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IN THE CIRCUIT COURT OF GILMER COUNTY, WEST VIRGINIA

IN RE: The Marriage of Douglas Shane Morris, Petitioner, and Kimberley A. Morris, Respondent.

Case No. 12-D-08
Chief Judge, Richard A. Facemire

ORDER

This matter is before the Court upon the Petitioner's Petition for Appeal filed on March 20, 2013, and the Respondent's Counter-Petition for Appeal filed on or about March 27, 2013. On May 28, 2013, Anita Harold Ashley, counsel for the Petitioner, and James Wilson Douglas, counsel for the Respondent, appeared for a hearing on the Petitioner's Petition for Appeal and the Respondent's Counter-Petition for Appeal. The Court, upon further review of the facts of the case, and pertinent law ORDERS that the Final Divorce Decree entered on February 21, 2013, is REVERSED, insofar as it sets aside the Post-Nuptial Agreement executed by the parties on February 11, 2009, and makes rulings contrary to the provisions of that agreement. The Court makes the following findings of facts and conclusions of law:

1. The Petitioner, Douglas Shane Morris, and the Respondent, Kimberley A. Morris, were married to each other on June 30, 1992, in Wytheville, VA.
2. The parties signed an "Agreement Respecting Marital Rights" (Post-Nuptial Agreement) on February 11, 2009. This Post-Nuptial Agreement provided that should the parties become separated or divorced, the Respondent shall have the option of remaining in the residence located at , West Virginia, rent free. Additionally, the Petitioner would assume the mortgage payments on said residence. If the parties desired to sell the residence, the amount from the sale would go to pay the mortgage, with any excess funds being given to the Respondent. The Post-Nuptial

Agreement also provided the Respondent with a monthly payment of five thousand dollars ($5,000.00) from the Petitioner for fifteen (15) years from either the date of the divorce decree, or the first day the Respondent remarried or cohabitated with another man.

3. The Respondent, Kimberley A. Morris, had legal counsel, Mr. Timothy Butcher, to review the agreement and advise her. Despite Mr. Butcher's advice that she not execute the agreement, the Respondent freely and voluntarily entered into this agreement.
4. The parties last lived and cohabitated together as husband and wife in Gilmer County, WV, on or about January 7, 2012.
5. This divorce action was initiated on February 23, 2012. The Petitioner and the Respondent in their divorce pleadings allege irreconcilable differences. The parties are entitled to a divorce on the statutory ground of irreconcilable differences as set forth in W. Va. Code Section 48-5-201.
6. On or about July 11, 2012, the Family Court upheld the Post-Nuptial Agreement as valid after evidentiary hearings on the matter. The Family Court also issued a Temporary Order requiring the Petitioner to pay spousal support to the Respondent as well as make mortgage payments on their house.
7. On December 26, 2012, the Family Court set aside and voided the Post-Nuptial Agreement, which it had previously upheld. The Family Court did such by concluding the Accumulated Adjustment Account (Retained Earnings) of Flying "W" Plastics was a marital asset and further stating the Post-Nuptial Agreement "would not achieve an equitable distribution of the parties' property" under W. Va. Code Section 48-7-101. The

Family Court also set aside the Temporary Order requiring the Petitioner to pay spousal support and make the mortgage payments on their house.

8. The Final Divorce Decree, entered on February 19, 2013, awarded the Respondent a one-half (1/2) interest in the Retained Earnings Account of Flying "W" Plastics that is attributable to the Petitioner as of January 7, 2012, as well as requiring the Petitioner to forthwith transfer one-half (1/2) of all of his interests in Flying "W" Plastics to the Respondent as a lump sum spousal support.

9. The Petitioner filed a Petition for Appeal on March 20, 2013, asserting:

   A. The Post-Nuptial Agreement should be upheld, and

   B. The Retained Earnings should not be counted as marital property nor should an interest in the Retained Earnings be assigned to the Respondent.

10. The Respondent filed a Counter-Petition for Appeal on or about March 27, 2013, asserting she should have been awarded alimony in addition to the Family Court's Final Divorce Decree.

11. "The validity of a prenuptial agreement is dependent upon its valid procurement, which requires its having been executed voluntarily, with knowledge of its content and legal effect, under circumstances free of fraud, duress, or misrepresentation; however, although advice of independent counsel at the time parties enter into a prenuptial agreement helps demonstrate that there has been no fraud, duress or misrepresentation, and that the agreement was entered into knowledgeably and voluntarily, such independent advice of counsel is not a prerequisite to enforceability when the terms of the agreement are understandable to a reasonably intelligent adult and both parties have had the opportunity

to consult with independent counsel." *Gant v. Gant*, 174 W. Va. 740, Syl. Pt. 2 (W. Va. 1985) quoted in *Ware v. Ware*, 224 W. Va. 599 as Syl. Pt. 2 (W. Va. 2009).

12. "For the presumption of validity to apply to a prenuptial agreement, both parties to that agreement must be represented by independent counsel. Moreover, where one party to a prenuptial agreement is represented by counsel while the other is not, the burden of establishing the validity of that agreement is on the party seeking its enforcement." *Ware v. Ware*, 224 W.Va. 599, Syl. Pt. 5 (W. Va. 2009).

13. The Court finds that while the Post-Nuptial Agreement is not a prenuptial agreement, it is governed by the same rules and laws as that which apply to a prenuptial agreement.

14. The Court finds that the Respondent, Kimberley A. Morris, was represented by counsel, Timothy Butcher, with regard to the Post-Nuptial Agreement. The Family Court heard testimony that Mr. Butcher helped to negotiate the terms in the Post-Nuptial Agreement, which were favorable to the Respondent. In addition, Mr. Butcher advised the Respondent not to sign the Post-Nuptial Agreement. The Respondent disregarded her attorney's advice and signed the Post-Nuptial Agreement after having her counsel advise her against doing that very act.

15. The Respondent, Kimberley A. Morris, claims the Petitioner, Douglas Shane Morris, used her desire to have a house built in order to force her to sign the Post-Nuptial Agreement. However, the Respondent was represented by counsel who negotiated on her behalf. The Court finds the Respondent's desire to have a house built, in order to leave the residence shared by her family, does not constitute fraud, duress, or misrepresentation on the part of the parties.

16. The Respondent also alleges that the Petitioner was untruthful in filling out his "Assets, Liabilities, Net Worth, Expectancies & Income As of January 31, 2009" sheet for the Post-Nuptial Agreement. The Respondent points to the fact that the Petitioner received a payout in Retained Earnings from Flying "W" Plastics, which was not listed on the sheet. The Respondent alleges this constitutes fraud or misrepresentation in the formation of the Post-Nuptial Agreement and the agreement should therefore be null and void.
17. The Court finds that the Petitioner holds a fifty percent (50%) interest in Flying "W" Plastics and that his sister owns the other fifty percent (50%) interest. As such, the Petitioner is unable to control the distribution of Retained Earnings. Therefore, the Petitioner would have no prior knowledge of a possible distribution, or the amount of such distribution, from the Retained Earnings. In this instance the Petitioner does not have the ability to control when retained earnings will be paid to the shareholders nor the amount to be paid.
18. The Court further finds that there was no fraud, duress, or misrepresentation in the parties reaching the Post-Nuptial Agreement. Likewise, the Family Court did not find any fraud, duress, or misrepresentation among the parties in reaching the Post-Nuptial Agreement.
19. The Court, therefore, concludes that the Post-Nuptial Agreement is a valid document. As such, the Post-Nuptial Agreement shall be upheld. In the Post-Nuptial Agreement the Respondent waived and released any claim or right she may have had in Flying "W" Plastics as a result of being married to the Petitioner, Douglas Shane Morris. The Respondent also waived and released any claim or right she may have had in the interest or assets of Flying "W" Plastics.

20. The Court finds that the issue of whether or not Retained Earnings are marital property is an issue of first impression in the State of West Virginia. As such, the Court looks to other jurisdictions for guidance.

21. In *J.D.P. v. F.J.H.*, the Delaware court found retained earnings could be marital property if certain factors were met, the most critical being whether or not the spouse had the power to control the distribution of the retained earnings. *Ramon v. Ramon*, 963 A.2d 128, 134 (Del. 2008) citing *J.D.P. v. F.J.H.*, 399 A.2d 207, 210-211 (Del. 1979).

22. In *Ramon v. Ramon*, the Delaware Supreme Court found that the Husband did have a one hundred percent (100%) interest in the companies in question, and that he was in control of when retained earnings would be distributed. *Id.* at 130. Because of this critical factor, the Delaware Supreme Court found that Retained Earnings were rightly considered part of marital property to be divided during the divorce. *Id* at 134.

23. In the case of *In re the Marriage of David M. Casten and Susanne Roesch Casten*, the Iowa Court of Appeals used the same "critical factor" as did the Delaware Supreme Court, in determining whether or not Retained Earnings should be considered marital property to be divided in a divorce. 819 N.W.2d 426, 2012 WL 1860358 (Iowa App.). Here, the court found that the husband was a minority shareholder, without the ability to control the distribution of Retained Earnings, and therefore, Retained Earnings were not marital property. *Id.*

24. In the case before this Court, the Petitioner is not a majority shareholder in Flying "W" Plastics. He owns a fifty percent (50%) interest in the company with his sister holding the other fifty percent (50%) interest in said company.

25. The Court finds that the Petitioner is unable to control the distribution of the Retained Earnings in Flying "W" Plastics. Therefore, the Retained Earnings in Flying "W" Plastics shall not be considered marital property.

26. The Court finds that the Family Court's finding that Retained Earnings were a marital asset was clearly erroneous. As such, the Family Court abused its discretion by setting aside and voiding the Post-Nuptial Agreement on December 26, 2012.

27. The Court concludes that the Post-Nuptial Agreement on December 26, 2012, shall be upheld and applied to the parties in regard to distribution of assets.

28. The Court finds that, as the Post-Nuptial Agreement is upheld, there is no need to address the issue of whether or not Retained Earnings are marital property in this case, as the Respondent signed away any potential rights or claims she may have had to the Flying "W" Plastics in the Post-Nuptial Agreement.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The Respondent's Counter-Petition for Appeal shall be DENIED.
2. The Petitioner's Petition for Appeal shall be GRANTED, with the Post-Nuptial Agreement being upheld and the Final Divorce Decree entered on February 21, 2013, is hereby ORDERED reversed insofar as it gave the Respondent one half (1/2) the Petitioner's stock in Flying "W" Plastics and one half (1/2) the Petitioner's Retained Earnings in said company.
3. It is further ORDERED by this Court that the Post-Nuptial Agreement be reinstated and followed in regards to distribution of the assets among the parties.
4. The Court shall note and preserve all parties' objections and exceptions to the Court's rulings.

5. The Clerk of this Court shall provide copies of this Order to Anita Harold Ashley, counsel for the Petitioner, Douglas Shane Morris, to James Wilson Douglas, counsel for the Respondent, Kimberly A. Morris, and to Family Court Judge Larry S. Whited.

It is accordingly so ORDERED.

ENTERED this the 15th day of July, 2013.

Entered: 15 July 2013

Richard A. Facemire, Chief Judge

7/15/13