

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

**Docket No. 13-0892**

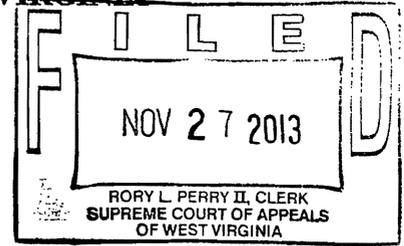
**IN RE: THE MARRIAGE OF:**

**CAROL KINSINGER,  
RESPONDENT BELOW/PETITIONER**

**vs.**

**TODD PETHEL  
PETITIONER BELOW/RESPONDENT.**

**HONORABLE DAVID W. NIBERT, JUDGE  
CIRCUIT COURT OF MASON COUNTY  
CIVIL ACTION No.: 05-D-110**



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**PETITIONER'S BRIEF**

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## **AUTHORITIES**

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## **ASSIGNMENTS OF ERROR**

- I. THE COURT BELOW COMMITTED CLEAR LEGAL ERROR AND AN ABUSE OF DISCRETION IN FINDING PETITIONER WAIVED HER INTEREST IN RESPONDENT'S RETIREMENT BENEFITS**
- II. RES JUDICATA AND COLLATERAL ESTOPPEL PRECLUDE A FINDING THAT THE PETITIONER WAIVED HER INTEREST IN THE RESPONDENT'S RETIREMENT**
- III. THE COURT COMMITTED CLEAR LEGAL ERROR AND AN ABUSE OF DISCRETION IN ITS FAILURE TO FIND THE RESPONDENT IN CONTEMPT WHERE THERE IS NO STATUTE OF LIMITATIONS AND GOVERNING ENTRY OF A QDRO**

## STATEMENT OF THE CASE

### I. PROCEDURAL HISTORY

This is the appeal of an order entered on the 30<sup>th</sup> day of July, 2013 issued by the Honorable Judge David W. Nibert of the Circuit Court of Mason County, West Virginia denying Petitioner's Petition for Appeal of a final order on contempt in this matter dated 7<sup>th</sup> day of June, 2013 issued by the Honorable Constance Thomas of the Family Court of Mason County, West Virginia that failed to find Respondent in contempt of an earlier Qualified Domestic Relations Order (QDRO), more specifically a Retirement Benefits Order entered on the 4<sup>th</sup> day of January, 2013.

### II. STATEMENT OF THE FACTS

The parties to this action were divorced by a Final Order entered on the 27<sup>th</sup> day of January 2006. A Settlement Agreement (hereinafter, "Agreement") prepared by Respondent's Attorney was incorporated by reference (Final Order, paragraph 32) into the Order. The Agreement specified in paragraph 5 "wife [Petitioner, here] is entitled to ½ the marital portion of the Thrift Savings Plan (TSP) - that is the portion that was contributed between October 6, 2001 and April 26, 2005. If she chooses to receive this money, then she shall be responsible for preparing the Qualified Order to receive the same."

Therefore, Petitioner prepared and filed a QDRO and on January 4, 2012 the same in the form of a Retirement Benefits Order was entered by Judge Constance J. Thomas, the Family Court of Mason County, West Virginia in this matter ordering that Petitioner be paid fifty percent (50%) of the portion of Respondent's Thrift Savings Plan (TSP) that was contributed while the parties were married and living together, specifically, from October 6, 2001 until April 26, 2005.

Respondent, unbeknownst to Petitioner, had already separated from the TSP and withdrew all amounts that accrued to him during and after the parties' marriage on January 14, 2009 which was Fifteen Thousand Two Hundred and Ninety-Seven and 19/100 Dollars (\$15,297.19), but, thereafter, opened a new TSP in December 2011 from which a payment of Seven Hundred and Eighty and 58/100 Dollars (\$780.58) was made to Petitioner on May 8, 2012 pursuant to the Retirement Benefits Order. The Legal Processing Unit of Respondent's TSP determined that the full amount to which Petitioner is entitled is Four Thousand and Eighty and 51/100 Dollars (\$4,081.51). Upon realizing that the remaining sum of Three Thousand Three Hundred and 93/100 (\$3,300.93) was not available because of Respondent's withdrawal of all of the TSP funds when he separated from the TSP in 2009, Petitioner filed a Petition for Contempt of the Retirement Benefits Order on November 5, 2012 in order to compel Respondent to pay the remaining sum to which she was entitled pursuant to the Agreement and the Order. However, the same Family Court Judge, Constance J. Thomas, who entered the Retirement Benefits Order refused to find Respondent in Contempt. Respondent filed no appeal of the QDRO nor did Respondent file an answer to the Petitioner's Petition for Contempt. Instead, the Family Court Judge merely decreed in her June 7, 2013 Order that the Petitioner had not timely filed her QDRO even though she had entered the QDRO several months prior to the contempt proceedings.

Thereafter, Petitioner appealed the Family Court Judge's order refusing to find Respondent in contempt of the Retirement Benefits Order to the Circuit Court of Mason County, West Virginia. The Circuit Court Judge denied the Petition for Appeal finding that the language of the Agreement was clear and unambiguous in spite of the difficulties that the Family Court Judge had in construing the language as evidenced by his initial determination to enter a QDRO and

subsequent decision to not enforce it all seemingly based on confusion surrounding the meaning of paragraph 5 of the Agreement (that was, again, prepared by Respondent's counsel during the divorce proceedings). The Circuit Court Judge, further, raised the doctrine of laches (for the first time) as cause to deny Petitioner's Petition for Appeal of the Family Court Judge's Order.

Ultimately, the Circuit Court Judge found no clearly erroneous findings of fact or abuse of discretion on the part of the Family Law Judge. This was done in spite of the Family Law Judge's refusal to find the Respondent in contempt of an active Order while making no finding as to the Respondent's compliance with the Order, but instead making findings not introduced prior to the entry of the QDRO about the Petitioner's timeliness in filing a QDRO. Therefore, Petitioner had filed this Appeal in the matter seeking reversal of the Orders below and enforcement of the QDRO.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

This Court has announced that in a review of a circuit court judge's refusal to review a final order of a family court judge, the Court will review the family court judge's finding of facts under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. This Court reviews questions of law *de nova*. See *Carr v. Hancock*, 216 W.Va.474, 607 S.E.2d 803 (2004); *Whittaker v. Whittaker*, 228 W.Va. 84,717 S.E.2d 868 (2011).

### **II. ASSIGNMENTS OF ERROR**

#### **A. THE COURT BELOW COMMITTED CLEAR LEGAL ERROR AND AN ABUSE OF DISCRETION IN FINDING PETITIONER WAIVED HER INTEREST IN RESPONDENT'S RETIREMENT BENEFITS**

**1. THE CIRCUIT COURT BELOW ERRED IN ITS CONCLUSION THAT THE SETTLEMENT AGREEMENT WAS UNAMBIGUOUS.**

“A contract is ambiguous if it is ‘reasonably susceptible to more than one meaning in light of the surrounding circumstances after applying the established rules of construction’.” *Jessee v. Aycoth*, 202 W.Va.215, 218, 503 S.E.2d 528, 531 (1998) citing *Williams v. Precision Oil, Inc.*, 194 W.Va. 52, 65, 459 S.E.2d 329, 342 (1995); see also *Benson v. AJR, Inc.*, 226 W.Va. 165, 698 S.E.2d 638 (2010) (includes discussion of existence of ambiguity where the “phraseology” renders the language of a contract susceptible to “reasonable differences of opinion”. *Id.* at 175, 648.).

In this matter, the Final Order and incorporated Agreement entered on the 27<sup>th</sup> day of January, 2006 was intended to make a complete and final distribution of the marital property. Paragraph 5 (five) of the Agreement, drafted by Respondent’s counsel and executed by the parties in this matter on December 23, 2006 states, in relevant part:

“5. HOUSEHOLD GOODS AND PERSONAL PROPERTY:

a. Wife shall receive:

- i. The items in her possession
- ii. Any banking/investment and retirement accounts solely in her name

b. Husband shall receive:

- i. The items in his possession
- ii. Any banking/investment and retirement accounts solely in his name

*- except that wife is entitled to ½ the marital portion of the TSP - that is the portion that was contribute between October 6, 2001 and April 26, 2005. If she chooses to receive this money, then she shall*

*be responsible for preparing the Qualified Order to receive the same.” Id. (emphasis added).*

It was the position of the Mason County Courts below that the above italicized portion of the Agreement did not, in fact, entitle Petitioner to one-half of the marital portion of Respondent’s TSP. Instead, the position of the Courts was that the last sentence set an actual contingency on Petitioner’s right to the money and, further, that there was an implied time limit within which Petitioner was required to take such action and that she failed to so do. Clearly, that precedent does not serve the interest of judicial economy; neither does it serve to define the expectations of the parties.

It is, on the other hand, the position of the Petitioner that the paragraph, like other paragraphs in the Agreement, identifies marital property, specifies its distribution, and recites the means by which that distribution will be effected. Otherwise, any divorce order that requires that a party file a QDRO to receive entitlements itemized therein would necessarily contain a stipulation that reopens the entitlement itself for further litigation. The Agreement, therefore, contains an ambiguity reasonably susceptible of two meanings.

**2. THE FAMILY AND CIRCUIT COURT BELOW ERRED BY FAILING TO CONSTRUE AN AMBIGUITY IN THE SETTLEMENT AGREEMENT AGAINST ITS DRAFTER**

This Court has announced and reiterated on numerous occasions that where there is an ambiguity in a document, a West Virginia Court is to construe that ambiguity against the drafter. See *Shafer v. Kings Tire Service, Inc.*, 215 W. Va. 169, 176 n. 8, 507 S.E.2d 302, 309 (1999); *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 671, 535 S.E.2d 727, 736 (2000); *Estate of*

*Tawney v. Columbia Natural Resources, L.L.C.*, 219 W. Va. 266, 273, 633 S.E.2d 22, 29 (2006).

More specifically, in a recent memorandum decision the Court applied the rule in a context comparable to the one sub judice as follows:

“To the extent the ambiguity between the Settlement Agreement and the QDRO was created by the drafter of both of these documents, we must interpret the documents against the Appellee in this case. Indeed, this Court has routinely applied the rule that documents are construed against the drafter when both sides [sic] are represented by counsel”. *King v. King*, W. Va. Supreme Court, No. 35696, paragraph 22, (2011).

As in *King*, both parties in this matter were represented by counsel at the time of the execution of the Settlement Agreement and during the parties’ divorce proceedings. The Settlement Agreement was drafted by Respondent’s Counsel and, as discussed above, contained an ambiguity in paragraph 5. The Circuit Court Judge of Mason County erred in his failure to construe the ambiguity against Respondent, where Respondent’s counsel wrote the Agreement.

**3. THE CIRCUIT ERRED IN ITS DENIAL OF PETITIONER’S APPEAL OF THE FAMILY COURT MATTER BY ITS INTRODUCTION OF A DEFENSE THAT NO PARTY EVER PLEADED OR RAISED, NAMELY, LACHES**

While the doctrine of laches is recognized in West Virginia as an equitable remedy available to parties to divorce proceedings with regard to the time of filing a QDRO, at the time that the QDRO is entered, the applicability of laches is moot as to the Court entering the QDRO unless an affected party raises the defense of laches by appeal or other appropriate motion to set aside the QDRO. *See Grose v. Grose*, 222 W.Va. 722, 621 S.E.2d 727 (2008) (finding the doctrine of laches appropriate in a case regarding a QDRO at a time prior to the actual entry of the

QDRO) and *State Dept. Of Health v. Robert Morris N.*, 195 W.Va. 759, 466 S.E.2d 827 (1995) (holding that the doctrine of laches was not appropriate in a child support arrearage context where it was neither properly raised by a party through pleadings and where the family law master in that case failed to raise the issue in the recommended order). Specifically, this Court has said:

“As we recently stated in *Young v. Young*, 194 W.Va. 405, 460 S.E.2d 651 (1995), we will not allow a party to "have a second `bite of the apple[,]" both because of the need for judicial economy in family issues, as well as because of the fundamental unfairness. *Id.* at 410, 460 S.E.2d at 656. In *Young*, the party failed to participate at all, and in the instant case, the Appellee failed to raise the issue effectively. See *id.* The Appellee could have properly pleaded and offered proof of the affirmative defense of laches before the family law master and the family law master could have then properly considered the applicability of laches to this action. However, the Appellee, who was represented by a lawyer throughout these proceedings, dropped the ball on that defense, and we are not going to give him a "second `bite of the apple." *Id.* We conclude that the Appellee, having failed to properly plead or prove the defense of laches, is liable for reimbursement support for his child from the child's birth.” *State Dept. Of Health v. Robert Morris N.*, at 766, 834.

In the case *sub judice*, the Family Court Judge of Mason County, West Virginia entered the QDRO, here a Retirement Benefits Order on January 4, 2012. Thereafter, when the Order was not enforceable against Respondent’s TSP because Respondent had removed monies to which the Petitioner was entitled from the TSP, the same Family Court Judge of Mason County, West Virginia refused to find Respondent in contempt of the QDRO and, instead, decreed in its June 7, 2012 Final Order on Respondent’s (here, Petitioner) Petition for Contempt that the Petitioner “did

not timely file the QDRO”. *Id* at page 2, paragraph 1. The Family Court Judge did not, in that order, mention laches or further explain the findings of fact that led to her conclusion that the Petitioner had failed to timely file the QDRO. Neither had the Respondent, at any time, appealed the QDRO or filed any answer or motion raising the defense of laches or moving to set aside the QDRO. Instead, the doctrine of laches was raised for the first time in the Circuit Court of Mason County’s Order Denying Petition for Appeal entered on July 30, 2013 wherein the Circuit Judge discussed the appropriateness of laches in the context of divorce proceedings and the *Grose* case, but failed to account for the major distinction between the facts of *Grose* and those in the case *sub judice*, namely that, *inter alia*, in this matter a QDRO had been entered and the opposing party had never appealed or taken any steps to raise or prove laches.

Further, assuming, arguendo, that the Respondent had properly raised the defense of laches or that the Circuit Court had authority to raise the doctrine as an equitable remedy, the facts of this case do not satisfy the elements of the defense, “that the person asserting it prove [1] a lack of diligence by the party causing the delay and [2] prejudice to the party asserting it”. *Grose*, at 728. The Circuit Court’s Order denying Petitioner’s appeal concluded that both elements were satisfied without any discussion of how Petitioner’s delay in filing the QDRO prejudiced the Respondent, especially where there was a sum certain of his TSP to which she had been entitled since the entry of the parties’ final divorce order and incorporated settlement agreement. This Supreme Court has found that prejudice would take the form of some unexpected or new debt to a party. *See Hartley v. Ungavi*, 173 W.Va. 583, 318 S.E.2d 634 (1984).

**B. RES JUDICATA AND COLLATERAL ESTOPPEL PRECLUDE A FINDING THAT THE PETITIONER WAIVED HER INTEREST IN THE RESPONDENT’S RETIREMENT**

**1. THE FINAL DIVORCE ORDER AND INCORPORATED SETTLEMENT AGREEMENT IN THIS MATTER WERE CONCLUSIVE AS TO PETITIONER'S INTEREST IN ANY AND ALL RETIREMENT BENEFITS THAT ACCRUED TO THE RESPONDENT WHILE THE PARTIES WERE MARRIED AND LIVING TOGETHER**

The doctrine of res judicata bars the prosecution of a matter when three elements are satisfied

“First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.” *Blake v.*

*Charleston Area Medical Center*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

In addition, this Court more recently said in *Whittaker* while requiring that a Raleigh County Circuit Court enforce a settlement agreement that “the law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts...”. *Id.* at 88 citing Syl. Pt. 1, *Sanders v. Roselawn Memorial Gardens, Inc.* 152 W.Va. 91, 159 S.E.2d 784 (1968).

Courts in other jurisdictions have spoken to the finality and authority of the underlying Settlement Agreement even where a QDRO was filed and entered long after the divorce order was entered. The Texas Supreme Court, in a matter where a QDRO was filed

18 years after the divorce decree, stated the “QDRO serves its intended purpose of implementing the division of benefits and does not impermissibly ‘amend, modify, alter, or change the division of property made or approved in the decree of divorce’.” *Reiss v. Reiss*, 118 S.W.3d 439, 442 (TX 2003). Similarly in a New York case where a QDRO was entered 13 years after the divorce order, the Court viewed the QDRO as a “motion to enforce the terms of a stipulation of a settlement”. *Denaro v. Denaro*, 84 A.D. 3d 1148 (NY App. Div., 2<sup>nd</sup> 2011).

In the instant case, the elements of res judicata were satisfied as to Petitioner’s interest in the marital portion of Respondent’s TSP on the date that the Final Order in the divorce was entered. At that time there was 1) a final adjudication on the merits; 2) in proceedings between the same parties that were involved in the contempt proceedings here appealed; and 3) the cause or subject of the action - that is, Petitioner’s entitlement to the marital portion of Respondent’s TSP - were identical in both the divorce proceedings and the contempt proceedings. Therefore, the doctrine of res judicata barred the Mason Courts from issuing its order on the contempt proceedings that, in fact, impermissibly altered the distribution of a subject of the divorce order.

**2. THE QDRO ENTERED IN THIS MATTER ON JANUARY 4, 2012 WAS SUBJECT TO ATTACK BY APPEAL ONLY**

Collateral estoppel or issue preclusion is a long-standing tool of judicial integrity and efficiency that operates to “foreclose the relitigation of issues” which were litigated at an earlier time between the same parties and were, further, the subject of a final order. See *Lane v. Williams*, 150 W.Va. 96, 100, 144 S.E.2d 234, 236 (1965). In addition, where there is an

underlying order on which contempt is based and it is merely erroneous, irregular, or improvidently awarded, it generally can be attacked only by appeal. Annot. 12 A.L.R. 2d 1059, 1067 (1950); 17 Am. Jur. 2d Contempt § 42; 17 C.J.S. Contempt § 64.

In the Petitioner's case, instead of placing a collateral bar on the issue of her entitlement to retirement benefits, which had been previously addressed in the final divorce order and the QDRO, the Family Court of Mason County, of its own motion, introduced new findings of fact at the hearing pertaining to Respondent's contempt on the QDRO. It was clear legal error for the Court to so do as these issues were estopped long before that hearing from being relitigated by the parties, let alone the Court itself.

**C. THE COURT COMMITTED CLEAR LEGAL ERROR AND AN ABUSE OF DISCRETION IN ITS FAILURE TO FIND THE RESPONDENT IN CONTEMPT.**

"It has been said that "[c]ontempt power is what distinguishes a court from an administrative tribunal. A court without contempt power is not a court." Lawrence N. Gray, Criminal and Civil Contempt: Some Sense of a Hodgepodge, 72 St. John's L. Rev. 337, 342 (Spring 1998).

In the *King v. King* memorandum decision discussed on page 8 of this brief, this court, faced with a conflict between a QDRO and settlement agreement, held that where "a court speaks only through its orders" the QDRO controlled as between the QDRO and the agreement in that matter. *Id.* paragraph 23 citing *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 671, 535 S.E.2d 727, 736 (2000).

In *Simmons v. Simmons*, it was clear legal error for the Randolph County Circuit Court Judge to refuse to consider whether the appellee in that matter was in contempt of an

alimony order when the appellee in that matter had accrued arrearages of Four Thousand Eight Hundred Dollars (\$ 4,800.00) . The lower court in the matter had refused to consider whether the appellee was in contempt and proceeded to conduct a lengthy hearing about the ownership of personal property and bank accounts. The Randolph County Judge in that matter advised the appellant’s counsel that the attorney would be responsible for finding another means of collecting the accrued alimony owed to his client. This Court in its per curiam opinion in that matter stated “[t]he trial court committed clear legal error in refusing to consider whether the appellee should be held in contempt.” 175 W.Va. 3, 330 S.E.2d 325, 327 (1985); *See also IN RE FRIEDA Q.*, W.Va Supreme Court of Appeals No. 11-1284 (2013).

This matter bears much in common with the *Simmons* and *King* cases where the Petitioner filed for contempt and instead received an order with findings of fact that were totally irrelevant to whether the Respondent was, in fact, in contempt; and, as in *King*, a QDRO was entered pursuant to the Agreement yet the Mason County Courts enforced the Agreement over the QDRO. The order, further, was clearly, as in *Simmons*, the result of an impermissible inquiry on the part of the Court into matters not touching the subject of whether Petitioner had received from the Respondent the full sum of the retirement benefits to which she was entitled.

### CONCLUSION

Based on the facts and law set forth herein, it is clear that the Petitioner has demonstrated that the Circuit Court of Mason County, West Virginia committed clear legal error in its denial of Petitioner’s appeal. Petitioner, therefore, prays that this court would

remand this case for further proceedings consistent with the law, as it stands, and require the enforcement of the QDRO entered in this matter.

Signed: Sherrone D. Hornbuckle

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 26<sup>th</sup> day of November, 2013, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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