STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

David E. Stafford, Sr.
Petitioner

vs) No. 16-0014 (Wyoming County, Civil Action No. 86-477-C)

Francis Ellen Newsome,
Respondent

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Respondent Francis Ellen Newsome ("Ms. Newsome") and Petitioner David E. Stafford, Sr. ("Mr. Stafford") were divorced by final order entered in 1986. The present litigation began when Ms. Newsome filed a petition with the family court in 2010, seeking a portion of a 2001 payment[1] Mr. Stafford received from his employer U.S. Steel. After protracted litigation, the family court awarded Ms. Newsome 25% of the 2001 payment Mr. Stafford received from his employer. By order entered on December 10, 2015, the circuit court affirmed the family court's order.

In this appeal, Mr. Stafford, by counsel G. Todd Houck, argues that the circuit court erred by affirming the family court's order. Ms. Newsome, by counsel Pat C. Fragile, urges this Court to affirm the circuit court's order. After review, we conclude that the circuit court erred by affirming the family court's order. We therefore reverse the circuit court's December 10, 2015, order. This case satisfies the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure for disposition by memorandum decision.

[1] The parties dispute the precise nature of this 2001 payment. Mr. Stafford argues that the 2001 payment was an "early employment buyout" payment that U.S. Steel offered him during the course of the company's reorganization. By contrast, Ms. Newsome asserts that the 2001 payment was "a transfer of [Mr. Stafford's] retirement account because U.S. Steel was moving all accounts." Our resolution of this matter turns on whether Ms. Newsome presented sufficient evidence demonstrating her entitlement to a constructive trust of the 2001 payment. This evidentiary analysis is not dependent on whether the 2001 payment is labeled a "buyout" or a transfer of Mr. Stafford's retirement account. For ease of the reader, we refer to this payment throughout this opinion as the "2001 payment."

I.
FACTUAL AND PROCEDURAL BACKGROUND

Mr. Stafford and Ms. Newsome were married in 1965. They had three children. They divorced by final order entered on November 21, 1986. Both parties were represented by counsel during their divorce proceedings. Pursuant to the 1986 final divorce order, Ms. Newsome was awarded: 1) permanent custody of the children; 2) $200 per month for child support; 3) $1.00 per month of alimony; 4) possession of the marital residence; and 5) possession of a 1984 Chevrolet automobile. The final divorce order required Mr. Stafford to 1) pay Ms. Newsome's attorney fees; 2) pay all of the medical expenses for the children; 3) provide medical insurance for the children; 4) pay all of the marital residence's utility bills; 5) make the monthly mortgage payment on the marital residence; (6) "maintain all major and minor upkeep on said dwelling,"; and 7) make the monthly payments and cover the upkeep and repair costs on the 1984 Chevrolet automobile.

The 1986 final divorce order did not award Ms. Newsome a portion of Mr. Stafford's pension or retirement benefits which had vested or could potentially vest in the future.

In March 1988, Ms. Newsome filed a petition with the family law master, requesting that Mr. Stafford make certain repairs to the marital residence. After holding a hearing, the family law master ordered Mr. Stafford to "complete repairs to the kitchen sink, the bathroom wall and floor, [and] the blocked sewer line."

Ms. Newsome subsequently filed a motion to modify the final divorce order.[2] After holding a hearing in November 1988, the family law master ruled that: 1) Mr. Stafford's child support obligation was terminated because all of the children were over the age of eighteen; 2) Mr. Stafford pay the children's medical bills; 3) Mr. Stafford pay "the outstanding bills due for the wheel trim and the welding of the frame" of the Chevrolet automobile; 4) Mr. Stafford pay for various repairs to the marital residence; 5) Mr. Stafford pay Ms. Newsome $200.00 per month in alimony for a period of five months; and 6) Mr. Stafford pay Ms. Newsome's attorney fees.

Ms. Newsome filed a petition for contempt and modification of the final divorce order on September 1, 1989. By order entered on February 7, 1990, the family law master ruled that: 1) Mr. Stafford was in contempt for failing to pay the utility bills on the marital residence; 2) Ms. Newsome be awarded a decretal judgment against Mr. Stafford in an amount equal to the utility payments she had made, and for the attorney

[2] Ms. Newsome's motion is not contained in the appendix-record. It is unclear when she filed this motion.

fees she had paid; and 3) Ms. Newsome was barred from receiving alimony from Mr. Stafford because she had remarried.

Following entry of the 1990 order by the family law master, there was no activity in this case until June 2010. In the interim, Mr. Stafford remarried. Mr. Stafford and his second wife were both employees of U.S. Steel. Mr. Stafford asserts that U.S. Steel reorganized in 2001, and that in the course of this reorganization, he and his second wife were offered and accepted a combined payment in the amount of $553,619.24. According to Mr. Stafford, this money was transferred to an IRA account. After receiving this money, Mr. Stafford states that he suffered a "dramatic loss" due to the stock market crash in September 2001. Mr. Stafford also asserts that his house suffered severe flood damage during this time period. Mr. Stafford states that due to the stock market loss, and the costs of repairing the flood damage, he and his second wife only retained approximately $100,000.00 of the 2001 payment they received from U.S. Steel.

Nine years after Mr. Stafford and his second wife received the 2001 payment from U.S. Steel, Ms. Newsome filed a petition requesting that the Family Court of Wyoming County grant her an equitable share of Mr. Stafford's 2001 payment from U.S. Steel. The family court held a hearing on Ms. Newsome's motion "which generally requested the creation of a constructive trust upon retirement accounts of [Mr. Stafford] which may have existed at the time of the separation of the parties[.]"[3] By final order entered on August 10, 2012, the family court denied Ms. Newsome's motion for a "constructive trust" and ordered the case to be returned to a "closed file status."

Ms. Newsome appealed the family court's ruling to the circuit court, alleging the family court erred by finding that she did not prove that Mr. Stafford deliberately or negligently failed to disclose his retirement benefits during the 1986 divorce proceedings. After holding a hearing, the circuit court remanded the case back to the family court for further factual development. The circuit court explained its order of remand as follows:

> During the . . . hearing before this Court, [Mr. Stafford] produced previously unseen documents concerning [his] pension, which is at the heart of this Petition for a Constructive Trust. . . .
>
> Given that these documents are of critical importance to the factual determinations which comprises the basis of

[3] Ms. Newsome's motion regarding the "creation of a constructive trust" is not in the appendix-record. The quoted language regarding the motion comes from the family court's August 10, 2012, final order.

> [Ms. Newsome's] first assignment of error, the Court FINDS that further inquiry and taking of evidence is necessary on the subject of [Mr. Stafford's] pension and on the subject of whether or not [his] pension was subject to equitable distribution at the time of the original divorce proceedings.

The "previously unseen documents" referenced in the circuit court's remand order was a copy of the 2001 payment agreement between U.S. Steel and Mr. Stafford and his second wife.

Following remand, the family court held a hearing and, thereafter, entered a final order on December 11, 2013. The family court's order determined that the 2001 payment agreement "indicates that [Mr. Stafford] may have had some type of 'retirement' benefit in existence at the time of the separation of the parties on September 11, 1986. Such document obviously was not disclosed at the time of the divorce, insofar as it was prepared fifteen years later in February 2001!" The family court's order notes that Mr. Stafford testified during the hearing. Mr. Stafford stated that the payment he and his second wife received from U.S. Steel was "a buyout and not a vested retirement benefit." Further, Mr. Stafford testified that "there was nothing to disclose at the time of the separation of the parties [in 1986] and that there was no future interest whether vested or non-vested or contingent at the time of separation." The family court's order notes that "both parties were represented by able and competent domestic relations practicing attorneys at the time of the divorce" in 1986. The family court's order states that it found Mr. Stafford's testimony to be credible, and notes that Ms. Newsome did not produce any documentation other than the 2001 payment agreement to support her claim that she was entitled to 25% of the $553,619.24 payment U.S. Steel paid to Mr. Stafford and his second wife.[4]

Based on these factual findings, the family court's order contained three conclusions of law: 1) Ms. Newsome "failed to prove . . . that [Mr. Stafford] deliberately or negligently failed to disclose any asset in question at the time of the original divorce"; 2) Ms. Newsome failed to prove that "any asset even existed at the time of the separation of the parties"; and 3) Ms. Newsome "has utterly failed to prove that . . . the existence

[4] The family court's order described how Ms. Newsome arrived at her demand of 25% of the 2001 payment ($138,403.75) as follows:

> Such amount was arrived at by a simple mathematical calculation of dividing the lump sum benefit in half (equitable distribution) and dividing that number in half again to attempt to produce a number to reflect a value representing 15 years of the marriage alleging the total sum was based upon 30 years of employment.

and value of the respective retirement plan[s] was fraudulently kept from [Ms. Newsome] at the time the parties negotiated their [1986] settlement." The family court therefore dismissed Ms. Newsome's petition for a constructive trust.

Ms. Newsome appealed the family court's order to the circuit court. The circuit court held a hearing and subsequently entered a March 25, 2014, order remanding the case back to the family court, again, "to determine what portion if any part of the retirement fund in question [Ms. Newsome] is entitled to." Based on the appendix-record before us, we cannot determine why the circuit court remanded the case back to the family court in March 2014. The family court had already examined the 2001 payment agreement, heard testimony from the parties, and entered a detailed order explaining its conclusion that Ms. Newsome was not entitled to a portion of the "retirement fund in question." The circuit court's order does not list any new evidence or provide a specific reason explaining why another remand to family court was necessary. Thus, it is unclear why the circuit court remanded this matter to the family court to perform a function it had already completed.

The circuit court's remand order did not provide that further discovery was necessary to resolve this matter. Ms. Newsome did not file a motion with the circuit court or with the family court requesting that discovery be permitted on remand. However, after the circuit court remanded the case to the family court, Ms. Newsome submitted five requests for admissions to Mr. Stafford regarding the 2001 payment. The five requests for admissions are as follows:

> 1) Please admit or deny that $553,619.24 was the amount of the pension fund that you received. 2) Please admit or deny that you worked 30 years to earn your pension. 3) Please admit or deny that you were married to [Ms. Newsome] for 15 of those years when you earned your pension. 4) Please admit or deny that the disclosures filed in the case do not disclose your retirement account. 5) Please admit or deny that [Ms. Newsome] never received any monies from the pension plan.

Mr. Stafford asserts that he was suffering from health problems when these requests were served, and that he was no longer represented by counsel. Thus, he did not respond to Ms. Newsome's requests for admissions.

The family court held a hearing on June 3, 2015. Mr. Stafford appeared at this hearing *pro se*, while Ms. Newsome was represented by counsel. Because Mr. Stafford failed to reply to Ms. Newsome's requests for admissions, the family court deemed all of the requests for admissions to be admitted. It therefore found that Mr. Stafford had a "pension fund" in the amount of $553,619.24; that Mr. Stafford worked

thirty years to earn this "pension"; that Ms. Newsome was married to Mr. Stafford for fifteen of the thirty years he worked to gain this "pension"; and that Ms. Newsome was entitled to 25% of the "pension." Based on these findings, the family court awarded Ms. Newsome $138,403.75.

Mr. Stafford appealed the family court's ruling to the circuit court. After holding a hearing, the circuit court denied Mr. Stafford's appeal by order entered on December 15, 2015. The circuit court's order denying Mr. Stafford's appeal does not set forth any legal analysis or factual recitation describing why it denied Mr. Stafford's appeal. After entry of the circuit court's order, Mr. Stafford filed the present appeal.

II.
STANDARD OF REVIEW

This Court has previously addressed our standard of review for an appeal of a circuit court's order affirming a family court's order. In Syllabus Point 1 of *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004), we held:

> 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*.

With this standard in mind, we turn to the parties' arguments.

III.
ANALYSIS

Before addressing the specific arguments raised by the parties, we pause to note the unusual procedural history of this case: It was before the family court on three occasions and before the circuit court on three occasions. During these six occasions, the only order that set forth a detailed recitation of the facts, and substantively addressed the issues and the law was the December 11, 2013, order entered by the family court. This order determined that 1) Ms. Newsome failed to prove that Mr. Stafford "deliberately or negligently" failed to disclose any asset during the 1986 divorce proceeding; 2) Ms. Newsome failed to prove that "any asset even existed at the time of the separation of the parties"; and 3) Ms. Newsome failed to prove that "the existence and value of the respective retirement plan[s] was fraudulently kept from [Ms. Newsome] at the time the parties negotiated their [1986] settlement." We now turn to the specific arguments raised by the parties.

Mr. Stafford asserts that the family and circuit courts committed numerous errors. First, he argues that Ms. Newsome's petition seeking 25% of the 2001 payment is an attempt to modify the parties' marital property distribution agreement contained in the 1986 final divorce order. Mr. Stafford argues that under W.Va. Code § 48A-4-1(i)(4), the statute in effect at the time the final divorce order was entered, a family court lacks jurisdiction to hear a petition for modification when the modification does not involve child custody, child support, or spousal support.[5] As this Court held in Syllabus Point 1 of *Segal v. Beard*, 181 W.Va. 92, 380 S.E.2d 444 (1989), "a [family court] lacks jurisdiction to hear a petition for modification of an order when the modification proceeding does not involve child custody, child support or spousal support. W.Va. Code, 48A–4–1(i)(4) [1986]." Because Ms. Newsome's petition seeking 25% of Mr. Stafford's 2001 payment does not involve child custody, child support, or spousal support, Mr. Stafford claims that the family court did not have jurisdiction over this matter.

Ms. Newsome concedes that she is not entitled to a modification of the marital property distribution agreement contained in the 1986 divorce order. However, she asserts that she is not seeking a modification of the divorce order, rather, she is seeking a constructive trust pursuant to W.Va. Code § 48-7-206(2) [2001]. It provides:

> (2) If any party deliberately or negligently fails to disclose information which is required by this part 2 and in consequence thereof any asset or assets with a fair market value of five hundred dollars or more is omitted from the final distribution of property, the party aggrieved by the nondisclosure may at any time petition a court of competent jurisdiction to declare the creation of a constructive trust as to all undisclosed assets, for the benefit of the parties and their minor or dependent children, if any, with the party in whose name the assets are held declared the constructive trustee, such trust to include such terms and conditions as the court

[5] The final divorce order was entered in 1986. In 2001, the Legislature reenacted our domestic relations statutes in W.Va. Code § 48-1-101 [2001], stating, "[t]he recodification of this chapter during the regular session of the Legislature in the year 2001 is intended to embrace in a revised, consolidated, and codified form and arrangement the laws of the state of West Virginia relating to domestic relations at the time of that enactment." The 2001 domestic relations act provides that amendments to statutes concerning the equitable distribution of marital property "are to be applied prospectively and have no application to any action for annulment, divorce or separate maintenance that was commenced on or before June 7, 1996." W.Va. Code § 48-7-112 [2001]. Because Mr. Stafford and Ms. Newsome were divorced by final order entered in 1986, a modification concerning the equitable distribution of their marital property is governed by W.Va. Code § 48A-4-1.

> may determine. The court shall impose the trust upon a finding of a failure to disclose such assets as required under this part 2.

We emphasize that Ms. Newsome's petition filed with the family court in 2010 sought a constructive trust. Her petition was not seeking a modification of the 1986 final divorce order. Ms. Newsome asserts that she is entitled to a constructive trust of a portion of Mr. Stafford's 2001 payment pursuant to W.Va. Code § 48-7-206(2) because he failed to disclose the existence of his retirement benefit in 1986. By contrast, Mr. Stafford asserts that a constructive trust pursuant to W.Va. Code § 48-7-206(2) is unavailable to Ms. Newsome because their divorce was final in 1986. The constructive trust statute Ms. Newsome relies upon, W.Va. Code § 48-7-206(2), was enacted in 2001 as part of the recodification of our domestic relations statutes. *See* footnote 5, *infra*. Because the parties' divorce was final in 1986, Mr. Stafford argues that the constructive trust statute relied upon by Ms. Newsome is not applicable.

After review, we find Mr. Stafford is correct that W.Va. Code § 48-7-206(2) was enacted as part of the 2001 domestic relations act. However, a separate statute in effect at the time of the parties' divorce in 1986 allows a party to seek a constructive trust. West Virginia Code § 48-2-33(2) [1984] provides:

> If any party deliberately or negligently fails to disclose information which is required by this section and in consequence thereof any asset or assets with a fair market value of five hundred dollars or more is omitted from the final distribution of property, the party aggrieved by such nondisclosure may at any time petition a court of competent jurisdiction to declare the creation of a constructive trust as to all undisclosed assets, for the benefit of the parties . . .

Because W.Va. Code § 48-2-33(2) was in effect at the time of the parties' divorce in 1986, we conclude that Ms. Newsome may seek a constructive trust of the alleged asset she asserts Mr. Stafford failed to disclose during their divorce.

In order to establish that she is entitled to a constructive trust pursuant to W.Va. Code § 48-2-33(2), Ms. Newsome was required to prove that Mr. Stafford "deliberately or negligently" failed to disclose an asset worth $500.00 or more at the time of their divorce in 1986. Our review of the record reveals that Ms. Newsome has failed to establish that a retirement benefit worth $500.00 or more existed at the time the 1986 final divorce order was entered.[6] Further, Ms. Newsome has failed to establish that Mr.

[6] Under our case law, with respect to pension benefits, this Court has held that the burden of proof is upon both parties to present evidence concerning the value thereof for

Stafford "deliberately or negligently" failed to disclose a retirement benefit worth $500.00 or more during the 1986 divorce proceedings.

The family court's ruling in Ms. Newsome's favor was based solely on the five requests for admissions that Ms. Newsome sent to Mr. Stafford. Because Mr. Stafford failed to reply to these requests for admissions, the family court deemed them admitted. We find the family court erred in this ruling.

Ms. Newsome sent the five requests for admissions to Mr. Stafford after the circuit court remanded the case to family court. The circuit court's order did not state that discovery was available to the parties upon remand. Further, Ms. Newsome did not comply with Rule 12 of the Rules of Practice and Procedure for Family Court and request that the family court permit discovery. Pursuant to Rule 12, a family court may enter an order allowing discovery *sua sponte*, or upon a motion by a party "demonstrating a particular need" for such discovery.[7] In the present case, the family court did not enter an order allowing discovery, and Ms. Newsome did not file a motion with the family court "demonstrating a particular need" for discovery. In fact, the information sought in her five requests for admissions had already been explored and ruled upon during the previous family court hearing, in which the family court examined the 2001 payment agreement, heard testimony from the parties, and entered a detailed order explaining its conclusion that Ms. Newsome was not entitled to a portion of the "retirement fund in question."

Assuming *arguendo* that it was not error for the family court to permit Ms. Newsome to pursue discovery without complying with Rule 12 of the Rules of Practice and Procedure for Family Court, the admissions relied upon by the family court do not provide a basis to support its award of a constructive trust to Ms. Newsome. A constructive trust requires a showing that a party "deliberately or negligently" failed to disclose an asset worth $500.00 or more. The requests for admissions do not address or establish that Mr. Stafford "deliberately or negligently" failed to disclose a vested retirement benefit in 1986.[8] Further, the requests for admissions do not include any

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equitable distribution purposes. In that regard, Syllabus Point 3 of *Roig v. Roig*, 178 W.Va. 781, 364 S.E.2d 794 (1987), states, "[w]hen the issue in a divorce proceeding is the equitable distribution of marital property, both parties have the burden of presenting competent evidence to the trial court concerning the value of such property."

[7] Rule 12 provides: "As the interest of justice requires, discovery pursuant to Rules 26 through 37 of the Rules of Civil Procedure may be ordered by the court at any time, or may be allowed by the court upon motion demonstrating a particular need."

[8] The fourth request for admissions states, "Please admit or deny that the disclosures filed in the case do not disclose your retirement account." This request does

question addressing whether the retirement benefit was worth $500.00 or more at the time of the parties' divorce in 1986. Because the requests for admissions do not address whether a retirement benefit existed in 1986, and, if so, whether the retirement benefit was worth $500 or more in 1986, we find that the family court's ruling granting Ms. Newsome a constructive trust was clearly erroneous.

Based on the foregoing, we reverse the circuit court's December 10, 2015, order which affirmed the family court's order awarding Ms. Newsome $138,403.75.

Reversed.

ISSUED: February 21, 2017

CONCURRED IN BY:
Chief Justice Allen H. Loughry II
Justice Robin Jean Davis
Justice Menis E. Ketchum
Justice Elizabeth D. Walker

DISSENTING AND WRITING SEPARATELY:
Justice Margaret L. Workman

Workman, J., dissenting:

Our jurisprudence clearly articulates the broad discretion to be afforded a trial court. We routinely recite appropriate standards of review. We pay fairly consistent homage to our disinclination to substitute our own judgment for that of trial courts. Yet, the majority in this case doesn't hesitate to toss those firmly-grounded legal concepts out the window, apparently just because they feel like it.

This case has a remarkably tortured past; it has been heard six times below, including the remands from the circuit court to family court for further development.[1] The parties to this appeal were married for twenty-one years and had three children. They were divorced in 1986. In 2001, the Mr. Stafford and his then-spouse received a

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not address whether Mr. Stafford "deliberately or negligently" failed to disclose a retirement account during the 1986 divorce.

[1]This Court must carefully clarify that this action is not a "modification" of the divorce order. This is a separate action, seeking to require disclosure of information that should have previously been disclosed and the establishment of a constructive trust to provide Ms. Newsome with the portion of the pension to which she is entitled.

lump sum payment from U.S. Steel for $553,619.24, which was then transferred to an IRA. In 2010, Ms. Newsome filed a petition in the Family Court of Wyoming County alleging that, at the time of the separation and divorce, Mr. Stafford did not disclose that he had either a UMWA or U.S. Steel retirement account. Ms. Newsome asserted that because of such non-disclosure, she was unable to make an informed decision as to the division of assets at the time of the divorce. She further requested that a constructive trust be placed on pension benefits received by Mr. Stafford for that portion to which Ms. Newsome was entitled based on their lengthy marriage. The family court denied her request and she appealed to the Circuit Court of Wyoming County. In this first appeal, the circuit court found that further evidence was needed and remanded the case for that purpose.

As a result of the second family court hearing, the majority states:

> Following remand, the family court held a hearing and, thereafter, entered a final order on December 11, 2013. The family court's order determined that the 2001 buyout agreement "indicates that [Mr. Stafford] may have had some type of 'retirement' benefit in existence at the time of the separation of the parties on September 11, 1986. Such document obviously was not disclosed at the time of the divorce, insofar as it was prepared fifteen years later in February 2001!" The family court's order notes that Mr. Stafford testified during the hearing. Mr. Stafford stated that the payment he and his second wife received from U.S. Steel was "a buyout and not a vested retirement benefit." Further, Mr. Stafford testified that "there was nothing to disclose at the time of the separation of the parties [in 1986] and that there was no future interest whether vested or non-vested or contingent at the time of separation." The family court's order notes that "both parties were represented by able and competent domestic relations practicing attorneys at the time of the divorce" in 1986. The family court's order states that it found Mr. Stafford's testimony to be credible, and notes that Ms. Newsome did not produce any documentation other than the 2001 buyout agreement to support her claim that she was entitled to 25% of the $553,619.24 buyout payment U.S. Steel paid to Mr. Stafford and his second wife.

In so ruling, the family court[2] chose to assign greater credibility to Mr. Stafford despite the fact that the document on its face is entitled "United States Steel and Carnegie Pension Fund, Application for Retirement Benefits." This document certainly constituted evidence of the existence of retirement benefits without resort to a credibility determination.

On the second appeal to circuit court, the circuit court obviously made the legal determination that an amount was owed, by its order dated March 25, 2014, wherein the family court was directed to "to determine what portion if any part of the retirement fund in question [Ms. Newsome] is entitled to."

It is at this juncture that Ms. Newsome submitted five requests for admissions to Mr. Stafford. According to the majority, her action constituted unauthorized discovery. Rule 12 of the Rules of Practice and Procedure for Family Court provides: "As the interest of justice requires, discovery . . . may be ordered by the court at any time, or may be allowed by the court upon motion demonstrating a particular need." Ms. Newsome did not file a specific motion requesting discovery, and the circuit court did not specifically order additional discovery; nor did Mr. Stafford file any objection. Yet the family court obviously approved her participation in discovery by basing its decision on the facts that were deemed admitted by Mr. Stafford due to his failure to respond to her discovery requests. Specifically, the family court found Mr. Stafford's failure to answer the requests for admission tantamount to an admission of all facts addressed therein.[3] The family court consequently ruled in favor of Ms. Newsome, and the circuit court thereafter denied Mr. Stafford's third appeal.

The standard of review applicable to Mr. Stafford's appeal to this Court was explained in the syllabus of *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004), as follows:

> 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

[2]As recognized elsewhere in the majority opinion, it was actually Mr. Stafford who produced the buyout agreement, as Ms. Newsome did not have access to that document.

[3]*See* Syl. Pt. 2, *Checker Leasing, Inc. v. Sorbello*, 181 W.Va. 199, 382 S.E.2d 36 (1989) ("A failure to respond to a request for admissions under Rule 36 of the West Virginia Rules of Civil Procedure will be deemed to be an admission of the matters set forth in the request.").

discretion standard. We review questions of law *de novo*.

This Court has also made it abundantly clear that discovery matters are firmly within the discretion of the family court. In syllabus point two of *B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W.Va. 463, 475 S.E.2d 555 (1996), this Court explained:

> A trial court is permitted broad discretion in the control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that we will interfere with the exercise of that discretion. A trial court abuses its discretion when its rulings on discovery motions are clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock our sense of justice and to indicate a lack of careful consideration.

In reversing the judgment below, a majority of this Court finds error in the family court's decision to premise its ruling upon unauthorized requests for admission. The majority also posits: "[a]ssuming *arguendo* that it was not error for the family court to permit" discovery, the admissions do not provide a basis to support the award of a constructive trust.

Indeed, a proper basis for a constructive trust would require proof that Mr. Stafford "deliberately or negligently" failed to disclose a vested retirement benefit in 1986. Ms. Newsome asked the following five questions: 1) Please admit or deny that $553,619.24 was the amount of the pension fund that you received. 2) Please admit or deny that you worked 30 years to earn your pension. 3) Please admit or deny that you were married to [Ms. Newsome] for 15 of those years when you earned your pension. 4) Please admit or deny that the disclosures filed in the case do not disclose your retirement account. 5) Please admit or deny that [Ms. Newsome] never received any monies from the pension plan. Taken as true,[4] the answers support the conclusion of the family court or, at the very minimum, the answers constitute evidence potentially supporting that legal conclusion; consequently, the appropriate resolution for this Court should have been either affirming the lower tribunal or remanding this matter. There are essentially two issues here: allowance of discovery and utilization of discovery to support legal consequences. If this Court did not wish to affirm a ruling based upon (1) discovery that is arguably unauthorized and/or (2) conclusions of law arguably not within the permissible scope of requests for admission, the only suitable response would have been a remand to the circuit court for additional evaluation.[5]

[4]Although inartfully written, it is quite clear what admissions are sought.

[5]As the majority correctly acknowledges in footnote five of its opinion, the burden of proof is upon both parties to present evidence of valuation of pension benefits.

I recognize, just as the majority did, the tortured and protracted litigation below. Certainly it would be an understatement to say that the lawyering and the judicial order-writing were less than ideal. Yet, any mistakes that were made by the lawyers on both sides and the lack of complete clarity in the orders should not all be visited on one side, especially in light of the fact that the trier of fact and determiner of applicable law found in favor of Ms. Newsome. These parties were married for twenty-one years, and Mr. Stafford ultimately submitted a "buy-out" document to the family court indicating the existence of a pension and pension benefits paid to Mr. Stafford. While this Court may be hesitant to remand this matter for yet another evaluation, the circuit court order should be upheld and the remand directed for a determination of the amount to which Ms. Newsome is entitled. Instead, because the majority throws its hands up and doesn't want to deal with the mess, an otherwise legitimate claim for a share of benefits earned during twenty-one years of marriage was lost.