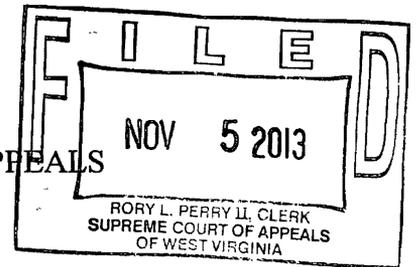


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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 IN REPLY

JAMES WILSON DOUGLAS
WV State Bar No. 1050
145 Main Street
Post Office Box 425
Sutton, West Virginia 26601
Counsel for Petitioner
304-765-2821
j1852@earth1.net
November 4, 2013

TABLE OF CONTENTS

Table of Authorities ii, iii

Assignments of Error 1

Supplemental Statement of the Case 1-3

Rebuttal Argument in Support of 3-9

Conclusion 9

TABLE OF AUTHORITIES

West Virginia Case Law:

Mayhew v. Mayhew (Mayhew II)
205 W.Va. 490, 519 S.E.2d 188 (1999) 4

Smith v. Smith
197 W.Va. 505, 475 S.E.2d 881 (1996), footnote 11 2, 5

Idaho Case Law:

Swope v. Swope
112 Idaho 974, 739 P.3d 273 (1973) 7

Illinois Case Law:

In re Marriage of Brown
110 Ill. App.3d 782, 443 N.E.2d 11 (1982) 8

In re Marriage of Joynt
375 Ill. App. 3d 817, 874 N.E.2d 916 (Ill. App. 2007) 5

Massachusetts Case Law:

Halpern v. Rabb
75 Mass. App. Ct. 331, 914 N.E.2d 110 (2009) 8

Minnesota Case Law:

Nardini v. Nardini
414 N.W.2d 184 (Minn. 1987) 5

Missouri Case Law:

Hoffman v. Hoffman
676 S.W.2d 817, 827 (Mo. 1984) 5

Ohio Case Law:

Scott G.F. v. Nancy W.S.

2005 Ohio 2750 (OH 6/3/2005) 8, 9

South Dakota Case Law:

Ochs v. Nelson

538 N.W.2d 527 (S.D. 1995) 8

Wisconsin Case Law:

Anderson v. Roach

750 N.W.2d 519 (Wis. App. 2008) 8

Other:

Rule 7, WVERRAP 2

Rule 10(g), WVERRAP 1

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 IN REPLY

Comes now the Petitioner, **KIMBERLEY A. MORRIS**, Respondent below (hereafter 'Petitioner Wife'), by her counsel, James Wilson Douglas, pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure of the West Virginia Supreme Court of Appeals, and in and for her Brief in Reply, for a timely response to the October 17, 2013 receipt of the October 15, 2013 Brief of Respondent to the Petitioner's original Brief in support of her Petition for Appeal, heretofore regularly filed, does aver, depose and say, as follows:

ASSIGNMENTS OF ERROR

Petitioner stands on her Assignments of Error No. 1., No. 2. and No. 3 as specifically set forth in her August 30, 2013 Brief in support of her Petition for Appeal, and she incorporates the same by reference as if appearing and reproduced verbatim hereat.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent in his Reply Brief complains of omissions from the record below.

Petitioner would have the Court note that the Respondent's counsel, with some suggestions, essentially agreed to Petitioner's Rule 7 designations. See Appendix, (See August 13, 14, 19 and 29, 2013 letters between counsel attached to August 30, 2013 Certificate of Counsel).

Secondly, the Exhibit "A" attached to the February 11, 2009 Post-Nuptial Agreement (hereafter 'PNA') under scrutiny, which was drafted by counsel for the Respondent's father, was conclusionary in nature with no corroborating documentation thereto. See Appendix, pp. 15 and 16.

Next, there was no valuation of the active appreciation of the Flying "W" Plastics, Inc., during the underlying divorce, because the Family Court Judge had originally ruled on July 11, 2012 that the said Corporation and all aspects thereof, *excepting* the retained earnings account of the Respondent, were the separate property of the Respondent by the force of the February 11, 2009 PNA, which position he subsequently reversed on December 26, 2012.

Thus, if the Petitioner could not access and present the active appreciation value of the Corporation due to the earlier ruling of the Family Court Judge, then under the *Smith v. Smith*¹ decision, discussed *infra.*, the next best indicator of the growth of the Flying "W" Plastics, Inc., was the retained earnings account, which the Family Court Judge consistently held below was marital property.²

The Court should be reminded that the Respondent Husband and his sister, were and are the only shareholders of the closely held Corporation which elected to become a

¹197 W.Va. 505, 475 S.E.2d 881 (1996), footnote 11.

²Clarifying the misleading assertions of the Respondent on Page 12 of his Brief, the Family Court Judge had consistently held that the subject retained earnings were marital. The Family Court Judge did hand-write his findings regarding the same in the December 26, 2013 Final Order, drafted by Respondent's current counsel, after being reminded of his former ruling by Petitioner's objection to its omission in the said Final Order.

“Subchapter S” or “flow through” corporation, effective July 1, 2007.³

Also, it bears repeating that 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”. Furthermore, the retained earnings⁴ held by the aforesaid Corporation under the Parties’ named account, were not mentioned in the PNA.

Additionally, as noted in Petitioner’s original Brief in support of her Petition for Appeal, if the Respondent’s stock in Flying “W” was a gift, and thus non-distributable in a divorce action, why was it necessary to include it in the PNA at all?

Finally, the raiding of the retained earnings accounts by the Respondent over the years⁵, without the incumbrance of prior written permission from the other shareholder, was never proceeded by a corporate resolution authorizing or declaring a dividend.

REBUTTAL ARGUMENT IN SUPPORT OF:

I. ***

II. ***

³The 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.

⁴Retained 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, respectively, as of the end of December 2012. See Appendix, pp. 180 and 181. ***It is significant that the amounts are unequal which refutes the “dividend” argument of the Respondent in his October 15, 2013 Brief; i.e., if withdrawals from said AAA were “dividends”, why were they not uniform leaving the same amount of cash in each retained earnings account?***

⁵See footnotes 8 and 9 below for specific examples of the unbridled spending from the Respondent’s AAA or retained earnings account.

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.

As a refresher of the uncontroverted facts of the case, 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, Respondent’s portion of the Corporation’s active appreciation is distributable. *Id.*

West Virginia authority for the classification of retained earnings within a divorce

context is found only in *Smith, supra*. This Court used a Missouri case⁶ in its *Smith* analysis that had held retained earnings had been held to be non-marital property "...unless the owning spouse has a 'controlling interest in the corporation ...' and/or 'substantial control over decisions to distribute corporate earnings.' ". At 888. (Emphasis supplied.). Accord as to the "substantial control" rule, calling it "substantial influence": *In re Marriage of Joynt*, 375 Ill. App. 3d 817, 874 N.E.2d 916 (Ill. App. 2007) (Cited by Respondent).

This Court recognized in *Smith* that some jurisdictions⁷ do consider retained earnings as marital property, but cautioned against including the same within valuations of active appreciation since that would be a "double dip". *Id.* at footnote 11.

To repeat as set forth in detail hereinabove, the Respondent herein definitely had "substantial control" or "substantial influence" on decisions in the Corporation pertaining to retained earnings. Petitioner would urge that given Respondent's unfettered spending habits from the AAA or retained earnings accounts, the same only became "dividends" for the convenience of the Respondent's defense in this divorce case. In short, had corporate resolutions existed, authorizing a dividend declaration before the Respondent spent the money, the same would have been produced in the evidence below. The overriding question is the one first posed in footnote 4 above for the Corporation's 2012 taxable year: *if withdrawals from said AAA were "dividends", why were the retained earnings accounts of the Respondent and his sister not equal in amounts? Why did they (AAA) not have the same amount of cash in each retained earnings account at the end of the year?*

⁶*Hoffman v. Hoffman*, 676 S.W.2d 817, 827 (Mo. 1984).

⁷*Nardini v. Nardini*, 414 N.W.2d 184 (Minn.1987).

The residual lesson here is that one cannot treat a retained earnings account like a private debit card, and then argue that those accounts are corporate properties until he spends them, which act of consumer consumption magically transforms those funds into individual dividends. Essentially, Respondent says it is “ok” to skip a step by calling it a dividend after the fact. See Respondent Husband’s July 2, 2012 Financial Disclosure below, at Appendix, pp. 183 - 330.

By way of analogy, Respondent’s argument puts Petitioner in mind of an attorney who spends money from his trust account for private purposes, instead of first transferring the earned funds to his attorney account and then paying private debts.

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,⁸ 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 or the antecedent dividend resolution of the Corporation. Appendix, pp. 200 - 212.

Again, Eric Brown, the Corporation’s accountant, confirmed that 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). Did the buy-out benefit the Corporation? No, it merely added to the individual,

⁸See Appendix, pp. 188, 224, 229, 230, and 213 - 269.

personal property holdings of the Respondent and his sister. Therefore, how can the retained earnings accounts be said to be corporate property?

This underscores the single most significant fact to be noted from the variety of the Respondent Husband's draws from his equity, AAA, or his retained earnings account, is that said draws, including the Greenlief buy-out, were for personal⁹ rather than corporate purposes; i.e., the subject Corporation herein did not gain one asset, nay, not one dime from the retained earnings account of the Respondent—he did.

These facts alone—how the Respondent Husband treated the retained earnings and what he spent them on without prior corporate approval or even contemporaneous concurrence by the remaining shareholder—should make his retained earnings account marital rather than corporate property.

For a further examination into the discussion of retained earnings, it is helpful, by way of comparative analysis, to briefly touch upon the holdings of other jurisdictions pertaining to retained earnings within the context of partnerships and as inclusions for child support calculations. The following cases from other jurisdictions provide useful guidance on the retained earnings issue since it is one of first impression in West Virginia; to-wit:

Swope v. Swope, 112 Idaho 974, 739 P.3d 273 (1973): Retained earnings of husband in a separate partnership were deemed marital property. Court held that retained earnings in partnership were different than in a corporation, in that, a corporation is a separate legal entity, while a partnership is not a separate entity, but is a sum of the owners' interests.

⁹See 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).

Anderson v. Roach, 750 N.W.2d 519 (Wis. App. 2008): Court reversed lower court because income generated by a partnership, and the accounts of the partnership, were excluded from marital property. The Court's ruling was made in light of the wife arguing that retained earnings in husband's partnership should be distributed as marital income.

In re Marriage of Brown, 110 Ill. App.3d 782, 443 N.E.2d 11 (1982): Even though a partnership was non-marital at the time of the transfer, during the marriage, the value of the partnership increased substantially. Due to the fact that the increase in value is attributable to the earnings that have been retained in the business, those retained earnings are classified as income to the husband, and are deemed marital property.

Still other jurisdictions have held that retained earnings can be utilized for child support purposes. The following cases illustrate the differing ways that other jurisdictions have handled the issue of child support in conjunction with retained earnings.

Ochs v. Nelson, 538 N.W.2d 527 (S.D. 1995): Court found that husband's retained earnings should be included in child support calculation because retained earnings fell within the definition of income in State's statute. Furthermore, the fact that husband had utilized funds from the retained earnings, and had borrowed money against the retained earnings, proved that the same was available for the husband to utilize.

Halpern v. Rabb, 75 Mass. App. Ct. 331, 914 N.E.2d 110 (2009): The Court found that retained earnings could be used for child support purposes in certain cases. Among the factors that the Court listed were the shareholder's degree of control over distributions (as measured by a shareholder's interest), and whether business interest in withholding or retaining the business income was legitimate.

Scott G.F. v. Nancy W.S., 2005 Ohio 2750 (OH 6/3/2005): Retained earnings can

be included as income for child support purposes when a payor uses the retained earnings to shelter income from child support liability. Moreover, in this case, the Court found that the other shareholders were family members, and that the retained earnings were easily accessible to the payor. Based on the totality of the evidence, the Court found no error in the lower court's including the payor's retained earnings as income for child support purposes.

In the case at bar, the Respondent would have had to pay not only income taxes, but also, child support from his retained earnings, then why should his retained earnings, irrespective of the enforceability of the February 11, 2009 of the PNA, be treated differently for equitable distribution purposes?

CONCLUSION

THIS Honorable Court should deem this Reply Brief timely filed; 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;**

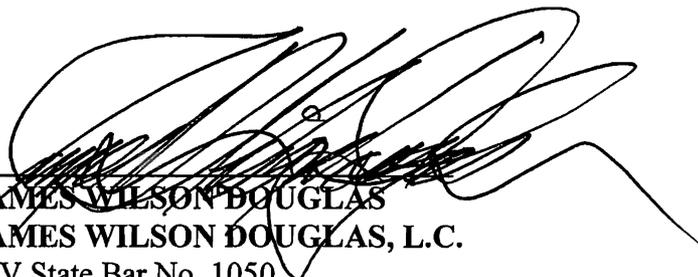
AND, that the same be **REMANDED with instructions**, to reinstate said February 19, 2013 Final Divorce Decree of the Family Court of Gilmer County;

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,

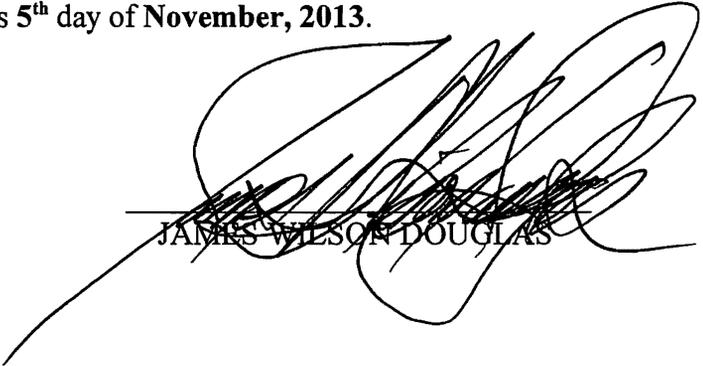
By Counsel



~~JAMES WILSON DOUGLAS~~
JAMES WILSON DOUGLAS, L.C.
WV State Bar No. 1050
145 Main Street
P.O. Box 425
Sutton, West Virginia 26601
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, JAMES WILSON DOUGLAS, the undersigned attorney do hereby certify that a true copy of the foregoing Petitioner's Brief in Reply 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 5th day of November, 2013.



JAMES WILSON DOUGLAS