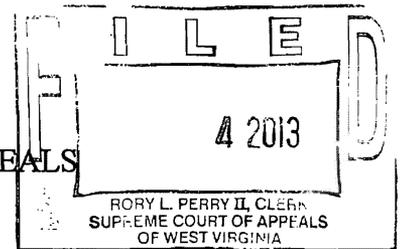


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



AT CHARLESTON

IN RE: THE MARRIAGE OF:

KIMBERLEY A. MORRIS,

Respondent Below,

Petitioner,

vs.

No. 13-0742

DOUGLAS SHANE MORRIS,

Petitioner Below,

Respondent,

PETITIONER'S BRIEF

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August 30, 2013

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

AT CHARLESTON

IN RE: THE MARRIAGE OF:

KIMBERLEY A. MORRIS,
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No. 13-0742

DOUGLAS SHANE MORRIS,
Petitioner Below,

Respondent,

PETITIONER'S BRIEF

Comes now the Petitioner, **KIMBERLEY A. MORRIS**, Respondent below (hereafter 'Petitioner Wife'), by her counsel, James Wilson Douglas, pursuant to Rule 5(g) of the Revised Rules of Appellate Procedure of the West Virginia Supreme Court of Appeals, and in and for her Brief for timely appeal of the Order below, does aver, depose and say, as follows:

ASSIGNMENTS OF ERROR

1. **ERROR ONE: FAILURE TO EMPLOY A STRICTER STANDARD FOR WEIGHING THE VALIDITY AND ENFORCEABILITY OF A POST-NUPTIAL AGREEMENT IN A DIVORCE ACTION AS OPPOSED TO A PRE-NUPTIAL AGREEMENT.**

The Circuit Court erred below by not assessing the validity and enforceability of a post-nuptial agreement with greater scrutiny than a pre-nuptial agreement.

When dealing with post-nuptial contracts, "the utmost fairness and good faith"

should be observed by the party who gains the most from the transaction. In the case of a pre-nuptial, a party can refuse to consummate the anticipated marriage. This is wholly different in the case where the party to the post-nuptial agreement is already in the marriage and may have a number of other considerations, such as children, standard of living, etc. Therefore, coercion, undue influence and duress, though less obvious and more subtle, can be just as effective and overbearing as the actual use of force in causing a party to enter into a post-nuptial contract.

Standards of review: Abuse of discretion, clearly erroneous and *de novo*.

2. ERROR TWO: OVERTURNING THE FAMILY COURT'S RULING FINDING THAT THE FEBRUARY 11, 2009 POST-NUPTIAL AGREEMENT WAS NOT FAIR AND EQUITABLE.

The Circuit Court erred below by upholding a post-nuptial, drafted by the Respondent Husband's Attorney, that (a) consigned a disproportionate percentage of marital assets to the Respondent Husband, (b) did not attach documentation confirming the extent and values of property, (c) did not include all marital assets, and (d) severely understated the anticipated annual income of the Respondent Husband who received the larger share of marital assets.

Under the Post-Nuptial Agreement, *sub judice*, the Respondent Husband would receive \$4,662,738.00 worth of alleged separate/marital property, while the Petitioner Wife would receive a mere \$90,000.00 worth of alleged separate property. In short, the total marital estate of \$4,752,738.00 would give the Respondent Husband 98.11% of the entire marital estate, while the Petitioner Wife would be left with only 1.89% of said marital estate.

In addition to not including all arguably marital or separate assets, the Respondent Husband attached no documentation to the subject Post-Nuptial Agreement to substantiate the financial and asset statements appended thereto as exhibits.

Also, the Respondent Husband grossly under-reported his anticipated income by 75% when indexed against his actual income for the year (2009) of the execution of said Post-Nuptial Agreement, and by over 88.04% when compared to the preceding year of 2008.

Standards of review: Abuse of discretion and clearly erroneous.

3. **ERROR THREE: DETERMINING THAT RETAINED EARNINGS ARE THE ASSETS OF A “FLOW THROUGH” CORPORATION, RATHER THAN DISTRIBUTABLE MARITAL ASSETS SIMILAR TO ACTIVE APPRECIATION OF A SEPARATE BUSINESS, WAS ERRONEOUS.**

The Circuit Court below erred, as a matter of law, when it overruled the Family Court and classified retained earnings of a “flow through” corporation, as corporate assets, controlled by the 2009 Post-Nuptial Agreement, notwithstanding that the shareholder Respondent Husband and Wife had paid income taxes on the retained earnings both before and after the Post-Nuptial Agreement.

Retained earnings are not true assets of a corporation, such as a corporate purchase of an automobile in its name. Said monies, upon which the Parties were already taxed herein, actually represent undistributed dividends or after tax income, that can be considered *re-contributions of the Parties to the capital of the corporation*. Simply put, the corporate earnings are taxed to the Parties, but some of the Parties’ after tax earnings are left in the corporation to insure adequate capitalization, as if the monies had been withdrawn and then redeposited. Retained earnings can also be explained as the measure of active appreciation of a corporation.

The tax driven structure of the subject Corporation, was, at separation of the shareholding Parties herein, a qualified “sub-chapter S” or a “flow through” corporation. This means that the profits¹ of the Corporation “flow through” to the shareholders as if they were partners, in that, the only taxes on those profits/income are those paid by the shareholders, *not* the Corporation.

Standard of review: *De novo*.

STATEMENT OF THE CASE

¹ Retained earnings are but residue of profits kept or ‘retained’ in a corporation.

Having met at Glenville State College, the Parties hereto entered into marriage on June 30, 1992 and had two children, one of each gender, both of whom are now emancipated². The Respondent Husband herein, Douglas Shane Morris, was the scion of the Glenville oil and gas tycoon, I. L. Morris; and in hope of the Respondent Husband ascending to his father's station at some point in the future, he became a part owner in the family petroleum business called Waco Oil and Gas, Inc.

The Fates decreed otherwise. When the Respondent Husband's father became disenchanted with the Respondent Husband's hedonistic and irresponsible life style, the Respondent Husband was terminated and his interest in Waco was purchased by his disappointed parent. Thereafter, the Parties hereto, with two young children in tow, relocated to Roanoke, Virginia, where they purchased, with the Parties' Waco "buy-out" monies in 2002, an opulent fifteen room, multilevel, 6700 square feet mansion, which was to be the family's residence through mid 2005, when they returned to Gilmer County from Virginia. The mechanics and motivations for the 2005 return³ were and are especially relevant to the principal issues raised in this case.

Due to the Respondent Husband's substance abuse, he and the Petitioner had separated in Virginia about mid-December 2004. In an effort to reconcile, and to raise their children in an intact home, the Respondent Husband promised the Petitioner that if she would reunite with him and come back to Glenville, he would build a comparable (to the Roanoke) home in Gilmer County. The Petitioner relented and agreed to reconcile on those terms. The Parties did indeed return to Gilmer County, and at first lived in Waco's airport hanger, and then the Parties

³The following factual representations are summarized from the July 11, 2012 in-Court testimony of the Petitioner.

purchased what the Petitioner thought was to be a temporary dwelling in the form of a double wide modular home.

For the next three plus years or into the beginning of 2009, the Petitioner and her two (2) children, much to her frustration and embarrassment, occupied a domicile that the Petitioner stated would have fit within the bottom floor of her former 6700 square feet Roanoke home.

The Respondent Husband made various excuses for his failure to fulfill his earlier promise regarding the erection of a much grander residence, and the Petitioner's desperation and irritation with her and the children's living arrangements brought matters to the point that the Parties briefly separated for a second time in early 2009. After another reconciliation, the Respondent Husband finally revealed that his procrastination in building the promised home for his family was that he had to have the financial assistance of his multimillionaire father to build such a house, and that his father was insisting on a post-nuptial agreement to protect what was anticipated to be a \$750,000.00 investment.

Bowles Rice, LLP, the corporate attorneys employed by the Respondent Husband's father, were engaged to and did draft the post-nuptial agreement. The Wife had the services of a local Glenville attorney,⁴ Timothy Butcher, who was a friend to both Parties herein.

Petitioner Wife had alleged and argued from the onset of the underlying action that said PNA, which, as stated, was prepared at the insistence of the Respondent Husband's father, I. L. Morris, and drafted by corporate counsel of the Respondent Husband's father, was entered into by the Petitioner Wife under duress, coercion, and undue influence.

⁴There is some lingering question whether the Petitioner Wife's counsel was "independent", where her attorney testified at the July 11, 2012 hearing that he was paid for his representation of the Petitioner Wife by the Respondent Husband's paving his, the lawyer's, residential driveway, or by some other in-kind compensation from the Respondent Husband.

Indeed, Petitioner’s counsel Timothy Butcher testified on the record at the July 11, 2012 trial that the Respondent Husband and his father’s attorney definitely “held [the PNA-house connection] over the Petitioner Wife’s head”, in that, the Petitioner Wife’s attorney was clearly and directly informed by counsel for the Respondent Husband that if she, the Petitioner, did not sign the Post-Nuptial Agreement, then the Respondent Husband would not complete construction on the then pending and now former marital home; i.e., “no signature, no house”.⁵ See also Appendix, p. 31.

Moreover, the Petitioner Wife’s attorney advised her not to sign the PNA, but, out of an overriding desire to have an acceptable house built for her and her children consistent with her and the children’s prior standard of living, the Petitioner Wife signed anyway.⁶ See Appendix, p.

32. After some negotiation on some minor points (but receiving no corroboration of listed property values— Appendix, p. 32) and, at that time, after nearly seventeen (17) years of a tenuous if not difficult marriage and two (2) children, the Parties subscribed to the February 11, 2009 Post-Nuptial Agreement (hereafter ‘PNA’). See Appendix, pp.1 through 19.

Said PNA, which was also entered into more than seventeen (17) years after the February 6, 1992 formation of Flying “W” Plastics, Inc., (hereafter Flying ‘W’) the ownership interests of which were represented, *for the first time on appeal to the Circuit Court below*, or after the trial before the Family Court Judge, to have been given by the Respondent Husband’s wealthy father to the Respondent Husband and his lawyer sister, Shelly Morris Demarino, during the marriage. The Respondent Husband and his sister, were and are the only shareholders of the closely

⁵In-court testimony of attorney Timothy Butcher on July 11, 2012, which was corroborated on the same date by the testimony of the Petitioner.

⁶*Ibid.*

held corporation which elected to become a “Subchapter S” or “flow through” corporation, effective July 1, 2007.⁷

The evidence was unrefuted at trial, and even confirmed by the Respondent Husband himself by his own sworn testimony in open Court, that he had exercised an active and a high level of administrative participation on a daily basis in Flying “W”.

Inspecting the document itself, the terms of the PNA under scrutiny basically consigned said Subchapter S Corporation (Flying ‘W’) and other marital assets, constituting 98.11% of the marital estate unto the Respondent Husband, while the Petitioner Wife took only 1.89% of such assets. In addition, said PNA contained only summary statements of finances by the Parties; i.e., no full financial disclosure was made due to an absence of any supporting documentation attached to the PNA. Appendix, pp. 15 through 18.

Also, the Respondent Husband greatly understated his projected income for the PNA year of 2009. The Respondent Husband reported on the PNA that his estimated annual income for 2009 would be \$231,000. Appendix, p. 16. In actuality, the Parties’ adjusted gross income for 2009 was \$889,862, or almost four (4) times more than the Respondent Husband led the Wife to believe. In comparison to 2008, the year prior to the PNA, the Parties earned \$1,931,914, which income, as well as, the aforesaid 2009 earnings, were the products solely of the Respondent Husband’s efforts because the Petitioner Wife did not work during that year of 2008 or the following year of 2009. Compare Appendix, p. 16 with pp. 154 and 158.

Of equal significance, the PNA failed to include all marital or arguable marital assets. Several working interests in oil and gas wells across central West Virginia, as well as, the

⁷The 2011 gross receipts of Flying “W” were \$40,773,394.00, and \$28,556,061.00 in 2010. See Appendix pp. 174 and 173, respectively, which were Petitioner’s Exhibits at trial on December 26, 2012.

very double wide modular home the Petitioner Wife was seeking to leave were not listed in the PNA attachments.

Furthermore, the retained earnings⁸ held by the aforesaid Corporation under the Parties' named account, was not mentioned in the PNA. Petitioner Wife maintained that even if the PNA were valid and enforceable, the retained earnings were not corporate assets, and thus, distributable, because the Parties had paid taxes on said earnings before and after the execution of the PNA. The Petitioner Wife also contended that, even if the PNA were upheld as to the Corporation, those post PNA retained earnings had been commingled with other corporate assets and monies, thus causing a transmutation of the Flying "W" Corporation, or at least its financial accounts, into marital assets.

Lastly, in the PNA, the new house for which the Petitioner Wife gave up so much, was to be lived in by the Petitioner Wife "rent free" in the event of a divorce, with the Respondent Husband servicing the mortgage until the Parties sold the marital residence, at which time the Petitioner Wife would receive all proceeds in excess of the mortgage payoff; provided, however, the Respondent Husband had the right of first refusal. See Appendix, p. 8. As something of a postscript, the Petitioner Wife also testified at trial on July 11, 2012 that the Respondent Husband had failed to honor her whole consideration for signing off on the PNA; *viz.*, the promised marital house was never finished, which position the Respondent Husband minimized by saying that only minor facets of the construction such as landscaping and closet doors remained undone.

In essence, the Petitioner Wife contended that the terms of said February 11, 2009 Post-Nuptial Agreement were unfair and unconscionable to her, and that despite having had access

⁸Retained earnings carried by Flying "W" in the name of the Respondent Husband and his sister for December 2011 were \$11,853,631.13 and \$14,343,307.86 as of the end of December 2012. See Appendix, pp. 180 and 181.

to legal advice, coercion in the form of denying her and her children the upscale home for which she had left a stately domicile in Virginia four (4) years past, was present and overwhelmed what would have otherwise been an unacceptable trade off in the context of the PNA. Secondly, the Petitioner Wife posited that even if the PNA were upheld, the retained earnings of Flying "W", in not being mentioned in the PNA, were marital assets upon which the Parties had paid taxes, and thus, the same were distributable in the pending divorce action.

The Respondent Husband countered that the Petitioner Wife, a college graduate, had voluntarily and knowingly entered into the PNA, in disregard of the advice of counsel, and that his, the Respondent Husband's, undocumented financial disclosure was of no serious moment. Regarding the omission of retained earnings in the PNA, the Respondent Husband urged that the same were corporate and not marital assets, and the retained earnings were therefore included in the PNA's release of Flying "W" to him.

Both Parties agreed that the validity and enforceability of the PNA should first be determined because of the impact the Family Court's decision would have on the remaining issues of the divorce proper. Trial on the viability of the PNA commenced on June 22, 2012, and the taking of evidence continued and concluded on July 11, 2012.

At the close of the July 11, 2012 hearing, the Family Court Judge found that the PNA should be upheld, primarily because the Petitioner Wife had freely, voluntarily and knowingly entered into the February 11, 2009 PNA, without force or threat; however, the retained earnings of Flying "W" were deemed to be marital assets subject to distribution. Appendix, p. 34.

The Final Hearing in the divorce was scheduled for December 26, 2012 for the purpose of concluding the case and determining the amount of the retained earnings on the January

7, 2012 separation date, and the method for distribution thereof. At the conclusion of the evidence, the Family Court Judge, for the purposes of this appeal, divorced the Parties, and ruled that his former decision as to the validity and enforceability of the PNA would be reversed on the grounds of being inequitable, when one considered other marital assets not covered by the PNA. Appendix, p. 41.

Pursuant to West Virginia Code §48-8-103, the Family Court Judge next awarded lump sum alimony to the Petitioner Wife in the form of one-half (½) of all of the Respondent Husband's interest in Flying "W", being 25% of the common stock of said Corporation. See Appendix, p. 45. Moreover, the Family Court Judge ordered that the Petitioner Wife was entitled to one-half (½) of the retained earnings account attributable to the Respondent Husband as of the January 7, 2012 separation date. Appendix, p. 45.

Interestingly, on the day after the Family Court Judge's pronounced opinion, or December 27, 2012, but before the February 19, 2013 entry of the conforming Final Divorce Decree, the Respondent Husband moved to and did execute and comply with every part of the December 26, 2012 ruling, save the apportionment of the retained earnings account. See Appendix, pp. 37- 49. When the Family Court Judge, upon the Petitioner Wife's objection to the retained earnings omission in the Respondent Husband's draft of the Final Divorce Decree, made the Paragraph N. interlineation in the Final Divorce Decree respecting the same, only then did the Respondent Husband decide that he wanted to appeal the entire December 26, 2012 ruling of the Family Court Judge, entered February 19, 2013. Appendix, pp. 50 - 93.

The Respondent Husband filed his Petition for Appeal and Motion for Stay on March 20, 2013. See Appendix, pp. 50 - 93. The Petitioner Wife lodged her Reply and her

Counter-Petition for Appeal on March 27, 2013. See Appendix, pp. 94 - 119. Respondent Husband, in turn, responded to the Petitioner Wife's Cross-Petition on April 9, 2013, to which Petitioner Wife replied on April 22, 2013. See Appendix, pp. 120 - 135 and Appendix, pp. 136 - 141, respectively.

Argument was had on the Parties' appeals on May 28, 2013. Through his Order of July 15, 2013, the Circuit Court of Gilmer County, the Honorable Richard Facemire presiding, completely reversed the Family Court's February 19, 2013 decision on all points, and granted the aforesaid appeal by the Respondent Husband. Appendix, pp. 144-151.

Hence, this appeal is made to overturn the July 15, 2013 decision of the Circuit Court below and reinstate in its entirety the February 19, 2013 ruling of the Family Court of Gilmer County below.

SUMMARY OF ARGUMENT

Post-nuptial agreements require the closest scrutiny in order to insure fairness and to guard against even subtle, much less overt, coercion. Weighty considerations of children, health, age, and standards of living, as well as, heavy investments of time, sweat and youth may cause a marriage partner to enter into an onerous and one-sided post-nuptial agreement, which elements are not present in pre-nuptial contracts.

Any post-nuptial agreement that consigns to a husband 98.11% or \$4,662,738,00 of the entire marital estate \$4,752,738.00, while giving the wife of a nineteen (19) year marriage only 1.89% of said marital estate, or \$90,000.00, is presumptively unfair and inequitable, and is invalid and unenforceable on its face. When one adds to the mix of facts here the undisguised and stark extortion of the Petitioner Wife's signature to such an agreement in order for her to have a home on the comfort level of her previous domicile and as fulfillment of an enticement to reconcile

from a former separation, the undue influence becomes as obvious as the inequity. The coercion and undue influence is not any less real because the Petitioner Wife may have had the services of an attorney. Quite the contrary, acquiescence in a clearly prejudicial and gender biased post-nuptial agreement over the objection of her attorney underscores the degree of the coercion in its acquisition.

Retained earnings in a flow through corporation were taxed to these Parties each year after the 2007 “Sub S” election. Even after the advent of the nefarious February 11, 2009 PNA, the Parties, not the Flying “W” corporation, paid taxes on those retained earnings and the accounts were carried in the name of the shareholders. The retained earnings of the Corporation were not used for corporate purposes, but rather a stock buy-out of a former shareholder’s widow, the taxes, personal expenses and interests of the individual shareholders; i.e., the Respondent Husband and his sister. In short, the retained earnings had consistently been available to and unilaterally accessed by the Respondent Husband despite his only being a 50% owner in the Corporation. Therefore, irrespective of the validity of the PNA, the retained earnings, as delayed distributions of income in the Flying “W”, are not corporate assets, but rather marital assets subject to distribution.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner urges that oral argument would significantly aid the decisional process under Rule 18(a)(4), WVRRAP. In addition, this matter should be set for a Rule 20(a) argument because this case involves issues of first impression with statewide application or importance, that are likely to recur with respect to the drafting and adoption of post-nuptial, as opposed to pre-nuptial agreements, and separation agreements in general, which are appearing with increasing frequency in West Virginia domestic relations actions. West Virginia Code §48-7-102. Moreover,

as marriages become more affluent and include either marital corporations or separately owned corporations with a marital component by virtue of active appreciation, the divorce question of whether retained earnings in a “flow through” corporate entity are corporate property or marital assets subject to distribution, should be addressed not only in order to give guidance to family courts judges in this State, but also to assist practitioners in advising and aiding clients similarly situated. The predictability function of the law expects it; justice to disadvantaged marriage partners demands it.

ARGUMENT

I. *IN A DIVORCE ACTION A STRICTER STANDARD MUST BE EMPLOYED IN WEIGHING THE VALIDITY AND ENFORCEABILITY OF A POST-NUPTIAL AGREEMENT, AS OPPOSED TO A PRE-NUPTIAL AGREEMENT.*

The Circuit Court below erred by not assessing the validity and enforceability of a post-nuptial agreement with greater scrutiny than a pre-nuptial agreement.

Pre-nuptial and post-nuptial agreements are, first and foremost, contracts. Thus, the rules of contract formation apply to pre-nuptial and post-nuptial agreements. *Lee v. Lee*, 228 W.Va. 483 721 S.E.2d 53 (W.Va. 2011). Basically, there must be valid consideration on both sides of the bargain to be a valid contract. See generally *Restatement (Second) of Contracts § 71*. Next one must inspect the terms of a contract in order to ascertain validity. Where the terms of a contract are substantially unequal, the disadvantaged spouse may be able to establish the defense of unfairness or unconscionability. *Id.* Any ambiguities or shortcomings in a contract should be construed against the Party who drafted the document. *Lee, supra.*

Descending to specifics, a post-nuptial is an agreement between lawful spouses, who intend to continue their marriage, that alters or confirms their legal rights that would otherwise arise under the divorce law of the controlling jurisdiction. American Law Institute, *Principles of the Law of Marital Dissolution*, §7.01(1)(b)(2002).

This Court has held that dower may be barred by a post-nuptial marriage contract, but the intent of the parties to bar dower must clearly appear from the language of the contract, or be necessarily implied. *Welsh v. Welsh*, 136 W.Va. 914, 69 S.E.2d 34 (1952). Further, when dealing with post-nuptial contracts, “ ‘the utmost fairness and good faith should be observed by the husband, and the consideration moving to the wife should be of such value as reasonably to compensate her for what she agreed to surrender; and such an agreement must be in writing, and must be entirely free from doubt.’ ” *Id.* at 921.

“A post-nuptial agreement stands on a different footing from both a premarital and a separation agreement.” *Ansin v. Craven-Ansin*, 457 Mass. 283, 289, 929 N.E.2d 955, 962 (2010). An agreement in anticipation of marriage is vastly different from a situation where a spouse is trying to save a long term marriage “to which she has committed her best years.” *Id.* at 290 and 962.

Moreover, a post-nuptial agreement must be given closer scrutiny than a pre-nuptial agreement for the simple reason that in the case of a pre-nuptial, a party can still walk away from the contemplated marriage. “Before marriage, the parties have greater freedom to reject an unsatisfactory premarital contract.” *Ansin* at 289 and 962. This is radically unlike the situation where the party to the post-nuptial agreement is already in the marriage and may have a number of other considerations, such as children, standard of living, advanced age, or waning health; thus, the opportunity for and the threat of latent or patent coercion in the subscription thereto is much greater. *In re Marriage of Traster*, 291 P.3d 494 (Kan. App. 2012). In brief, “[c]ourts must recognize that parties to a marriage are not dealing at arm’s length”. *Casto v. Casto*, 508 So.2d 330, 334 (Fla. 1987).

The State of Connecticut explains that standards of fairness and notions of equity

are an ongoing process, not frozen in time. “Although we agree with the defendant that principles of contract law generally apply in determining the enforceability of a post-nuptial agreement, we conclude that post-nuptial agreements are subject to a *special scrutiny* and the terms of such agreements *must be both fair and equitable at the time of the execution and not unconscionable at the time of the dissolution.*” *Bedrick v. Bedrick*, 300 Conn. 691, 696-697, 17 A.3d 17,23 (2011). (Emphasis supplied). Accord: *Pacelli v. Pacelli*, 319 N.J. Super. 185, 190-196, 725 A.2d 56 (1999).

In the case below, the Circuit Court of Gilmer County employed the same degree of review, applied the same rules, and cited the same authorities that it would have utilized had it been evaluating the validity of a *pre-nuptial* contract, *not a post-nuptial* agreement, as presented here, thereby committing error. See Appendix, pp. 146-147, Paragraphs Nos. 11., 12. and 13.

II. A POST-NUPTIAL CONTRACT DRAFTED BY THE HUSBAND’S ATTORNEY CANNOT BE UPHeld THAT (A) CONSIGNED A VASTLY DISPROPORTIONATE PERCENTAGE OF MARITAL ASSETS TO THE HUSBAND, (B) DID NOT ATTACH DOCUMENTATION CONFIRMING THE EXTENT AND VALUES OF PROPERTY, (C) DID NOT INCLUDE ALL MARITAL ASSETS, AND (D) SEVERELY UNDERSTATED THE HUSBAND’S ANTICIPATED ANNUAL INCOME.

The Circuit Court below erred in overturning the Family Court’s ruling finding that the February 11, 2009 Post-Nuptial Agreement was unfair and inequitable.

The Respondent Husband below bore the burden of proof on an appeal to the Circuit Court of Gilmer County, in that, all presumptions are in favor of the correctness of the proceedings and judgment by the Family Court below. *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973).

In addition, the Circuit Court below, in relation to the validity, equity and enforceability of February 11, 2009 PNA, should have given due deference to the Family Court’s findings of fact and conclusions of law, or the application of the facts to the law, if the Family Court

did not violate one of the established standards of review. *Stephen L.H. v. Sherry L.H.*, 195 W.Va. 384, 465 S.E.2d 841 (1995).

Also, the Circuit Court below, as an immediate appellate court for family court decisions, cannot substitute its judgment for the Family Court, and the Family Court's findings and inferences may not be overturned even if the Circuit Court below may have been inclined to make different findings or draw contrary inferences. *Protan v. Ghannam*, 2011 LEXIS 121 (Memorandum Decision 2011) and *Rosen v. Rosen*, 222 W.Va. 402, 664 S.E.2d 743 (2008).

A hallowed tenet in this State's case law is that the standards of review of a final order from a family court, in this application, must be shown to have been clearly erroneous and/or an abuse of discretion. *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004).

In the case *sub judice*, the Respondent Husband for the first time on appeal to the Circuit Court, referred to the Flying "W" as being separate property by virtue of being a gift from his father, I. L. Morris. Appendix, pp. 55 and 57.

If Flying "W" Plastics, Inc., or the constituent shares thereof, were not marital property, as erroneously alleged by the Respondent Husband in his April 9, 2013 Reply herein, then why did he and his attorneys deem the Petitioner Wife's signature on the February 11, 2009 Post-Nuptial Agreement to be necessary in the first place? Moreover, considering the litany of corporate aspects and assets attempted to be covered by the recitations of the February 11, 2009 PNA, why were retained earnings not mentioned at any place therein if the Respondent Husband deemed them a corporate asset?

Flying "W" Plastics, Inc., was incorporated just four (4) months before (2/6/92) the Parties' marriage (6/30/92); however, even if said Corporation or its shares at corporate birth were separate, the Respondent Husband, by his own testimonial admission and as confirmed by Eric

Brown (the CPA and comptroller for Flying ‘W’) at trial, had exercised a high level of administrative participation on a daily basis, therefore giving rise to the “active appreciation” concept of equitable distribution.

This principle stands for the proposition that although an asset may be separate in its initial form, appreciation in its value during the marriage may be wholly marital if certain circumstances have occurred. See *Mayhew v. Mayhew (Mayhew II)*, 205 W.Va. 490, 519 S.E.2d 188 (1999). This was certainly the case below—all appreciation of the Corporation was during the marriage and at least a partial result of the Respondent Husband’s efforts and involvement. Therefore, active appreciation is distributable. *Id.*

Again, assuming for argument’s sake that Flying “W”, or its stock attributed to the Respondent Husband, was separate property from the inception of the subject Corporation, then the same became marital when the retained earnings, taxed to the Parties, were commingled with other corporate earnings or shareholder dividends, and such **commingling** caused a **transmutation** of separate property into marital property. *Miller v. Miller*, 189 W.Va. 126, 428 S.E.2d 547 (1993); and *Mayhew v. Mayhew (Mayhew I)*, 197 W.Va. 290 475 S.E.2d 382 (1996).

Be that academic exercise as it may, Respondent Husband had the burden of proof to demonstrate that Flying “W” or its stock claimed by the Respondent Husband was not marital. *Mayhew I, supra*. For some unexplained reason, the Respondent Husband did not undertake this burden at trial and the same should now be deemed as having been waived. In essence, the Respondent Husband cannot raise the issue of the separate classification by gift of Flying “W” Plastics, Inc., or its stock, for the first time on appeal. *Mayhew II, supra*.

With respect to validity, equity and enforceability of the PNA, there are certain

stipulated or unrefuted facts from the Family Court proceedings below, appearing in the Appendix, pp. 15 - 19, pp. 28 - 36, p. 43, and pp. 154, 158 and 162; to-wit:

1. That the subject PNA was entered into by the Parties on February 11, 2009;
2. That the PNA was prepared at the insistence of the Respondent Husband's father, I. L. Morris, and the same was drafted by legal counsel for the Respondent Husband's said father;
3. That the PNA was entered into nearly seventeen (17) years after the Parties were married, and the Parties' circumstances have changed for the worse in the four (4) years since said PNA was executed;
4. That pursuant to the terms of the PNA, the Respondent Husband would receive \$4,662,738.00 worth of alleged separate property, while the Petitioner Wife would receive a mere \$90,000.00 worth of alleged separate property; and, if said PNA were to control the equitable distribution of the assets herein, the Respondent Husband is left with property valued at *over fifty (50) times the amount left to the Petitioner Wife*;
5. That reduced to comparative quantitative terms, under the PNA, the total marital estate of \$4,752,738.00 would have generated the following inequitable result: the Respondent Husband would have received 98.11% of the entire marital estate, while the Petitioner Wife would have acquired only 1.89% of said marital estate;
6. That said PNA does not include all of the Parties' actual or potential assets⁹;

⁹ The property listings did not include Respondent Husband's oil and gas working interests, royalties, holdings or leaseholds, nor did they list a modular home, a trust set up from his retained earnings account at Flying "W", stock holdings in another family corporation, investments, all insurance policies or various higher value items of personalty, such as

and, the Respondent Husband did not provide a full financial disclosure prior to the execution of said PNA; i.e., that in addition to not including all arguably marital or separate assets, the Respondent Husband attached no documentation to the PNA to substantiate the summary financial and asset statements attached thereto as exhibits; and,

7. That the Respondent Husband grossly under-reported his income, in that, the Respondent Husband represents in the post-nuptial agreement that his estimated annual income for 2009 would be \$231,000. In actuality, the Parties' adjusted gross income for 2009 was \$889,862. In 2008, the year prior to the PNA, the Parties earned \$1,931,914, and in 2010, the year after the PNA, the Parties reported adjusted gross income of \$1,070,202, which income for all three (3) years was the product solely of the Respondent Husband's efforts because the Petitioner Wife did not work during that year of 2008 or the following years of 2009 and 2010.

One may then conclude on these admitted or unchallenged facts that the Respondent Husband misled the Petitioner Wife as to the total effect of the PNA, as well as, what his annual income was and what the value of the marital property was at the time of the PNA.

Of greatest significance to this case, the said PNA was, according to the July 11, 2012 in-Court testimony of Petitioner Wife's counsel, "held over the [Petitioner Wife's] head", in that, the Petitioner Wife was informed by Respondent Husband's counsel, through her attorney, that if she did not sign the PNA, then the Respondent Husband would not complete construction on the now former marital home; i.e., "no signature, no house". Appendix, p. 31.

Moreover, the Petitioner Wife's attorney had advised her not to sign the PNA, but which, out of desire to have a house built for her and her children consistent with her and the

recreational and other vehicles. See, in part and for example, Appendix, pp. 291 and 305.

children's prior standard of living in Virginia, the Petitioner Wife signed anyway. Appendix, pp. 33 and 57.

The Circuit Court erred below by viewing the presence of an attorney in the PNA transaction as the metaphorical detergent "washing away of all sins" of coercion, undue influence or duress; and, apparently as a question of law, the Circuit Court below found the fact of the Petitioner Wife's being represented by counsel as being dispositive of all claims of coercion in overruling the Family Court and upholding the PNA. See Paragraphs 14. and 15. of the Circuit Court's July 15, 2013 Order, appealed hereby, appearing in the Appendix at p. 147.

Surely, this Court cannot imagine or even conceive of a more coercive measure than to withhold suitable habitation to a spouse and her children, unless her signature appeared on a compromising and property related document. Also, the mere presence of an attorney in negotiation of a post-nuptial and his or her unheeded advice to refrain from its execution, does not equal fair and equitable or negate unconscionability in the referenced document, nor does it relieve the trial court of the obligation to pass on the presence of fraud, duress or unconscionable conduct, or enforceability and equitable considerations in any marital agreements. West Virginia Code §48-7-102. In essence, coercion is not any less real because one may have the services of an attorney.

In this connection, compare the case of *Casto, supra*.¹⁰ The parties there were married for a second time in 1967. The wife never worked outside the home. During the last marriage, the husband had made a fortune in developing shopping centers. In 1977, the parties entered into a post-nuptial agreement whereby the wife took the marital home, with mortgage paid for one year, \$100,000.00 in cash, health insurance benefits, club memberships, and credit card

¹⁰508 So.2d 330 (Fla. 1987).

privileges; and whereby the husband took “everything else”, which was later estimated at trial to be valued at \$10,000,000. Each party also waived claims for alimony and attorney fees.

The husband in *Casto* filed for a divorce in 1978 and sought to enforce the post-nuptial, while the wife contested the same based on claims of duress and over-reaching by the husband.

There were other factual features in *Casto* very similar to the case at bar. The wife had prepared a written addendum to the post-nuptial of her understanding of her husband’s holdings and she did admit to a general knowledge of their assets. The husband was represented by counsel, during the negotiations, and the wife had two attorneys: the first who advised her not to sign the post-nuptial, and a second lawyer who did. The evidence also revealed that the husband had told the wife after the first attorney advised her not to sign the post-nuptial, that she would get another attorney to approve the post-nuptial agreement, or he would see to it that she would lose the marital home and all the furnishings therein, and that he would burn down the marital home. The wife’s second attorney was not well versed in domestic relations, and inspected the post-nuptial agreement as to whether it “was in proper form” only. *Id.* at 335.

The *Casto* domestic relations trial judge had ruled that the husband’s disclosure was insufficient, that the post-nuptial agreement was unfair and inequitable, and that the conduct of the husband had negated the legal advice she had initially received not to sign the agreement, all of which nullified the post-nuptial contract. Recognizing that parties to a marriage do not deal at arms length in arriving at marital agreements, the *Casto* appellate court affirmed the trial court in all particulars as articulated in that lower court’s opinion, set forth above. *Id.* at 334 and 335.

Other collateral, but relevant evidence before the Gilmer County Family Court

below that the marital home remained unfinished as of the trial date. See footnote No. 3 above. The affirmative defense of “failure of consideration” asserted by the Petitioner Wife in her pleadings carried more than passing weight.

Worthy also of some consideration, the Respondent Husband had already presumptively accepted and acted upon said December 26, 2012 Final Divorce Decree, entered February 19, 2013, by the issuance of 44.5 shares of stock to the Petitioner Wife, pursuant to the Court’s pronounced ruling of December 26, 2012, which terms were not contained within a written Order until February 19, 2013, or nearly two (2) months later. Appendix, pp. 53 and 118. If the Parties have acted consistent with the Family Court Judge’s Order and conveyed property, then the Parties have reformed and modified the PNA by their conduct and apparent agreement on the terms of the Family Court Judge’s December 26, 2012 Final Order, which they obviously accepted. Compare *Teed v. Teed*, No. 12-0232 (W.Va., filed May 17, 2013) (Memorandum Decision).

Based on the foregoing, there can be no other conclusion that the terms of the February 11, 2009 Post-Nuptial Agreement are and were unfair and unconscionable to the Petitioner Wife, and the same was entered into by the Petitioner Wife under duress, coercion, and undue influence.

III. *RETAINED EARNINGS OF A “FLOW THROUGH” CORPORATION, UPON WHICH THE PARTIES TO A MARRIAGE PAID INCOME TAXES, ARE DISTRIBUTABLE MARITAL ASSETS, AND NOT ASSETS OF THE CORPORATION.*

The Circuit Court below erred, as a matter of law, when it overruled the Family Court and classified retained earnings of the “flow through” Corporation, as corporate assets, controlled by the 2009 Post-Nuptial Agreement, notwithstanding that the shareholder Husband and Wife had paid income taxes on the retained earnings, and the shareholder Husband had taken additional non-payroll and third party draws from the Corporation, both before and after the execution of the Post-Nuptial Agreement.

All property and earnings acquired by either spouse during a marriage is presumed marital. West Virginia Code §48-1-233. Since case law construes the aforementioned statute as expressing a marked legislative preference for characterizing the property of spouses as marital property, the burden of proof is on the spouse party who asserts the non-distributable separate property classification in a divorce action. *Loudermilk v. Loudermilk*, 183 W.Va. 616, 397 S.E.2d 905 (1990).

If the February 11, 2009 PNA is upheld in its separate property consignments, it is limited to the property covered by its terms. The February 11, 2009 PNA did not mention the Respondent Husband's retained earnings account at Flying "W".

Irrespective of the validity of the PNA, the Family Court below found on July 11, 2012, and again on December 26, 2012, that the retained earnings of Flying "W" Plastics, Inc., were to be marital properties because the Parties had paid taxes on said earnings over several years during the marriage. This was purely an equitable distribution issue and NOT an alimony issue. See Appendix, p. 34, being the August 7, 2012 Order, Page 7, last paragraph, and p. 45, being the Final Divorce Decree, Page 9, Paragraph 10., n), respectively.

For the Family Court to have denied, or to have failed to award the Petitioner Wife one-half (½) of the retained earnings, would have rendered the Family Court's lump sum alimony award meaningless or moot when one considers the two (2) letters from Marc Monteleone, Esq., attorney for Flying "W" Plastics, Inc., attached to the Petitioner Wife's March 27, 2013 Response to Respondent Husband's Petition for Appeal (to the Circuit Court below). Appendix, pp. 111 - 118. These missives indicate or clearly imply that the Petitioner Wife would not receive one penny from the hostile Respondent Husband and his sister, who owns the remaining shares of the subject company, absent a sale of Flying "W". *Ibid*. This is the reality of the corporate attitude that would

defeat the Family Court Judge's ruling in this regard.

There are also legal, as well as, equitable reasons for awarding the Petitioner Wife her ratable share of the Parties' retained earnings accumulated through, and taxed to them over, a number of years during the marriage. To make Petitioner Wife's shares equal to the shares that the Respondent Husband retains, she must have one-half (½) of the retained earnings account, as well. Without such an award, the Petitioner Wife does not have a position equal to the Respondent Husband. Simply put, her position as a minority shareholder is less than equal. Moreover, the Respondent Husband would receive a windfall of Petitioner Wife's one-half (½) of the retained earnings, which is accentuated if the Respondent Husband would choose to pay dividends from the retained earnings in the future.

To be clear, the Petitioner Wife does not maintain that there must be an immediate cash *payout* to her from the retained earnings, but she merely contends that she should share ratably in the account *entitlements*, much as one would have a bank account, subject to withdrawal restrictions.

What precisely are retained earnings for the purposes of this discussion? Retained earnings are not true assets of the corporation, such as a corporate purchase of an automobile in its name. Said monies, upon which the Parties were already taxed, actually *represent undisbursed dividends or income*, or they can be said to be *re-contributions of the Parties to the capital of the corporation*. Concisely stated, the corporate earnings are taxed to the Parties, but some of the Parties' after tax earnings are left in the corporation to be withdrawn at a later time, or to insure adequate capitalization, as if the monies had been withdrawn and then redeposited.

Moreover, retained earnings, sometimes referred to as Accumulated Adjustments Account (hereafter 'AAA'), represent the whole of the shareholder's undistributed but already taxed

net earnings, which can be numerically determined by multiplying the AAA by the shareholder's percentage of stock ownership.

Retained earnings are similar to a bank savings account with respect to entitlements, and approved withdrawals therefrom, which are determined by the shareholders. This Court should not accept the Respondent Husband's argument below, and anticipated position here, that retained earnings accounts are like treasury stock of the subject Corporation, and thus, corporate assets. The glaringly apparent reason for rejection of such a position is simple—the Parties hereto **DID NOT** pay income taxes on any treasury stock or any other common corporate assets, such as automobiles, equipment, inventory, land or condominiums owned by the Corporation.

This Court should not overlook the functioning form of the subject Corporation, which supports the Petitioner Wife's position; to-wit: Flying "W" Plastics, Inc., was, at separation, a qualified "Sub S" or a "flow through" corporation. This means that the profits¹¹ of the Corporation "flow through" to the shareholders as if they were partners, in that, the only taxes on those profits/income are those paid by the shareholders, *not* the Corporation. Essentially, the tax planning attraction is that the same income for "Sub S" corporations is not taxed twice: once at the corporate level and once at the dividend or salary level. Thus, the Respondent Husband cannot have it both ways—retained earnings, undisbursed dividends or profits that are income to him only for tax purposes, but corporate assets that cannot be reached for equitable distribution purposes.

Petitioner Wife would advance another very compelling point in favor of the

¹¹ A short definition is that retained earnings are that portion of residue profits not paid out as dividends or 'retained' in a corporation. Black's Law Dictionary, (Abridged 5th Edition 1990). Another brief definition is that an AAA is the summation of undistributed, after tax earnings.

marital classification of retained earnings. Had the Respondent Husband sold ½ of his 50% of his corporate shares to a stranger at any time after the corporate issue of stock and certainly after the “Sub S” election, that portion of the retained earnings corresponding to the amount of the third party stock sale, or 25% in our example, would have gone with the purchase and the purchaser.

Petitioner Wife further argues that after the Family Court Judge’s February 19, 2013 Final Divorce Decree, the Respondent Husband’s then retained earnings account was configured in an amount as if he owned 50% of the Flying “W” Plastics, Inc., stock, which, of course, was then not the case. When argued in any proceeding below, Respondent Husband did not deny it.

Authority for the classification of retained earnings within a divorce context is sparse, but not non-existent. In the only case in West Virginia that even mentions retained earnings, this Court appeared to equate distributable active appreciation with retained earnings accounts, so that both are not counted in equitable distribution computations. See *Smith v. Smith*, 197 W.Va. 505, 475 S.E.2d 881 (1996), footnote 11. Thus, one could conclude that this Court in *Smith* (had it decided the issue), believed that retained earnings in a corporation were distributable in marital dissolution actions.

This Court, however, should note with approval, and be fully persuaded by the authority from other jurisdictions that the retained earnings in the subject Corporation, to the extent of the Respondent Husband’s holdings on the date of separation, are wholly marital and subject to distribution, regardless of any decision reached herein regarding the enforceability of the February 11, 2009 PNA.

Although West Virginia has not squarely decided the question of the marital/non-

marital nature of retained earnings within a divorce context, aside from the *Smith* footnote mentioned above, other jurisdictions have addressed this issue. For example:

(i) *Ramon v. Ramon*, 963 A.2d 128 (Del. 2008), which held that retained earnings in marital companies are marital properties for distribution to the wife because: 1) husband had the burden of proof of showing such assets were not marital, and 2) husband had the power to distribute funds from the retained earnings. In *Ramon*, the husband argued, as the Respondent Husband did below in the case *sub judice*, that the family court did not have jurisdiction over the third party corporation where the retained earnings were on deposit. The Appellate Court disagreed, stating that since the retained earnings were deemed marital, the Court did not need jurisdiction over the company, when it had jurisdiction of the parties and the divorce subject matter. *Id.* at 135.

(ii) *In re Marriage of Lundahl*, 919 N.E.2d 480 (Ill. App. 2009), determined that the husband's retained earnings were marital because he was the sole shareholder, and he alone possessed the ability to distribute funds from the retained earnings (which he did every year); and that the retained income was the husband's actual income from the business which was merely delayed in its realization. *Lundahl* is readily contrasted with the Illinois domestic relations appeal, *In re Marriage of Joynt*, 375 Ill. App. 3d 817, 874 N.E.2d 916 (Ill. App. 2007), cited by the Respondent Husband below, in which Midwest case, retained earnings were deemed non-marital solely for the reason that the husband was only 33% shareholder and did not have the power to solely distribute income from the retained earnings account.

In the case at bar, the Respondent Husband and his sister, each having 50% of the subject stock, have undiluted control over the distributions of retained earnings income, and the

testimony below indicated that they had done so, on an frequent basis, since Flying “W” Plastics, Inc., had been incorporated, which will be more fully discussed *infra*.

In addition to *Joynt*, the Respondent Husband sought solace below in the dated rulings of other jurisdictions that hold retained earnings to be non-marital. This dependence is misplaced, especially his heavy reliance upon the case of *In re Casten*, 819 N.W.2d 426 (Iowa App. 2012). The dispute in *Casten*, hinged on the fact that husband was 1) only a minority (*less than 50%*) shareholder, 2) that he did not have the authority to distribute retained earnings, and 3) that he did not conspire with others to minimize distributions from retained earnings.

(iii) *Heineman v. Heineman*, 768 S.W.2d 130 (Mo. App. W.D. 1989), similarly, deemed wife’s retained earnings in her studio business to be marital on the grounds that she did not take a salary during the marriage for tax purposes, and that she was the sole proprietor, and that the retained earnings actually represented the income she did not take.

(iv) *Zaccardelli v. Zaccardelli*, 2013 Ohio 1878 (Ohio App., No. 26262, 2013) is the most nearly factually identical, recent (2013) and simplistically influential case, supporting Petitioner Wife’s position herein.

In *Zaccardelli*, the wife and husband were married in 2000 after executing a pre-nuptial agreement that the husband’s pre-marital interest (50% with his brother having 50%) in his family business, Blue Line Design, Inc., a Subchapter “S” corporation (hereafter ‘Blue’), including any increase in value, would remain the husband’s separate property. Subsequent to the wedding, the wife quit her job as a teacher two years later to raise two children born in 2002 and 2004, respectively. Wife filed for divorce in 2010, and the case proceeded to trial on December 16, 2011.

The parties did not contest the validity of the pre-nuptial, but they disagreed on its

application to the retained earnings in Blue and the former marital residence. The trial court determined that ½ of the retained earnings accumulated during the parties' marriage was undisbursed income attributable to husband as a 50% shareholder in Blue, and therefore 50% of the retained earnings was distributable as marital property in the divorce case. *Id.* at p. 2.

The husband appealed, claiming (a) that the parties' pre-nuptial contract barred wife's recovery of any portion of the Blue corporation-held retained earnings account because the retained earnings were specified in the asset statement attached to the pre-nuptial, and (b) that the retained earnings account was a Blue corporate asset anyway, and (c) that he had no unilateral access to Blue's retained earnings account without the consent of his brother, the other 50% owner of Blue. *Id.* at pp.3-7.

Rejecting the husband's contentions in *Zaccardelli*, the Ohio Appeals Court affirmed the domestic relations trial court, and held that, as in the case at bar, the classification of the retained earnings as marital, did not affect the husband's separate ownership of Blue and the increase in value of the corporation, under the valid and enforceable pre-nuptial agreement— it just did not cover the retained earnings. This disposed of the husband's first argument. *Id.* at p. 5.

Also, the Ohio appellate court, in addressing the last two points of the husband's claim together, stated that the analysis of whether the retained earnings were marital, undistributed income to the husband, despite his having only 50%, would turn on his accessibility to the retained earnings of Blue. *Id.* at p. 6.

In reviewing the evidentiary record, the *Zaccardelli* court found that, from the shareholders' retained earnings account, Blue had purchased two (2) vehicles for the husband's use, paid the husband and wife's property taxes, and made contributions to the pair's health savings

account. *Id.* at p. 7. The fact that the husband in *Zaccardelli* had claimed as income the monies paid by Blue from the retained earnings account for the property taxes and health savings account contributions, seemed to clinch the issue for the court in favor of a marital property classification of the retained earnings account. *Id.*

The similarities of *Zaccardelli* to the case at bar, are as striking as they are obvious. The Respondent Husband below is a co-majority shareholder with his sister, Shelly DeMarino, and 2) *if the Respondent Husband herein and his sister do not have the power to distribute retained earnings, who does?*

Also, after 2007, when the subject Corporation elected “Sub-Chapter S” status, the Respondent Husband and his sister were the only shareholders in the subject corporation, owning equal share percentages therein; and, according to Eric Brown, the corporate accountant and comptroller, various payments were made at times from their respective retained earnings accounts for and on behalf of the Respondent Husband. Therefore, Respondent Husband could never be considered a “minority” shareholder in the said Corporation, mainly due to the established fact that he did have and did exercise equal authority with his sister to distribute funds in the past from his retained earnings account. See Respondent Husband’s July 2, 2012 Financial Disclosure below, at Appendix, pp. 183 - 330.

As in *Ramon* and *Zaccardelli* , the Respondent Husband here cannot seriously argue that as a 50% shareholder, he is a “minority” shareholder when he and his sister, the other 50% shareholder, have had a history of taking draws from the retained earnings accounts for personal taxes, debts and acquisitions, which evidence before the Family Court was provided by their own company accountant, Eric Brown. See Appendix, p. 182, being the July 1, 2007 through June 22, 2012 recapitulation or summary of Respondent Husband’s draw expenditures from his

equity account in Flying “W”, designated as Petitioner Wife’s Exhibit 9 tendered at the July 11, 2012 Family Court hearing. Also, see Appendix, pp. 183 - 330, being the Respondent Husband’s July 2, 2012 Financial Disclosure, which confirmed the individual draws by the Respondent Husband that are summarized on the Appendix, p. 182 aforesaid.

Specifically, this Court should remark that over a number of years, including 2010 through 2012, the Respondent Husband took draws designated as “non-payroll owner” and “\$0.00 tax” draws from Flying “W”, not only for payment of taxes,¹² but also, for undesignated purposes at irregular intervals in amounts ranging from \$5,000.00 to \$30,000.00 in 2011 alone, none of which apparently required the other 50% shareholder’s permission or cooperation. Appendix, pp. 200 - 212.

According to Eric Brown, the Corporation’s accountant, the Respondent Husband and his sister also utilized the retained earnings account to complete, over a four (4) year period, the post “Sub S” election buy-out (\$586,522.27) of the widow of a deceased former shareholder, one Kenny Greenlief, who held a 10% interest in Flying “W” at the time of his death on September 26, 2006 (which was just a few months before the said July 1, 2007 “Sub S” election).

The single most significant fact to be noted from the variety of the Respondent Husband’s draws from his equity, AAA, or retained earnings accounts is that said draws, including the Greenlief buy-out, were for personal¹³ rather than corporate purposes; i.e., the Flying “W” Corporation received or derived no financial benefit, no purchases, no maintenance from the monies

¹²See Appendix, pp. 188, 224, 229, 230, and 213 - 269.

¹³See Appendix, p. 192 (two [2] house payments); Appendix, p. 194 (landscaping); Appendix, pp. 271 - 330 (electrical work on the Morris home to personal vehicle maintenance and repair to gifts to Respondent Husband’s father to water fixtures for his residence to funding of personal trusts to purchasing personal vehicles or paying off loans for personal vehicles).

in these retained earnings accounts—they were historically used, enjoyed and consumed by the two equity shareholders *for wholly personal purposes!!!* See Appendix, pages set forth in footnotes 12 and 13 hereinbefore.

Succinctly, whether the Respondent Husband’s retained earnings in Flying “W” are characterized as dividends or undistributed income, they are still income, and as set out above in vast detail, the Respondent Husband treated the retained earnings account at Flying “W” as his own personal banking account, drawing and *unilaterally* accessing the monies available in such amounts and when and for whatever purposes as he pleased. If the Respondent Husband herein claimed the retained earnings as income, and paid taxes on that income, why should this Court regard or treat it any differently in a divorce case? If the retained earnings account was corporate in nature, would one be able to point to any monies that were spent from the retained earnings for the good of the Corporation? The subject Corporation herein did not benefit from one dime of the retained earnings. The apparent answer then is the same to both questions: the retained earnings of Respondent Husband’s account at Flying “W”, which he historically claimed as income, is a distributable marital asset and not a corporate asset.

These facts alone (the Respondent Husband’s unilateral and unrestricted access to his AAA, together with his tax treatment of/payment on the retained earnings) should render his retained earnings account marital rather than corporate property. Thus, the erroneous legal conclusions made on July 15, 2013 by the Circuit Court below in holding the Respondent Husband’s corporate retained earnings to be a corporate asset are successfully underscored and exposed. Appendix, pp. 148, 149 and 150.

Finally, the Respondent Husband cannot seriously contend that the Petitioner Wife herein would have no interest in any dividends or undistributed income disbursed in the future from

the retained earnings account that the Parties paid taxes on and which existed during the marriage. See West Virginia Code §48-7-104. Therefore, how can the Respondent Husband argue below that the Petitioner Wife would have no distributable marital interest in the retained earnings account that generated those future dividends?

All of the foregoing factors should indicate the plain error of the Circuit Court below in concluding within Paragraphs 17., 24., 25., 26. and 28., that the retained earnings account of the Respondent Husband were not marital assets but rather corporate assets that were controlled by the ill-conceived February 11, 2009 PNA. Appendix, pp. 148, 149 and 150.

CONCLUSION

THIS Honorable Court should deem this appeal timely perfected; that the same be promptly accepted, properly docketed and duly considered; that upon the facts stated, the errors and omissions complained of, the arguments made, the reasons given, the authority cited, and oral presentation, if permitted, the July 15, 2013 Order of the Circuit Court of Gilmer County, the intermediate appellate trial court below, granting the Respondent Husband's Petition for Appeal to the Circuit Court of Gilmer County, and thereby reversing the February 19, 2013 Final Divorce Decree of the Family Court of Gilmer County, should be **REVERSED, set aside and held for naught;**

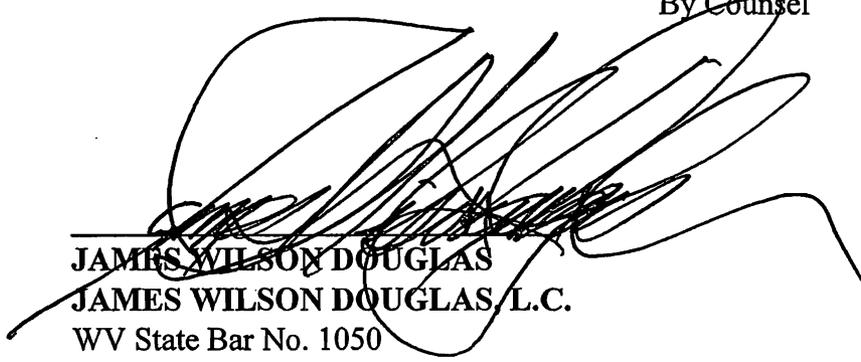
AND, that the same be **REMANDED with instructions,** to reinstate said February 19, 2013 Final Divorce Decree of the Family Court of Gilmer County;

AND, that Petitioner be granted such other and further relief as this Court may deem equitable, proper and just, and in the premises, meet, she will ever pray, etc.

KIMBERLEY A. MORRIS,

Petitioner,

By Counsel



~~JAMES WILSON DOUGLAS~~

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WV State Bar No. 1050

145 Main Street,

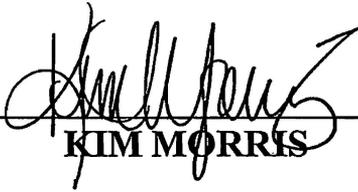
Sutton, West Virginia 26601

Counsel for Petitioner

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF BRAXTON, TO-WIT:

KIM MORRIS, the Petitioner named in the foregoing
Attached Pleadings, after being duly sworn, says that the facts and allegations
therein contained are true, except so far as they are therein stated to be on
information and belief, and that so far as they are therein stated to be on
information and belief, she believes them to be true.



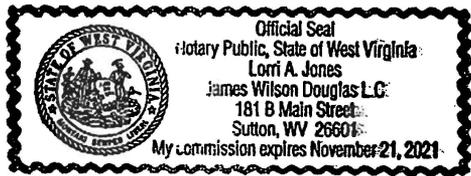
KIM MORRIS

Taken, sworn to and subscribed before me this the 30th day of
August, 2013, by **KIM MORRIS**.

My Commission Expires: November 21, 2021

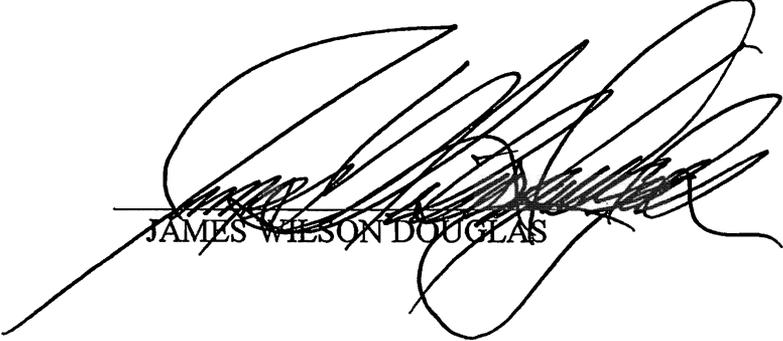


NOTARY PUBLIC



CERTIFICATE OF SERVICE

I, JAMES WILSON DOUGLAS, the undersigned attorney do hereby certify that a true copy of the foregoing Petitioner's Brief was deposited in the regular United States mail in an envelope properly stamped and addressed to Anita Harold Ashley, Post Office Box 823, Spencer, West Virginia 25276, on this 30th day of August, 2013.



JAMES WILSON DOUGLAS