Brief filed by the Petitioner does not follow the briefing requirements as set forth in the Rules of Appellate Procedure promulgated by this Court. By way of background the parties were married on September 9, 1995, in Kanawha County, West Virginia, and were divorced by Order of the Circuit Court of Kanawha County, West Virginia entered June 2, 1999. The parties had one child born of the marriage, namely Noah Mullins, who was born August 14th, 1997.

In their original Agreement the parties agreed that they would equally share the parenting of their son, Noah. The Final Order, entered by the Honorable Judge James C. Stucky, approved a Property Settlement Agreement

which was attached to that Order as Exhibit "A". That Property Settlement Agreement, which was executed on the 2nd day of June, 1999 agreed to the shared responsibility for the maintenance, guidance, and care of the child (paragraph 4, page 3 of the Separation Agreement), and agreed to a two week alternating schedule that would have each party having the child an equal number of days over a fourteen day period. They each agreed to pay for one-half of the day care costs and one-half of any extracurricular activities for the child.

In 2006 the father filed a Petition in anticipation of the mother's Notice of Relocation. The mother filed a Notice of Relocation and a request for payment of certain alleged arrearages, and the initial hearing was held on the 11th day of August, 2006, at which time the Family Court of Kanawha County, West Virginia, Judge Robert Montgomery, made a finding of fact that since the entry of the Divorce Order that both parties had had approximately one-half (1/2) of the parenting time since the Divorce Order was entered, but that it appeared that the testimony of the father was true, that he had had fifty-three percent (53%) of the overnight parenting time, and the Court allowed the child to remain with the father pending the full litigation of this matter, while the mother relocated to North Carolina to marry. After hearings, after the Court granted the father the parenting time during the school year, and the mother the parenting time during the non-school period, after the mother filed a Petition For Reconsideration of the Order denying her request to take the child to North Carolina with her for the majority of the time, the Court addressed child support issues.

The Appellant also requested certain other relief by verified Petition. Appellant requested one-half of the proceeds from the sale of the marital home and a calculation of arrearages of child support.

The Final Order and the Property Settlement Agreement contain a number of provisions with regard to payment of certain obligations. It required each party to pay one-half (1/2) of all of the costs of extracurricular activities for the child (see Property Settlement Agreement, page 7, paragraph H); it also required the parties to split on a fifty-fifty (50-50) basis any medical support obligations, (see paragraph I, page 7 of the Property Settlement Agreement); and also made certain provisions with regard to payment of the mortgage on the former marital home (see paragraph N, page 9 of the Agreement); and made other distribution of marital assets. Child support was set at Four Hundred Dollars (\$400.00) per month.

When the mother sought payment of arrears, both parties filed substantial and extensive Financial Disclosure. The Appellee filed copies of checks and accountings of monies that he believed that he had paid over and above his one-half (1/2) of those obligations against his Four Hundred Dollar (\$400.00) per month child support obligation..

Appellant has asserted that the Court did something wrong in dividing the parenting time. Rick Mullins contests that the mother has a hundred and fifty-eight (158) days of parenting time per year. However, when she chose to move to Raleigh, North Carolina, it became impossible for the parties to have equal parenting time, or one parent to have one hundred and eighty-two (182)

overnights, and the other parent to have one hundred and eighty-three (183) overnights. The Court made Findings of Facts and Conclusions of Law with regard to the relocation, which were not appealed by Ms. Hemmings.

Those Findings of Facts and Conclusions of Law were based in part on a Mediated Agreement that the parties had. The parties agree that one parent should have the child during the school year, subject to the other parent having the majority of the Summer and the long breaks from school, and the right to have a weekend on a regular weekend from school, but the parties could not agree which parent would have the child during the school year, and which parent would have the non-school year type timer with the child. When the Court concluded that the father was the most appropriated parent to have the time in Kanawha County, West Virginia for a variety of factors, the parties agreement, reached in mediation, as to how they would divide up those times, was essentially followed by the Court.

The Court had facts upon which to conclude that Rick Mullins was entitled to set-offs against the unpaid child support. Among those set-offs were the following chart attached hereto as Exhibit "A", and which was attached to a pleading filed with a Certificate of Service dated March 1, 2009.

The Court's Order of September 12th, 2008 makes a finding in paragraph F that the parties stipulated that the monies paid by the father to Twila Blake, the day care provider, and the mother's payment to Twila Blake, should have been the same amount of money. The Court then made a finding that the mother's extra payments to Twila Blake were not for normal daycare, but were for extra

services, and that Twila Blake has made no claim for unpaid daycare expenses against the father, and that it would be a wash.

The father made no request, for unpaid daycare expenses. The Court did make a finding that the mother paid Three Thousand Three Hundred and Eighty Three Dollars and Fifty Nine Cents (\$3,383.59) for expenses for the child and that the father made payment for expenses for the child in the amount of Twenty One Thousand Six Hundred and Ninety Nine Dollars and Fifty-Five Cents (\$21,699.55), and gave the father credit for the one-half of payments that he made over and above the mother's half. The Court further gave the father credit for payments that he had made on a home mortgages that the parties were to make equally. That is contained in paragraph E, sub-paragraph (a), (b), and (c) and gave the father a credit against child support that he owed in the amount of Eight Thousand Seven Hundred and Fifty Eight Dollars and Seventy Four Cents (\$8,758.74) for the payments that the mother should have made on that mortgage. He received a credit against child support for the more than one-half payments that he made for the child's expenses in the amount of Nine Thousand One Hundred and Fifty Seven Dollars and Ninety Eight Cents (\$9,157.98). The father also received credit for actual child support payments for which he provided cancelled checks on paragraph H of the Order in the amount of Four Thousand Two Hundred and Seventy Two Dollars (\$4,272.00). The father therefore received a credit for having paid Twenty Two Thousand One Hundred and Eighty Eight Dollars and Seventy One Cents (\$22,188.71) towards his child support obligation, which equaled 55.47 months of child support, and made a

finding of the amount of the arrearage, which was Twelve thousand Two Hundred and Two Dollars (\$12,202.00) without calculating interest. The father has paid that amount to the mother. The Court found it would be inappropriate to award interest in the fashion that the father calculated interest, because the mother's calculation of interest did not take into consideration the payments that the father made over and above his one-half (1/2) child support payments. The Court disallowed only the payments the mother made to Twila Blake, based on the stipulation of the parties, and a finding that some of the payments requested were for extra work Twila performed.

Appellee filed a number of Disclosures with checks demonstrating payments he made. These Disclosures included, but were not limited to the following: "Petitioner's Additional Disclosure of Checks Written For The Benefit Of The Minor Child, Mortgage, and Other Obligation" with a Certificate of Service dated July 12, 2006; "Petitioner's Disclosure of Documents" with a Certificate of Service of May 19, 2006; and Response of Richard R. Mullins to The Order For Child Support Arrearage with supporting documents (see paragraph 11 of the Response) with a Certificate of Service dated March 1, 2007.

III. ISSUES

A. Whether or not the Court received sufficient disclosure of payments to support the Findings of Facts made in the Court's Order.

B. Whether the Court was correct in refusing to take into consideration daycare payments paid by either party to the babysitter, Twila, because there was no testimony that either party failed to pay Twila for each and every week that she provided daycare services for the parties child.

C. Whether the Court below was correct in giving the father a set-off against child support for payments that he made as required by the Property Settlement Agreement which were in the nature of support for the child for the child's extracurricular activities.

D. Whether the Court below was correct in beginning the calculation of interest on arrearage at the point where the payments made by the father for which he was granted a set-off against child support obligations met the next date that child support was due and owing.

IV. ARGUMENT

A. WHETHER OR NOT THE COURT RECEIVED SUFFICIENT DISCLOSURE OF PAYMENTS TO SUPPORT THE FINDINGS OF FACTS MADE IN THE COURT'S ORDER.

Courts will review decisions of the Family Court, and the Circuit Court reviewing decisions of the Family Court, under an abuse of discretion standard.

The challenges to Findings of Fact are reviewed under a clearly erroneous standard, and Conclusions of Law reviewed on a de novo standard. See Syllabus Point 4, *Burgess vs. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996). This Court decided in the Donahue case that payments which were required to be made under a Court Order for one-half of the mortgage payments on a former marital home continued to be due and owing from the date of the entry of the Divorce Order until the mortgage was extinguished. There was an argument that payments were no longer due and owing after the property was conveyed by the former husband to the former wife. The Supreme Court rejected that argument inasmuch as the Court Order and the Agreement of the parties had not changed, and required that payments be made up

until the point when the mortgage was extinguished. In the case at bar Judge Montgomery did not require the Appellant to pay one-half of the mortgage payment to the Appellee after she conveyed her interest in the former marital home to the Appellee. If the Court had followed the ruling of Donahoe v. Donahoe, 219 W.Va. 102, 632 S.E.2d 42 (W.Va. 2006) and continued to require her to make the payments until the mortgage was extinguished there would have even been a greater amount of set-off for the Appellee against the child support obligation he owed to the Appellant. The mother's calculations did not factor in the amount of money that the mother owed to the father for non-payment of the mortgage payments. It also gave her credit for payments to Twila Blake when in fact both parties must have paid Twila Blake all the money that was owed by them to Twila Blake because she has made no claims against either party for unpaid daycare expenses. Additionally, the evidence found by this Court on the Motion To Relocate made it clear that the father had the child more than half of the time, and therefore by definition may have incurred more daycare expenses than the mother did. The Court further made a finding that some of the payments made by the mother to Twila Blake were for non-daycare related chores, and therefore she was not entitled to a credit for those payments.

The rulings by the Family Court were based upon evidence introduced to the Court and on the record. This Court will not reverse a ruling by the Family Court because it might have made a different Finding of Fact under the same evidence introduced before the Court. Findings of Facts are only altered on appeal if they are clearly erroneous. Judge Montgomery had pages of calculations, cancelled checks,

and other documents upon which to support his Findings of Fact. Therefore the contention that the numbers found by Judge Montgomery in his Order of September the 12th, 2008 were made up is clearly inconsistent with the record before Judge Montgomery, and the record reviewed by Judge Stucky.

B. WHETHER THE COURT WAS CORRECT IN REFUSING TO TAKE INTO CONSIDERATION DAYCARE PAYMENTS PAID BY EITHER PARTY TO THE BABYSITTER, TWILA, BECAUSE THERE WAS NO TESTIMONY THAT EITHER PARTY FAILED TO PAY TWILA FOR EACH AND EVERY WEEK THAT SHE PROVIDED DAYCARE SERVICES FOR THE PARTIES CHILD.

Beverly Mullins, now Beverly Hemmings, has argued that the Family Court of Kanawha County, West Virginia erred in failing to reimburse her for day care expenses that she paid to Twila. Her position is inconsistent with the testimony on the record. Rick Mullins and Beverly Hemmings both testified about this issue at the hearing of March 6, 2007. The Court considered these issues again by telephone hearing December 3, 2007, a telephone hearing to consider tendered Orders. On the recording on the CD Rick Mullins testified at 10:58:30 that both parents paid Twila, that they alternated weeks having parenting time with their son Noah, and that he paid his weeks and she paid her weeks. In addition, Rick Mullins testified that the weekly payment to Twila was Two Hundred and Thirty Dollars (\$230.00) a week, and that any checks that Beverly wrote to Twila in excess of that amount was for additional work, such as cleaning her house, keeping Noah past the 5:00 o'clock pick-up time, or house/dog sitting. The Court on December 3, 2007 considered the

Twila payments again and at 10:44:44 specifically stated that those payments were for extra services for extra payments which the parties did not agree to split.

Beverly testified about that issue at 11:11:10. She testified that both she and Rick paid Twila cash, as well as by check, and that both of them paid Twila and that Rick paid just the same as she did. At 11:14 she testified that Twila took care of her dogs for free, but conceded that some of the checks that she submitted could have been for extra work. (See transcript, pg. 46, 47)

Appellant testified the weekly child care payments to Twila were Two Hundred Thirty Dollars (\$230.00) a week (See transcript, pg.30) that Beverly also paid Twila for house sitting/dog sitting. (See transcript pg. 31)

Since both parents paid Twila, and according to Beverly she acknowledged at the hearing that he paid the same as she did, since both parents were suppose to have the child the same amount of time; one week with the mother, one week with the father, both parties paid Twila the same amount of money, and further Beverly did not testify nor were there any arguments made on her behalf, that she paid Twila for any of Rick's weeks.

Therefore, the Court was correct in eliminating any consideration for the amount that she paid for the babysitter since the weeks that she paid Twila and the weeks that Rick paid Twila would cancel one another.

C. WHETHER THE COURT WAS CORRECT IN GIVING THE FATHER A SET-OFF AGAINST CHILD SUPPORT FOR PAYMENTS THAT HE MADE AS REQUIRED BY THE PROPERTY SETTLEMENT AGREEMENT WHICH WERE IN

THE NATURE OF SUPPORT FOR THE CHILD FOR THE CHILD'S
EXTRACURRICULAR ACTIVITIES.

This Court has granted in prior occasions a set off against a child support obligation by the amounts that have been paid by one party that are in the nature of support. See for example *Sly v. Sly*, 187 W.Va. 172, 416 S.E.2d 486 (1992), where the father was given a credit against his child support obligation for the house payments he was making, and the Court held in Syllabus Point 1 that the provision of a Divorce Decree requiring the father to make one half of the house payments until the child reached age eighteen would be deemed a child support provision rather than an alimony provision, and in Syllabus Point 2 the father was entitled to a credit against his child support obligation for the house payments he was making for the benefit of his daughter. Here the Court gave Rick Mullins, the Appellee, a credit against his child support obligations for the payments that he made required under the Property Settlement Agreement which were for the benefit of the child, such as payments on extracurricular activities, school expenses, medical payments, etc. Since both parties were living in the marital home, first the Appellant, and then when she moved out the Appellee, and since it is uncontroverted that the child was living one-half time in the marital home, the payments required under the Property Settlement Agreement which required both parties to make one-half of the house payment inured to the benefit of the child because they preserved the former marital home in which the child lived, according to the Property Settlement Agreement, one-half of the time, first with

the mother and then with the father. The Court therefore did not abuse its discretion under Sly v. Sly by granting the father a set-off when he made the entirety of those house payments.

D. WHETHER THE COURT BELOW WAS CORRECT IN BEGINNING THE CALCULATION OF INTEREST ON ARREARAGE AT THE POINT WHERE THE PAYMENTS MADE BY THE FATHER FOR WHICH HE WAS GRANTED A SET-OFF AGAINST CHILD SUPPORT OBLIGATIONS MET THE NEXT DATE THAT CHILD SUPPORT WAS DUE AND OWING.

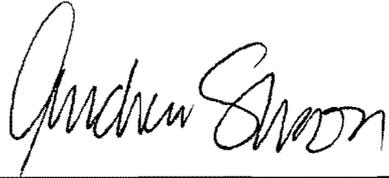
Judge Montgomery then calculated the amount of the Appellee credit against his child support. The Court took the dollar amount Appellant paid for child support plus payments that echoed in the nature of child support and divided the amount he paid in half over and above the amount the Appellant paid. The Court then divided that amount by the child support obligation (Four Hundred dollars (\$400.00)) per month and gave him credit for that many months of child support paid, and ordered interest would begin to run from that date. Such a method was not arbitrary but based on actual dollars paid. Appellant has not supplied any calculations to determine if the Appellant is receiving less money by that method than she would have received for the child now residing primarily with the Appellee. Appellant has paid the principal amount the Court found due. Appellant has not paid any of her child support obligation (only Eighteen Dollars (\$18.00)) per month, or any share of ongoing medical bills for the parties child. Appellee asserts he is entitled to a set-off against any interest payments owed to Appellant for those amounts which she has not paid..

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE the Appellee requests this Court to affirm the decision of the Family Court of Kanawha County, West Virginia, as reviewed by the Circuit Court of Kanawha County, West Virginia, and award him his attorney fees and costs in defending this action.

RICHARD R. MULLINS
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CERTIFICATE OF SERVICE

I, Andrew S. Nason, counsel for the Appellee, do hereby certify that I mailed a true and exact copy of the foregoing Response Brief of Appellee, Richard R. Mullins, to the Appellant, Beverly J. Hemmings, by First Class United States Mail, postage prepaid, addressed to 3830 Casey Leigh Lane, Raleigh, North Carolina 27612, which address is her last known address, on this the 11 day of January, 2010.



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EXHIBITS

ON

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CLERK'S OFFICE