

13-0892

IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

In re: The Marriage of:

TODD PETHEL,
Appellee/Petitioner,

v.

Civil Action No. 05-D-110
JUDGE DAVID W. NIBERT

CAROL KINSINGER,
Appellant/Respondent.

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ORDER DENYING PETITION FOR APPEAL

This matter is before the Court upon Appellant/Respondent Carol Kinsinger's Petition for Appeal filed July 8, 2013, by counsel, Sherrone Hornbuckle. Appellee/Petitioner Todd Pethel filed no response. The Court has reviewed the Petition for Appeal, the entire record of this case and consulted pertinent legal authority. After due consideration, the Court does find and conclude that the Petition for Appeal should be, and hereby is, DENIED for the reasons discussed below.

STANDARD OF REVIEW

According to 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." Pursuant to West Virginia Code § 51-2A-14(a), this

Court may refuse, affirm in whole or in part, reverse in whole or in part, or remand the case to the family court judge.

Upon review of a decision made by the Family Court, this Court may not simply substitute its own findings and conclusions for those of the Family Court Judge. Instead this Court has a duty to review the findings of fact and conclusions of law made by the Family Court Judge, along with the record of the case, and determine whether or not there was clear error or abuse of discretion in the entry of the final order.

DISCUSSION

The Petition for Appeal in this matter arises from a settlement agreement adopted by the family court in the underlying divorce action. In the January 27, 2006, Final Order of Divorce, the family court adopted the parties' settlement agreement in which the parties stipulated that the Appellant/Respondent would be entitled to a certain percentage of the marital portion of the Appellee/Petitioner's Thrift Savings Plan ("TSP") account, but the terms of the agreement made receipt conditional. Specifically, the settlement agreement stipulated that "[i]f [the Appellant/Respondent] chooses to receive this money, then she shall be responsible for preparing the Qualified Order to receive the same." According to the record, the Appellee/Petitioner withdrew the full amount in his Thrift Savings Plan account nearly three years after the Final Order of Divorce on January 14,

2009. The Appellant/Respondent caused a Qualified Domestic Relations Order (“QDRO”) to be entered on January 3, 2012.

On November 5, 2012, the Appellant/Respondent filed a Petition for Contempt on the basis that she had not received her percentage of the TSP account. The Family Court dismissed the petition in a final order entered June 7, 2013, on the grounds that the Appellant/Respondent had an affirmative duty to cause a QDRO to be entered if she wished to receive said money from the TSP account, and she failed to do so in a timely manner, resulting in a forfeiture of said money. The Family Court further found that the Appellee/Petitioner “could not be expected to wait an eternity to see if the Respondent was choosing to receive the money,” and found the Appellee/Petitioner was not required to pay additional sums to the Appellant/Respondent. The Appellant/Respondent appeals the Final Order on Respondent’s Petition for Contempt.

The Appellant/Respondent asserts the family court abused its discretion when (1) it subjected terms of a stipulation of settlement to a statute of limitations, (2) it found the Appellant/Respondent’s delay in filing a QDRO was evidence of an intent to waive her rights, and (3) it did not use language giving fair meaning to the understanding of the parties.

As to grounds one and two in the petition for appeal, this Court finds the family court’s finding that the Appellant/Respondent forfeited her share of the TSP

account by failing to cause a QDRO to be timely entered was not an abuse of discretion. The Appellant/Respondent argues that the family court applied a statute of limitations contrary to West Virginia law, and that the family court erroneously found the Appellant/Respondent's delay resulted in a waiver of stipulated rights. This Court interprets the family court's findings as an application of the laches doctrine by which "a delay in the assertion of a known right works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right." *Grose v. Grose*, 222 W. Va. 722, 728 (2008) (internal citations omitted). Accordingly, "[l]aches is an equitable remedy which places the burden on the person asserting it to prove both lack of diligence by the party causing the delay and prejudice to the party asserting it." *Id.* Both of these factors were demonstrated in the present case.

In *Grose*, the West Virginia Supreme Court of Appeals found no error in the application of the laches doctrine in divorce proceedings regarding retirement benefits and date of entry of a QDRO under the facts presented therein. *Id.* In *Grose* the final order on equitable distribution placed no duty of notification on the husband recipient of retirement benefits and the wife made no claim that she was misled or unable to make an earlier inquiry as to the husband's receipt of the benefits. *Id.* In the present case, the settlement agreement placed no duty to notify on the Appellee/Petitioner, but rather placed an affirmative duty on the

Appellant/Respondent to cause a QDRO to be entered if she wished to receive a share of the marital portion of the TSP account. The Appellant/Respondent failed to timely satisfy the condition of the settlement agreement and has made no allegation that she was misled or unable to fulfill her duty. As a result thereof, this Court finds no abuse of discretion in the family court's findings that: (1) the Appellant/Respondent does not have an absolute right to a share of the TSP account, (2) the Appellant/Respondent failed to timely satisfy the condition of the agreement, and (3) the Appellee/Petitioner is not required to pay further sums to the Appellant/Respondent.

As to ground three in the petition for appeal, this Court finds the family court's finding that the settlement agreement imposed an affirmative duty on the Appellant/Respondent was not an abuse of discretion. The Appellant/Respondent argues that the family court did not use language giving fair meaning to the understanding of the parties. This Court disagrees. The settlement agreement was clear and unambiguous, and the family court applied the plain meaning of the agreement, which made the Appellant/Respondent's receipt of her portion of the marital share of the TSP account conditional on her affirmative duty to cause a QDRO to be entered.

Based on the foregoing findings, the family court's Final Order on the Respondent's Petition for Contempt is AFFIRMED and the Petition for Appeal is DENIED.

Order

Appellant/Respondent's Petition for Appeal of the Family Court Order is DENIED, and the family court Final Order on Respondent's Petition for Contempt is AFFIRMED.

This is a final order disposing of the appeal. The appeal is hereby stricken from the active docket of this court. No motions for reconsideration or renewals of a petition for appeal on this specific matter are permitted in this court. However, this decision may be appealed to the West Virginia Supreme Court of Appeals by filing a petition within four months and otherwise complying with the West Virginia Rules of Appellate Procedure and West Virginia Code § 58-5-1, *et seq.*

The Clerk of this Court shall send an attested copy of this Order to Family Court Judge Constance Thomas, all counsel of record, and the parties.

ENTERED this Order the 29 day of July, 2013.



DAVID W. NIBERT
Judge, Fifth Judicial Circuit

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