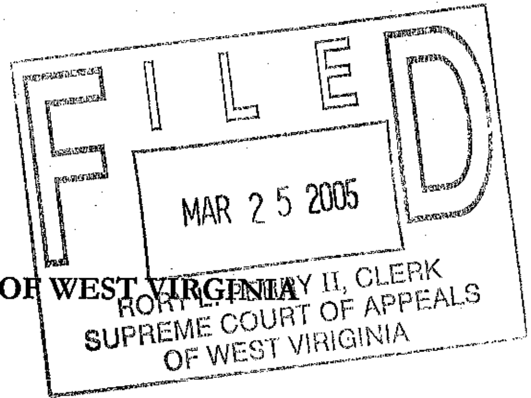

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMIE C. METZ,

Appellant,

V.

DAVID M. METZ,

Appellee

No. 32517

APPELLEE'S BRIEF

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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West Virginia Code Sec. 48-2-16(a),

West Virginia Code Sec. 48-2-16(a)

West Virginia Code Sec.48-2-15 (b)(4)

I.

THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

The parties were divorced by Order entered in the Circuit Court of Wood County, West Virginia, on February 16, 2000. On December 16, 2003, the Appellant filed a Motion for Modification of Child Support and Spousal Support wherein she sought a recalculation of child support and the entry of an Order requiring the appellee to pay her "... incident to spousal support, the amount of what he paid to secure COBRA directly to her rather than to a private insurance carrier to enable the Plaintiff to pay for medical expenses not covered by Medicare." On January 26, 2004, a hearing was held before C. Darren Tallman, Family Court Judge, and upon hearing the evidence presented and the arguments of Counsel, the Court denied Appellant's petition for modification of child support but ordered Mr. Metz to pay Mrs. Metz, incident to spousal support, a monthly amount equal to the COBRA insurance premium payment in December, 2003. The Appellee filed a timely Petition for Appeal in the Circuit Court of Wood County, West Virginia and by Order entered on April 9, 2004, the Honorable George W. Hill determined the Family Court Judge had no jurisdiction to modify Mr. Metz's spousal support obligation to the Appellant and reversed the ruling of the Family Court Judge. It is from this Order that this appeal is brought.

II.

STATEMENT OF FACTS

Incident to their divorce, the parties entered into a written settlement agreement prepared by counsel for the Appellant, wherein the parties determined their personal and property rights. By Order entered on February 16, 2000 the parties were divorced and the written agreement was received by the Court and paragraph nos. 3 through 24 were made an Order of the Court.

At the time of her execution of the agreement, the Appellant suffered from Lupus and had medical insurance coverage under the Appellee's's medical insurance policy. Mr. Metz agreed to assist Mrs. Metz in maintaining medical insurance coverage and, incident thereto, paragraph no. 12 of the separation agreement as adopted by the Court provides that:

> "12)From and after the mutual execution of the 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 cost of hospitalization, health care and dental care for the Wife, and shall take all necessary action, including payment of the monthly premium payments 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 payment."

Pursuant to the agreement of the parties, for the next 36 months Mr. Metz maintained medical insurance coverage for the appellant through his employer and paid the entire amount of the appellant's monthly insurance premium, which, in December 2003, was $296.00. In January 2003 at the conclusion of the coverage period required by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), the Mr. Metz's medical insurance carrier terminated coverage for the Appellant. Following the termination of her insurance coverage under Mr. Metz's policy, Mrs. Metz was unsuccessful in obtaining a replacement policy and accordingly Mr. Metz's ceased making a monetary contribution toward payment of an insurance policy premium.

Mrs. Metz filed her petition for modification in December 2003 and asked the Family Court to modify its prior order and to require the Appellee to pay her directly a sum equal to the COBRA insurance premium payment in December, 2003 rather than contribute toward payment of a medical insurance policy premium for her as previously agreed by the parties and ordered by the Court.

At the hearing of her motion, the Appellant testified that she had no private medical insurance but was covered only by Medicaid. Medicaid provides hospitalization and medical care for the appellant but no prescription benefits. Mrs. Metz further testified that while she had attempted unsuccessfully to contract for full medical insurance coverage, she had made no attempt to obtain a medical insurance policy providing only prescription coverage. In response, the Appellee argued that paragraph no. 10 of the agreement of the parties deprived the Court of jurisdiction to modify its award of alimony:

> "10. 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 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."

Upon hearing the evidence presented and the arguments of Counsel, the Family Court Judge rejected Appellee's position and concluded that:

> "The Defendant owes to the Plaintiff the amount of what he was paying for COBRA coverage for the Plaintiff 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."

Mr. Metz was then ordered to pay the Appellant the sum of $296.00 (the monthly amount of the medical insurance premium in January, 2003) per month as spousal support until such time as the Appellant remarries or dies, or until the Appellee dies.

III.

ARGUMENT

This Court held in its sole syllabus point in *Carr v Hancock*, W.Va. __, 607 S.E.2d 803, that:

> "In reviewing a final order entered by a circuit court judge upon review of, or upon a refusal to review, a final order of a family court judge, the Supreme Court of Appeals reviews the findings of fact made by a family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard, and reviews questions of law *de novo*. W.Va. Code, 51-2A-15(b)"

The Family Court Judge was clearly erroneous and abused his discretion when he modified the provisions of the property settlement agreement and ordered the Appellee to pay the Appellant alimony in the amount of $296.98 per month.

Paragraph number 12 of the agreement of the parties requires Mr. Metz to maintain medical insurance on Mrs. Metz through his place of employment and to pay the full premium for that insurance for a period of 36 months. Beginning in the 37th month, "... 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 payment." Paragraph number 10 of their agreement provides that aside from this obligation to contribute toward payment of the Appellant's medical insurance premium "... the Wife knowingly, intelligently and voluntarily waives any claim which she might have against the Husband for alimony..." and further provides that, "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." Contrary to the

agreement of the parties as adopted by the Court, on February 24, 2004, the Family Court Judge modified the original order to provide that, "The Defendant owes to the Plaintiff the amount of what he was paying for COBRA coverage for the Plaintiff 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."

West Virginia Code Sec. 48-2-16(a), now 48-6-201(a), provides in pertinent part, that a separation agreement may, "… contractually fix … whether a Court shall have continuing jurisdiction…" over issues regarding alimony and spousal support. The parties agreed and the final order provided that: "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." West Virginia Code Sec. 48-2-16(a), now 48-6-201(b) further provides that an award of alimony set forth in a property settlement agreement is subject to 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.*" How much more explicit, well-expressed, clear, plain and unambiguous can you be than, "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 alimony except as set forth in Paragraph No. 12."

Nor do the provisions of West Virginia Code Sec.48-2-15 (b)(4), now 48-5-606, provide a basis for the Family Court Judge's decision: " …That the designation of insurance coverage as alimony under the provisions of this subdivision shall not, in and of itself, give rise to a subsequent modification of the order to provide for alimony other than insurance for covering the costs of health care and hospitalization."

When read in its entirety, the separation agreement of the parties is clear and unambiguous and this Court has consistently held that the language of a contract must be accorded its plain meaning and, where plain, the language must be given full effect. Stone v National Surety Corporation, 147 W.Va. 83, 125 S.E.2d618 (1960); Christopher v United States Life Insurance Company, 145 W.Va. 707, 116 S.E.2d 864 (1960); Mitchell v Metropolitan Life Insurance Company, 124 W.Va. 20, 18 S.E.2d 803 (1942).

Clearly, upon expiration of the original 36-month period, Mr. Metz's only obligation to provide support to Mrs. Metz is to contribute an amount not less than "the amount of the monthly premium payment for January, 2003," toward payment of a health insurance premium for a policy covering Mrs. Metz until such time as she remarries or dies, or until the Appellee sooner dies. This is an obligation he still stands ready to honor. It requires a perversion of logic to find in the words of the separation agreement an obligation on the part of Mr. Metz to make a direct payment to Mrs. Metz when the she is not maintaining a medical insurance policy for which she makes a premium payment. In Jessee v Aycoth, 202 W.Va. 215, 503 S.E. 2d 528 (1998), this Court held that, "… the mere fact that parties do not agree to the construction of a contract does not render it ambiguous (syl. pt. 2) "Ambiguity in a contract consists of susceptibility of two or more meanings and uncertainty as to which was intended; mere informality in phraseology or clumsiness of expression does not make it ambiguous, if the language imports one meaning or intention." (syl. pt. 5). Nowhere in the parties' agreement does it provide that Mr. Metz shall pay Mrs. Metz an amount equal to the premium payment for January 2003 if she does not have an insurance premium payment.

Appellant apparently agrees that the Family Court had no jurisdiction to modify the order of spousal support. In her brief to this Court, the Appellant mis-characterizes the modification of Appellee's spousal support obligation as merely an enforcement action. By

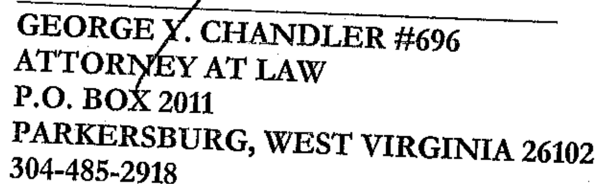
doing so, she hopes to restore the Family Court's jurisdiction over matters, which the parties had agreed the Court should have no jurisdiction. If the Appellant truly believed this to be the case, why did she not proceed by a petition for contempt; why did she not request a judgment for accrued arrearages? The answer of course is because this is a modification. The clear intent of the parties was that Mr. Metz would assist Mrs. Metz in maintaining health insurance, first by paying her premium for three years and then by paying a potion of the premium. At no time was it contemplated by either of the parties that Mr. Metz would somehow be required to make a direct payment to Mrs. Metz, which she was free to spend in any manner she chooses. To so order now clearly constitutes a modification of the prior order of the Court. A modification specifically prohibited by the agreement of the parties and one the Family Court has no jurisdiction to order.

IV.

CONCLUSION

For all of the foregoing reasons, the ruling of the Circuit Court of Wood County, West Virginia should be affirmed, and for such other relief as this Court may deem proper.

DAVID METZ, APPELLEE
BY COUNSEL



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the foregoing and hereto annexed **Appellee's Brief** upon the Appellant by mailing, postage prepaid, a true copy of the same to her counsel of record at the address indicated below, on this 23rd day of March 2005.

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