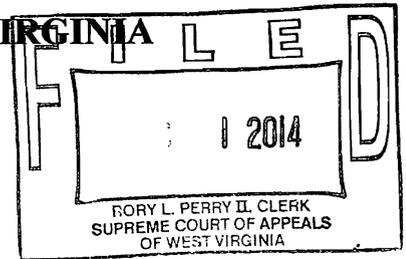


**IN THE SUPREME COURT OF APPEALS WEST VIRGINIA**



\_\_\_\_\_  
No. 14-0194  
\_\_\_\_\_

**BEVERLY TRUMAN-GILMORE,**

**Petitioner herein -- Respondent below,**

Appeal from a final order  
of the Circuit Court of  
Kanawha County (No. 10-D-469)  
Hon. Tod J. Kaufman, Judge  
(Hon. Sharon M. Mullens, Family  
Court Judge)

v.

**BOYD GILMORE**

**Petitioner Below -- Respondent herein.**

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**PETITIONER'S SUMMARY REPLY TO RESPONDENT'S  
SUMMARY RESPONSE TO PETITIONER'S BRIEF**

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## **PETITIONER'S PRELIMINARY STATEMENT**

While the Respondent may not fully understand the case law cited by the Petitioner in support of application of the "Clean Hands Rule," Respondent's does not cite any case law to support his arguments against the Court's application of the "Clean Hands Rule." Nor, does the Respondent argue the Petitioner's citations of case law or references to the undisputed and objective facts supporting application of the "Clean Hands Rule" are incorrect or otherwise inapplicable. Thus, Respondent appears to be in agreement with the Petitioner with respect to applicable law and the facts and relies on a nonsensical standing argument and pejorative statements regarding Petitioner's counsel.<sup>1</sup> At bottom, the undisputed and objective facts and the law support this Court's application of the "Clean Hands Rule" and summary dismissal of Respondent's claim.

## **RESPONDENT'S PRELIMINARY STATEMENT**

Respondent's principle argument is the Petitioner's strategy is to attack Boyd Gilmore's character and establish that Boyd Gilmore is a "bad man." The Petitioner's strategy has never been "to attack Boyd Gilmore's character" or establish that he is a "bad man." The Petitioner presumes the fact that Gilmore initiated sexual relations with a minor under his professional care; was content to pay each of his five (5) children child support less than \$43 a month while at the same time enjoying a millionaire's income;

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<sup>1</sup> Respondent's desperate and pejorative statements regarding Petitioner's counsel bring to mind the old adage: "When the law is against you, argue the facts. When the facts are against you, argue the law. When both are against you, call the other lawyer names." At the conclusion of trial, Respondent moved for disgorgement of legal fees Petitioner paid her counsel, which the Family Court correctly denied. Petitioner's SUP.APP. p. 1. Respondent's decision to not assign cross error to the Family Court's denial of his motion speaks volumes to the lack of merit of both the motion for disgorgement and his accusation of collusion.

and beat up his then estranged ex-wife with a 200,000 volt stun gun says everything that needs to be said about Boyd Gilmore's character.<sup>2</sup> APP. p. 136, ¶¶. 3, 27, 33.

Respondent's strategy is to bring to this Court's attention the objective and undisputed facts presented to the Family Court below that establish the Respondent's transfer of his U.S. Treasury Securities to the Petitioner was a fraudulent conveyance intended to hinder, frustrate or delay: (1) his ex-wife Kimberly Gilmore's civil claim<sup>3</sup> to recover substantial damages arising from Respondent's attacking her with a 200,000 volt stun gun; (APP. pp. 61-69) and (2) the State of West Virginia's collection of criminal fines and restitution from him. APP. pp. 136-37, ¶33.

The application of the "Clean Hands Rule" in this case does not turn on the credibility of the parties. The Court's application of the "Clean Hands Rule" turns on the Court's consideration of the substantial, objective and undisputed facts presented and admitted without objection below that require its application and dismissal of the Respondent's claim.

#### **RESPONDENT'S MISLEADING STATEMENT REGARDING APPENDIX**

The Respondent argues the Petitioner seeks to establish factual matters by "citation to documents not admitted or proven below, but merely filed by the Petitioner there." The argument is specious. Respondent's counsel conveniently fails to disclose that at the conclusion of trial, the Family Court invited either side to present additional materials not presented in open court<sup>4</sup> and issued a closing order with a formal invitation

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<sup>3</sup> Kimberly Gilmore filed her lawsuit on July 30, 2003 following the Kanawha Country Grand Jury's May 2003 Term issuance of a four count indictment of the Respondent on charges arising from Respondent's attack on her. On information and belief, her civil action was extended several times but subsequently dismissed for failure to prosecute while Boyd Gilmore was in prison.

<sup>4</sup> Gilmore's presentation of his case-in-chief consumed more than 2/3<sup>ths</sup> of the trial time allotted by the Family

to submit additional materials. PETITIONER'S SUP APP. p.1. The Family Court's closing order also provided seven days for any response to any new material filed by either side. *Id.*

On March 25, 2013, Respondent was served with copies of all of Petitioner's proposed findings of fact and conclusions of law with copies of all new exhibits proffered by the Petitioner on or about March 25, 2014. APP. p.19. Respondent did not object to the admission of any of the Petitioner's proffered exhibits. Thus, Respondent's argument for their exclusion should be rejected.

Even if the Respondent's proffered exhibits had not been admitted without objection below, the Respondent's exhibits that were admitted at trial are more than sufficient to establish the "Clean Hands Rule" must be applied by this Court and Respondent's claim dismissed. They are:

- (1) On August 26, 2002, Boyd Gilmore was arrested at the home of his then estranged wife (Kimberly Gilmore) and charged with assaulting her with a 200,000 volt stun gun. APP. p. 130. ¶3 (Petitioner's Trial Exhibit 1);
- (2) During the May 2003 term of the Kanawha County Grand Jury entered a four count indictment of Boyd Gilmore (Burglary by breaking and entering, Burglary by entering without breaking, Domestic Battery, and Violation of a protective order felony counts arising from the claimed attack on his former wife. APP. p. 130, ¶1. *Id.*;
- (3) On July 30, 2003, his ex-wife filed a civil lawsuit against him to recover compensatory and punitive damages for injuries sustained as a result of the claimed attack. APP. pp. 61-69, 135, ¶27 (Petitioner's Trial Exhibits 1 and 8.)
- (4) On August 10, 2004, Boyd Gilmore and the Petitioner entered into a prenuptial agreement that had been drafted by the Respondent, which

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Court. By the time Gilmore rested his case, the Respondent was allowed only three hours to present her case-in-chief. As such, when the Family Court closed the proceedings, the Petitioner had not completed the presentation of her case-in-chief or presented all her documents for admission.

listed Respondent's ownership of U.S. Treasury Securities and other Assets but failed to disclose their values. APP. pp. 38-43 and APP. p. 91 at ¶12 and APP. p. 126 at ¶¶5-6 (Respondent's Trial Exhibit 1);

- (5) On August 23, 2004, Boyd Gilmore and the Petitioner were married and traveled to Florida for their honeymoon where Boyd Gilmore took the Respondent into a Florida bank and transferred ownership of U.S. Treasury Securities with a value in excess of \$1,000,000, APP. p. 22, APP. p. 125, ¶¶. 1 and 7(Respondent's Trial Exhibit 9<sup>5</sup>);
- (6) Boyd Gilmore sold his home and rental properties during 2004 but failed to disclose these sales and related income of \$267,000 to the Kanawha Country Circuit Court's investigator during his presentence investigation. APP. pp. 137, 145-47 (Petitioner's Trial Exhibit 1);
- (7) Boyd Gilmore reported his total assets to the presentence investigator as having a value of \$70,000 with no disclosure of the \$1,000,000 plus in U.S. Treasury Securities Boyd Gilmore testified in Family Court was transferred to the Petitioner to manage. APP. pp. 136-37 at ¶33, *Id*;
- (8) Boyd Gilmore did not mention any ownership of or receipt of income from the U.S. Treasury Securities when he reported his total income to the presentence investigator. Gilmore reported his total income for 2004 of \$21,917 was earned entirely from rental property in the and oil and gas investments in the amount of \$6,617. *Id*;
- (9) On July 5, 2005, Boyd Gilmore's attorney sent a letter to the presentence investigator to give notice of perceived errors in her report. This letter gave Boyd Gilmore a final opportunity to report his ownership of and income from the U.S. Treasury Securities to the State's presentence investigator. Gilmore elected to reject this opportunity to disclose Gilmore's ownership interest in the \$1,000,000 plus in U.S. Treasury Securities he transferred to the Petitioner or disclose his receipt of any interest income from them. APP. pp. 139-42(Petitioner's Trial Exhibit 2).

Petitioner's exhibits admitted at trial without objection establish the Respondent's transfer of in excess of \$1,000,0000 in U.S. Treasury Securities to the Petitioner was a fraudulent conveyance intended to hinder, delay, or entirely frustrate: (1) Kimberly

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<sup>5</sup> This trial exhibit was inadvertently omitted from the Joint Appendix. Respondent, nevertheless, admits its contents in its summary response. The U.S. Treasury Direct account statement dated August 26, 2004 (the date of Respondent's transfer of his U.S. Treasury Securities to the Petitioner.) There is no dispute the parties were in the State of Florida on their honeymoon when the transfer was made.

Gilmore's civil lawsuit and claim for compensatory and punitive damages arising from Respondent's attack; and (2) the efforts of the State of West Virginia to collect fines and restitution ordered as a result of his guilty pleas to one of the four felony counts Respondent was charged with at the time he transferred the U.S. Treasury Securities to the Petitioner.

The Respondent also complains Petitioner did not include two dozen unidentified trial exhibits in the Joint Appendix. Prior to filing the Joint Appendix, Petitioner's counsel made repeated requests of Respondent's counsel to identify exhibits Respondent wanted included in the Joint Appendix. Respondent elected to not include any document in the Joint Appendix.<sup>6</sup> As such, his complaint regarding any trial exhibits not included in the Joint Appendix deserves no consideration.

Finally, the Respondent complains the Respondent did not include a transcript of the proceedings in the Joint Appendix. Following the conclusion of the trial, Petitioner served Respondent with Petitioner's proposed findings. The Petitioners proposed findings contained date and time references to certain trial testimony. The Respondent did not object to their consideration. As such, it was unnecessary for the Petitioner file a transcript of the trial.

### **PETITIONER'S REPLY TO RESPONDENT'S ARGUMENTS**

#### **Assignment of Error 1: "Clean Hands"**

The Respondent argues without legal support the Petitioner does not have standing to argue Respondent's "bad conduct toward" his ex-wife Kimberly Gilmore

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<sup>6</sup> Respondent's counsel made E-mail requests of Respondent's Counsel to provide the documents he wanted to include in the Joint Appendix on May 22, 2014, May 24, 2014 and June 5, 2014 and June 24, 2014.

requires this Court's application of the "Clean Hand's Rule."<sup>7</sup> The Respondent's naked standing argument reveals a fundamental failure to comprehend the purpose of the "Clean Hands Rule" and how it is applied. Petitioner's standing or lack thereof has no relevance to its application. In this case, it was not disputed below:

(1) Gilmore transferred ownership of his entire investment in U.S. Treasury Securities with a market value in excess of \$1,000,000 to the Petitioner when he was facing substantial claims of his ex-wife and the State of West Virginia;

(2) The Respondent failed to disclose any ownership in these securities to the State of West Virginia during his presentence investigation when disclosure of any ownership interest in them was required<sup>8</sup>;

(3) The U.S. Treasury Securities could be managed without any transfer of ownership.

(4) Gilmore filed multiple affidavits of poverty in both Federal and State Court during his incarceration to obtain relief from the payment of filing, transcription and copying fees in the pursuit of his criminal appeal and multiple civil actions Gilmore filed in Federal court;

(5) Gilmore was provided the *pro bono* legal services of Thomas J. Gillyooly at the request of U.S. Magistrate Judge Stanley on the basis of Gilmore's multiple sworn claims of poverty.

The Family Court did not address or otherwise mention these substantial and undisputed objective facts and held Gilmore did not intend to gift the securities to the Petitioner but transferred them to the Petitioner to manage as a

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<sup>7</sup> Following this argument to its logical conclusion, the Petitioner presumes the Respondent further agrees Petitioner has no standing to assert Respondent's "bad conduct" in failing to disclose his substantial investment in U.S. Treasury Securities to the State of West Virginia when he was required to disclose any claimed ownership in these assets to the State of West Virginia during his presentence investigation.

<sup>8</sup> Gilmore was required to disclose all of his assets to his presentence investigator to enable the State to assess Gilmore's ability to pay fines and restitution arising from his criminal conduct. Gilmore failed to disclose any ownership interest whatsoever in the U.S. Treasury Securities he transferred to the Petitioner. JT. APP. p. 135, ¶33. Even after being called out by the investigator on his failure to disclose his income from property sales, Gilmore failed to disclose his ownership of the U.S. Treasury Securities or income in the correction letter he directed his counsel to send. *Id.*; JT. APP. pp. 139-42.

convenience to him while in prison. Even if this finding was not clearly erroneous, it does not matter the Family Court held the securities were transferred to the Petitioner to manage for this Court's application of the "Clean Hands Rule" and dismissal of Respondent's claim.

"Fraud may be inferred from the facts and circumstances of the case. The test is whether a reasonable man would conclude that the conveyance was made with the intent to hinder, delay or defraud." *Wachter v. Wachter*, 178 W. Va. 5, 9, 357 S.E.2d 38, 42 (1987) (citation omitted). "The unclean hands rule is raised only because of conduct connected with the particular transaction sought to have redressed." *Wallace v. Wallace*, 291 S.E.2d 386, 388 170 W.Va. 146 (W.Va., 1982) (citations omitted).

The Family Court's finding Respondent did not intend to gift the U.S. Treasury Securities to the Petitioner is no bar to the Court's application of the Rule.

Whenever and if it is made to appear to the court that by reason of f fraudulent or other unconscionable conduct, the plaintiff has lost his right to invoke a court of equity, the court will, on the motion of a party, or its own motion, wash its hands of the whole." (Citations omitted) The unconscionable character of a transaction between the parties need not be pleaded or set up as a defense. **Whenever it is disclosed the court will of its own motion apply the maxim. It does not matter at what state of the proofs or in what order a lack of clean hands is discovered.**

*Foster v. Foster*, 655 S.E.2d 172, 178 (W.Va., 2007) (Emphasis added.)

The Respondent further argues the Defendant does not have standing to invoke the "Clean Hands Rule" because she herself has unclean hands. Again, the Respondent fails to comprehend the "Clean Hands Rule" is "not applied, for the benefit of either

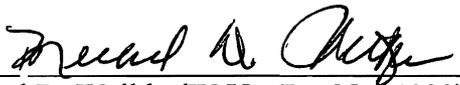
litigant, but exists for the purpose of maintaining the dignity and integrity of the court acting only to administer equity.” *Wheeling Dollar Sav. v. Hoffman*, 35 S.E.2d 84, 127 W.Va. 777 (W.Va., 1945)

A party guilty of fraud in a transaction on which he relies for recovery can have no relief in equity against another person, even though that person may be equally guilty. Equity will grant no relief to either party ... It will leave such parties in exactly the position in which they place themselves by their own acts, and will refuse affirmative aid to either. (Citations Omitted)

*Dye v. Dye.*, 39 S.E.2d 98, 128 W.Va. 754 (W.Va., 1946).

In this case, the Respondent’s fraudulent conveyance of his U.S. Treasury Securities to the Petitioner prohibits Gilmore’s enlistment of the aid of a court of equity to recover it. Gilmore put himself in this position when he fraudulently conveyed his U.S. Treasury Securities to the Petitioner. Application of the rule by this Court will only leave Gilmore where he placed himself.

Respectfully submitted this 29<sup>th</sup> day of November, 2014.



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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on November 29, 2014, a copy of the Petitioner's Reply To Respondent's Summary Response was served via U.S. Mail (postage prepaid) to:

Thomas J. Gillooly  
P.O. Box 3024  
Charleston, WV 25331

  
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Michael D. Weikle