

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

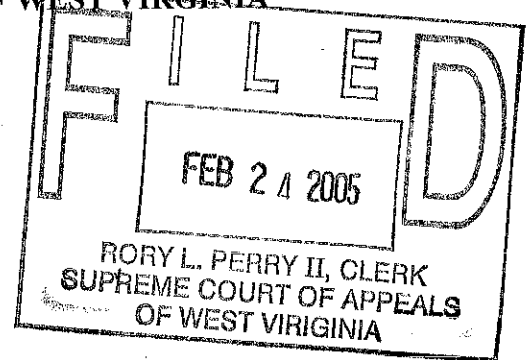
CHARLESTON

JAMIE C. METZ,
Appellant,

No. 32517

v.

DAVID M. METZ,
Appellee.



**OPENING BRIEF OF
JAMIE C. METZ, APPELLANT**

Upon Appeal from the Wood County Circuit Court
The Honorable George W. Hill, Presiding
Wood County Family Court # 99-D-625

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<i>Did the Wood County Circuit Court improperly reverse the ruling of the Wood County Family Court which Ordered DAVID METZ to make payments incident to spousal support to JAMIE METZ pursuant to Paragraph Twelve of the Agreement?</i>	
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<i>The Family Court properly enforced the agreement set forth in Paragraph Twelve by requiring DAVID METZ to pay to JAMIE METZ an amount equal to the January 2003 health insurance premium.</i>	
<i>The general waiver of spousal support and alimony contained in Paragraph Ten of the Separation Agreement explicitly excluded from its terms the ex-husband's alimony obligation outlined in Paragraph Twelve. DAVID METZ was therefore required to make payments for his ex-wife's health care, unless she died or remarried or he died. The Wood County Circuit Court therefore erred in holding that the Family Court lacked jurisdiction to modify this agreement.</i>	
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OPENING BRIEF OF THE APPELLANT
JAMIE C. METZ

Now comes the Appellant, JAMIE C. METZ (hereafter "Appellant"), by and through her counsel, MICHELE RUSEN and pursuant to Rule 10 of the Rules of Appellate Procedure for West Virginia and the Order of this Honorable Court, hereby files the within "*Opening Brief*" seeking a reversal of the ruling rendered in the Wood County Circuit Court, the Honorable George W. Hill presiding. The Circuit Court's ruling reversed the decision of the Wood County Family Court, the Honorable C. Darren Tallman presiding, which enforced DAVID METZ's (hereafter "Appellee") obligation to pay to his ex-wife a sum equal to the health insurance premiums Mr. Metz had paid for the first thirty-six months following the finalization of the parties' divorce. This obligation was the result of the agreement of the parties entered into at the time of their divorce.

Specifically, Ms. Metz. appeals the Circuit Court's ruling that the Family Court lacked jurisdiction to modify the *Final Order of Divorce* granted in this matter. As the result of this ruling, DAVID METZ was relieved from honoring the terms of the original agreement and from complying with the *Final Order of Divorce*.

In the Wood County Family Court, Ms. Metz complained of her ex-husband's failure to pay to her an amount equal to the health insurance premium (as of January 31, 2003) after Ms. Metz's COBRA coverage had expired. David Metz agreed to make this payment "incident to alimony" in exchange for his wife's permanent waiver of any other spousal support.

The Wood County Family Court, the Honorable C. Darren Tallman presiding, agreed with JAMIE METZ and directed and Ordered ex-husband, DAV IDMETZ to make the required payments to the Appellant. Upon appeal to the Wood County Circuit Court, however, the Circuit Court erroneously held that the Family Court lacked jurisdiction to grant the relief sought, and reversed the ruling of the Family Court enforcing the parties' initial agreement. It is from the ruling of the Wood County Circuit Court that JAMIE METZ now appeals.

I. Nature of the Proceedings Below

The action below was instituted on December 16, 2003 by the Appellant, JAMIE METZ in the Wood County Family Court upon the filing of a "*Motion for Modification of Child Support and Spousal Support*". In her motion, JAMIE METZ sought additional child support based upon alleged changes in the parties' financial circumstances following their divorce. Additionally, Ms. Metz sought to enforce Mr. Metz's obligation to make alimony payments to her for her health care in lieu of health insurance premiums previously paid by him.

A hearing before Family Judge Tallman was held on this motion on January 26, 2004. At that time, the Appellant's "*Motion for Modification*" was granted in part by the Family Court, and an "*Order of Modification*" was entered on February 24, 2004. Although the modification of child support JAMIE METZ sought was denied, DAVID METZ was Ordered to pay to his former wife \$296.98 per month, incident to spousal support, an amount equal to the cost of health insurance premiums DAVID METZ had paid as of January 2003 on behalf of his ex-wife.

DAVID METZ then appealed this ruling to the Wood County Circuit Court, the Honorable George W. Hill presiding. Upon consideration of the appeal, the Circuit Court reversed the ruling of the Wood County Family Court, holding that the Family Court did not have jurisdiction to modify the final Order with respect to spousal support. JAMIE METZ now seeks a reversal of Judge Hill's ruling.

II. Statement of the Facts

The parties, JAMIE METZ and DAVID METZ were divorced by *Order* entered February 16, 2000. (*Judgment Order of 2/16/00.*) As recited in the final *Order* granting this divorce, the case was resolved by agreement of the parties, which was reduced to

writing, and presented to the Court (*Id.*) The terms of this written agreement were incorporated into the final *Order*. Specifically at issue in this matter are two paragraphs of this written agreement, Paragraph Ten and Paragraph Twelve, which dealt with the issue of spousal support. These two paragraphs were considered by the Wood County Family Court and then by the Circuit Court. Paragraph Ten states in its entirety:

From and after the mutual execution of this Agreement, incident to alimony, the Husband shall pay nothing to the Wife. By the mutual execution of this Agreement, the Wife knowingly, intelligently, and voluntarily waives any claim which she might have against the Husband for an award of alimony, *except as set forth in Paragraph No. 12*, below. By the mutual execution of this Agreement, each of the parties stipulates and agrees that no Court shall hereafter have jurisdiction to modify this permanent and irrevocable waiver of alimony. (*Judgment Order of 2/16/00, ¶10; p.8 .*)

The agreement also contained Paragraph Twelve concerning the payment of health insurance premiums for the ex-wife. This provision, specifically excluded from the general waiver of alimony contained within Paragraph 10 as set forth above provided as follows:

From and after the mutual execution of this Agreement, incident to alimony, the Husband shall maintain in full force and effect the policy of hospitalization, major medical, and dental insurance currently maintained through his employment, pursuant to the provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) covering the costs of hospitalization, health care, and dental care of the Wife, and shall take all necessary action, including payment of the monthly premium payments thereon, to secure the benefits of said policy for the benefit of the Wife; said alimony obligation to continue until the Wife remarries or dies, or until the Husband sooner dies.

From and after the mutual execution of this Agreement, for a term and period of thirty-six (36) months, *the obligation of the Husband pursuant to this paragraph shall be the entire amount of the monthly premium payment. From and after the 31st day of January, 2003, the obligation of the Husband pursuant to this paragraph shall not exceed the amount of the monthly premium payment for January 2003; the Wife shall thereafter pay the remainder of each monthly premium.*" (*Judgment Order of 2/16/00 at ¶12; p. 9.*)

Due to a change in her financial circumstances, in December, 2003, JAMIE METZ filed a "*Motion for Modification of Child Support and Spousal Support*" seeking

additional child support. (*Appellant's Motion for Modification.*) The Appellant also sought relief for her ex-husband's refusal to honor his obligation to make the payments set forth in Paragraph Twelve of the agreement as required by the *Final Divorce Order*. (*Id.*) DAVID METZ had stopped making these payments to Ms. Metz at the conclusion of the 36 months of COBRA coverage. The cessation of payments occurred after JAMIE METZ attempted to obtain health insurance from a private source, but rejected due to the pre-existing illness from which she suffered, namely Lupus. (*Appellant's Motion for Modification at ¶10, p.2.*) Due to this pre-existing medical condition, JAMIE METZ was able to obtain only Medicare coverage following the expiration of the 36 month period of COBRA coverage. (*Id. at ¶10-11.*) However, medicare did not cover any of the \$600 to \$750 in prescriptions that were needed every month to treat her illness. (*Id. at ¶11.*) As a result, JAMIE METZ found herself financial strapped.

Due to these circumstances, Ms. Metz requested that "the [Appellee] continue to pay to her the amount of what he paid for the COBRA payment in order for her to offset the medical expenses that she must pay out of pocket due to not being able to attain health insurance." (*Id. at ¶ 12.*) DAVID METZ countered and requested that this motion be denied, arguing that "the [Appellant] irrevocably waived any claim to alimony" in Paragraph Ten of their written agreement. (*Response to Petition for Modification.*)

A hearing on the Appellant's *Motion* was held before Wood County Family Court Judge C. Darren Tallman on January 26, 2004. At the conclusion of this hearing, Judge Tallman noted that JAMIE METZ had "present gross monthly income" of \$1,111.00 "from Social Security" for herself, and \$587.00 for her daughter "from Social Security due to her mother's illness." (*Order of Modification, ¶4, p. 2.*) On the other hand, DAVID METZ earned \$2864.84 per month at that time. (*Id. at ¶5.*) The court-below declined to modify child support, noting that "a recalculation of child support with current income, pursuant to the income shares formula, does not meet the fifteen (15%) percent increase necessary to warrant a change in current child support." (*Order of Modification at ¶6, p. 2.*) Accordingly Mr. Metz's child support obligation to Ms. Metz remained at \$387 per month.

Turning to the second aspect of the Appellant's motion, and the one pertinent to this appeal, the Family Court noted that under the terms of the *Final Divorce Order*, DAVID METZ "was required to maintain health insurance coverage for the Appellant under COBRA for a period of thirty-six (36) months" and that after "January 31, 2003, the [Appellee's] monthly obligation to the [Appellant] was not to exceed what he was paying under COBRA until the [Appellant] remarried, died, or until the [Appellee] died." (*Id. at ¶8, p. 2.*) However, due to her pre-existing condition, admittedly one known at the time of the divorce, JAMIE METZ "was turned down for health insurance by private insurers . . . and could receive only Medicare coverage." (*Id. at ¶¶9-11, p. 2.*) The Family Court further noted that JAMIE METZ's "pre-existing prescription needs exceeded \$600.00 per month which Medicare did not cover, and she had no other insurance carrier to meet this expense." (*Id. at ¶12, p. 2.*)

Ms. Metz's financial predicament was further compounded by her ex-husband's refusal to continue to pay to her the "the amount of the monthly premium payment for January, 2003" that he had previously paid for the COBRA coverage as set forth in the *Final Divorce Order*. His refusal stemmed from the "assertion that because the [Appellant was] not paying a premium to an insurer, [and was instead receiving only Medicare coverage, that] he [was] under no further obligation to make payments incident to spousal support." (*Order of Modification at ¶13, p. 3.*) JAMIE METZ countered, arguing that "the [Appellee] limited his exposure to increased medical costs for the [Appellant] by capping his spousal support obligation in the amount of the COBRA premium that he was paying in January, 2003." (*Id. at ¶14, p. 3.*) Appellant reasoned that DAVID METZ was therefore still under an obligation to make a spousal support payment to her equivalent to the January, 2003 COBRA premium.

DAVID METZ also contended that his ex-wife had waived the right to seek any modification of his spousal support obligation. This contention was rejected by the Wood County Family Court, which found that "although the parties waived general alimony pursuant to Paragraph 10 of the *Final Divorce Order*, they carved out an exception for alimony as was awarded under Paragraph 12 and described in Paragraph 10 herein." (*Id. at ¶15, p. 3.*) Based upon these findings, the Wood County Family Court concluded that "[DAVID METZ] owed to [JAMIE METZ] the amount of what he was

paying for COBRA coverage for the Appellant as of January, 2003, irregardless of whether she is paying an insurance premium or using the spousal support for an offset to her medical prescriptions.” (*Order of Modification, p. 3.*) Accordingly, pursuant to the parties’ agreement and the final *Order of Divorce*, DAVID METZ was Ordered to pay \$296.98 per month to JAMIE METZ beginning on February 1, 2004, and continuing until Ms. Metz died or remarried, or until the Mr. Metz died, in order to fulfill his obligation to pay for health insurance COBRA premiums. (*Order of Modification, p. 4.*)

DAVID METZ then appealed this ruling to the Wood County Circuit Court, the Honorable George W. Hill presiding. By Order dated April 9, 2004, the Circuit Court issued a one-page ruling, simply stating that “[t]he Family Court Judge being without jurisdiction to modify as agreed in the original agreement, this ruling is reversed.” Since the Family Court of Wood County simply enforced the agreement and did not modify its terms in any manner, the Circuit Court’s jurisdictional ruling was wrong as a matter of law. Further, whether or not the Family Court’s Order is interpreted as a modification versus enforcement, Judge Tallman correctly found that the original agreement of the parties pertaining to the payment of health insurance was excepted and excluded from the parties’ general waiver of alimony, and therefore the court maintained its jurisdiction to modify Paragraph Twelve of the Agreement. JAMIE METZ therefore seeks this Court’s reversal of the Circuit Court’s erroneous ruling, and reinstatement of the Family Court’s decision.

III. Issues Presented

Did the Wood County Circuit Court improperly reverse the ruling of the Wood County Family Court which Ordered DAVID METZ to make payments incident to spousal support to JAMIE METZ pursuant to Paragraph Twelve of the Agreement?

IV. Appellant’s Response

The Family Court properly enforced the agreement set forth in Paragraph Twelve by requiring DAVID METZ to pay to JAMIE METZ an amount equal to the January 2003 health insurance premium.

The general waiver of spousal support and alimony contained in Paragraph Ten of the Separation Agreement explicitly excluded from its terms the ex-husband's alimony obligation outlined in Paragraph Twelve. DAVID METZ was therefore required to make payments for his ex-wife's health care, unless she died or remarried or he died. The Wood County Circuit Court therefore erred in holding that the Family Court lacked jurisdiction to modify this agreement.

V. Argument

A. Property Settlement Agreements

The statutory scheme pertaining to property settlement agreements in divorce cases was re-codified in 2001, but the new statute was derived from the former West Virginia Code §48-2-16. A property settlement agreement is a "written agreement between a husband and a wife whereby they agree to live separate and apart from each other" which may also provide "for the payment or waiver of spousal support by either party" and settlement or "compromise [of] issues arising from the marital rights and obligations of the parties." *West Virginia Code §48-6-101(a)(4) and (5)*. In divorce cases, where a court finds "that the agreement is fair and reasonable, and not obtained by fraud, duress or other unconscionable conduct by one of the parties . . . and [that the agreement] would be enforceable by a court in future proceedings" then the court shall accept that agreement and "conform the relief which it is authorized to order" to this agreement. *West Virginia Code §48-6-102(a)*.

A property settlement agreement may govern all aspects of a spousal support or alimony award. For instance, the agreement "may determine whether spousal support shall be awarded, whether an award of spousal support . . . may be reduced or terminated . . . [and] whether a court shall have continuing jurisdiction over the amount of a spousal support award so as to increase or decrease the amount of spousal support to be paid" *Id.* Additionally, "any award of period payments of spousal support shall be deemed to be judicially decreed and subject to subsequent modification unless there is some explicit well expressed, clear, plain and unambiguous provision to the contrary set forth in the court-approved separation agreement or the order granting the divorce." *West Virginia Code §48-6-102(b)*.

Once a settlement agreement is approved, Family Court Judges and Circuit Court Judges retain jurisdiction to enforce this agreement. *Summers v. Summers, 413 S.E.2d*

692 (W.Va. 1991). “In order to avoid the trial court’s continuing jurisdiction, the agreement must expressly provide otherwise.” Blackhurst v. Blackhurst, 186 W.Va. 619, 621, 413 S.E.2d 676, ___ (1991).

When interpreting a property settlement agreement, it must be remembered that it “is in the nature of a contract.” Bittof v. Bittof, 182 W.Va. 594, 390 S.E.2d 793 (1989). While an agreement which expresses the intent of the parties in plain and unambiguous language is not subject to “judicial construction”, the contract or agreement must be construed and considered “as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt unless to do so will violate some principal of law inconsistent therewith.” Farley v. Farley, 215 W.Va. 465, 600 S.E.2d 177 (2004).

B. The Wood Family Court Properly Enforced the Agreement of Parties

In the instant case, the parties’ contract contains two provisions relevant to the controversy before this Court. In Paragraph Ten, JAMIE METZ agreed to waive any claim she might have against her ex-husband for an award of alimony *except as set forth in paragraph No. 12*. She further agreed that no court would have jurisdiction to modify this general waiver of alimony. However, in Paragraph Twelve, a provision expressly, explicitly, clearly and unambiguously excluded from Paragraph Ten’s general waiver of alimony, DAVID METZ agreed to a permanent award of alimony to his former wife. In Paragraph Twelve, DAVID METZ agreed that “incident to alimony”, he would pay for and provide health insurance coverage pursuant to COBRA, including payment of the monthly premium payments for a term of thirty-six (36) months. “After the 31st day of January, 2003, the obligation of the Husband pursuant to this paragraph” was not to exceed the amount of the monthly premium payment for January 2003 and JAMIE METZ was to pay the remainder of any monthly health insurance premium payment.

While the proceeding before the Family Court below was characterized as a “modification” action, what in fact occurred was the enforcement of the parties’ original agreement. What the Family Court actually ordered was not a modification of the original agreement; instead, the Family Court instituted an Order setting forth a method by which the “obligation” outlined in Paragraph Twelve would be satisfied. Thus, the

question of the jurisdiction of the Family Court is really irrelevant. In fact, the Order of the Family Court states as much:

The [Appellee] owes to the [Appellant] the amount of what he was paying for COBRA coverage for the [Appellant] as of January, 2003 irregardless of whether she is paying an insurance premium or using the spousal support for an offset to her medical prescriptions. *Order of February 24, 2004 at p. 3.*

C. *The Family Court Retained Jurisdiction Over Matters Pertaining to Paragraph Twelve*

Reading paragraphs ten and twelve together (as must be done), the parties unquestionably excepted from the general waiver of alimony given by the Wife in Paragraph Ten, DAVID METZ's obligation to make payments to Ms. Metz for health care as outlined in Paragraph Twelve. Thus, Mr. Metz's contention that the Family Court had no jurisdiction to modify Paragraph Twelve because of the provisions of Paragraph Ten is wholly without merit. Further, his assertion that Ms. Metz should receive nothing unless she is actually insured under a policy of health insurance is not supported by the clear language of this agreement. Nowhere in Paragraph Twelve does it explicitly state that Wife must be insured for the Husband's obligation to continue. Paragraph Twelve is silent as to what, if anything, relieves DAVID METZ from his "obligation" to make the requisite payment other than his ex-wife's death or remarriage or his own death. Further, this "obligation" is undeniably "incident to alimony".

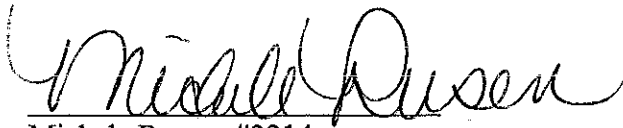
A "circuit court's final order and ultimate disposition [are reviewed] under an abuse of discretion standard." Challenges to findings of fact are reviewed under a clearly erroneous standard; conclusions of law are reviewed *de novo*. *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996). As the Appellant has demonstrated herein, the Circuit Court's conclusion that the Family Court lacked jurisdiction to enforce the provision in Paragraph Twelve was incorrect as a matter of law. The terms of the agreement were clear that DAVID METZ had a continuing obligation to pay a sum certain (the amount of the January, 2003 premium payment) "incident to alimony". The Family Court did nothing more than enforce that provision. Further, Paragraph Twelve was excluded from the terms of the general waiver of alimony set forth in Paragraph Ten.

That being the case, the Order of the Circuit Court of Wood County should be reversed, and the Order of the Family Court of Wood County should be reinstated.

VI. Conclusion and Prayer

For all of the reasons set forth herein, the Appellant, JAMIE METZ respectfully prays that this Court enter an Order which reverses the ruling of the Wood County Circuit Court, and reinstates the ruling of the Wood County Family Court thereby requiring DAVID METZ to make good on the promises he made as contained within the *Final Divorce Order*; and for such further and other relief as this Court may deem appropriate.

JAMIE METZ
By Counsel,

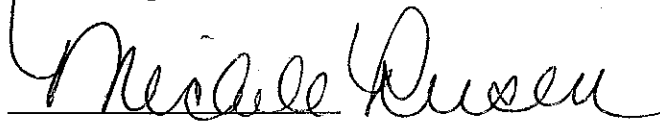


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CERTIFICATE OF SERVICE

This 23rd day of February, 2005, the undersigned certifies that the enclosed
"Opening Brief of the Appellant, Jamie C. Metz" in Metz v. Metz, 99-D-625 was
served upon the following persons, by mailing, first class postage prepaid, a true
and accurate copy thereof to:

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