

FILED
February 10, 2012

released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Justice, concurring, in part, and dissenting, in part:

I concur with the majority’s holding and new syllabus that allows for federal, service-connected veterans disability benefits received by the payor spouse to be considered by the family court as a resource in assessing the ability of the payor to pay spousal support.¹

I dissent, however, to the majority’s decision to remand this case to the circuit court “for further proceedings and the entry of a final order addressing, with particularity, the findings, conclusions and award of the family court set forth by the family court in the orders entered on June 3, 2010, and September 29, 2010.” The decision to remand the case to the circuit court, rather than simply to reverse the circuit court, goes against the grain of the well-established standard of review.

The appropriate standard of review as set forth by the majority is as follows:

¹Interestingly, this isn’t really the issue presented. Both the family court and the circuit court held that veterans disability benefits can be considered in determining spousal support.

In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004). Moreover, in reviewing orders entered by a family court judge, the majority correctly states that “a circuit court may not substitute its findings of fact for those of a family court judge merely because it disagrees with those findings. See, syl. pt. 2, *In re: Robinson*, 212 W. Va. 632, 575 S.E.2d 242 (2002); syl. pt. 4, in part, *Stephen L.H. v. Sherry L. H.*, 195 W. Va. 384, 465 S.E.2d 841 (1995).”

Under the guidance of the foregoing standard of review, the majority first determines that “[i]n the current action, the family court considered the husband’s military disability benefits and his other sources of income in awarding the wife permanent spousal support.” This determination by the family court is correct under the law enunciated by the majority in the new syllabus point. The majority next states that “[t]he final order of the circuit court, however, *failed to address* with any specificity how those disability benefits were taken into account in setting aside the family court decision.” (Emphasis added). Given that the majority makes clear in a new syllabus point that consideration of disability benefits was proper and given that the majority affirms the family court’s consideration of the husband’s military disability benefits in awarding permanent spousal support, then why is it necessary to remand the case to the circuit court for its failure to address the issue with any

specificity? The implication from this remand is that the majority does not like the family court's determination regarding the amount of spousal support and, therefore, is encouraging the circuit court, upon remand, to revise its order to make it (forgive the pun) "more appealing."

Even more significantly, the majority twice notes in the opinion that "[t]he circuit court *did not* determine that any of the factual findings of the family court were erroneous." (Emphasis added). Under the provisions of West Virginia Code § 51-2A-14(c)(2008), "[t]he 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." *See Deitz v. Deitz*, 222 W. Va. 46, 57, 659 S.E.2d 331, 342 (2008) (citing statute in considering whether the circuit court correctly reviewed family court's order). Thus, it is not the proper role of the circuit court to make new or revised findings of fact. Further, the family court followed the statute, explicitly setting forth the reasoning regarding each of the statutory criteria for awarding spousal support.

Like the circuit court, this Court also cannot substitute its findings of fact for the family court. *See Lee v. Lee*, No. 101605, __ W. Va. ___, ___ S.E.2d ___, 2011 WL 5902237 (W. Va. filed Nov. 21, 2011) (Davis, J., dissenting) ("Because the majority has substituted its own judgment for that of the lower court[']s when neither the facts nor the law support such a result, I respectfully dissent."). The circuit court's order is devoid of any

findings that the family court clearly erred in its factual determination. Moreover, a review of the family court's order reveals that the family court correctly applied the law regarding consideration of veterans disability benefits. Thus, under the well-established standard of review, it is clearly inappropriate to remand the case back to the circuit court to give it a second bite of the apple to explain why it reversed the family court's decision. The remand is simply not correct under our law relating to the standard of review, and the circuit court should not get a do-over.

For the foregoing reasons, I respectfully concur in the new law enunciated by the majority, but dissent in the majority's decision to reverse and remand to the circuit court, rather than simply reverse the circuit court's decision.