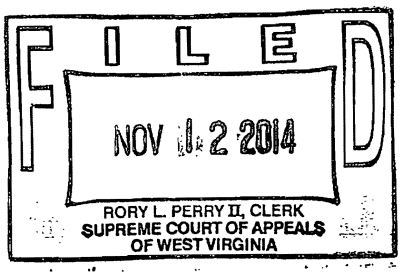
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0194



BEVERLY TRUMAN-GILMORE,

Respondent Below, Petitioner.

v.

BOYD GILMORE,

Petitioner Below, Respondent,

Hon. Tod J. Kaufman, Judge
Circuit Court of Kanawha County
No. 10-D-469
(Hon. Sharon M. Mullens, Family Court Judge)

RESPONDENT'S SUMMARY RESPONSE TO PETITIONER'S BRIEF

Thomas J. Gillooly (5112)
P.O. Box 3024
Charleston, WV 25331
304 546-7228
fax 720-2276
tgillooly@gmail.com
Counsel for Respondent

Pursuant to R.A.P. 10(e), Respondent Boyd Gilmore, by counsel, submits this Summary Response to the Petitioner's Brief.

PRELIMINARY STATEMENT

This case, at bottom, turns on the family court's assessment of the parties' credibility. Both parties were on the witness stand at the final hearing for extended periods of time. The Final Order, App. 1, makes it clear that the court below did not believe the Wife's testimony on the issues crucial to her case. The court below accepted the Husband's version of the facts material to the status of the substantial sum of money involved. For that reason, and because the case does not present issues worthy of this Court's attention, the Court should affirm by memorandum decision.

The marriage in this case was childless, making the division of property the only issue. Boyd Gilmore entered the marriage in possession of United States government securities worth approximately $2,000,000. App. 88 (Husband's Exhibit 10, admitted December 4, 2012, relied on by the Family Court in its final order). The parties signed a prenuptial agreement which entitled him to those funds.

Shortly after the marriage, Gilmore entered into a plea agreement under which he pled guilty to burglary as a felony, in a case unrelated to the Wife in this case. On July 29, 2005, he was given an indeterminate sentence of one to fifteen years by Kanawha County Circuit Judge Duke Bloom (order filed on that date in Case No. 03-F-253, Kanawha County Circuit Court). In family court, the Wife attempted to refute the Husband's contention that he placed his government securities in her name to enable her to manage the funds during his imprisonment.

She contended below that he had instead gifted them to her. The family court resolved that factual issue in the Husband's favor in its Final Order. App. 1, p. 5.

The Wife's strategy in Family Court, which she maintains on appeal, was to attack Boyd Gilmore's character, almost entirely on the basis of events unrelated to the Wife or the parties' marriage. The Wife's objective has been to establish that Gilmore is a bad man, and that he therefore does not deserve to recoup any of the approximately Two Million Dollars that the Wife has placed beyond the reach of the courts, in a "Cook Island Trust," in a bank on a South Pacific island. *See* Final Order.

It was undisputed below that the attorney for the Wife (who also represents her on appeal) orchestrated the formation of the Cook Islands Trust and presided over the execution of the necessary documents in this country. The Wife disclosed on her financial statement below that she paid her lawyer, Michael D. Weikle, $247,923.02. That sum could only have come from the Husband's separate property, as determined by the family court. The family court chose not to order Mr. Weikle to disgorge any of those funds.

STATEMENT REGARDING APPENDIX

The Court should carefully inspect the record references in Petitioner's brief. On numerous occasions, the Petitioner's brief seeks to establish factual matters by citation to documents not admitted or proven below, but merely filed by the Petitioner there. For example, the brief (at p. 6) describes a trip it claims the parties took to Florida ("[i]mmediately after [the parties'] marriage"), during which the brief claims that the Husband transferred "sole ownership of his US Treasury Direct Securities" to the Wife. *Id.* The claimed support for this assertion is said to be at "App., p. 93, ¶¶ 22-23" and App., p. 126, ¶ 7."

App. 93 is a page from the Wife's proposed findings and conclusions submitted below,

which the family court did not adopt. Specifically, ¶¶ 22-23 refer to an affidavit of the Wife. The Wife testified at trial (where the family court essentially found her not credible, *see* the Final Order); citation to an affidavit that her lawyer filed below does not establish a fact. (App. 126, ¶ 7, refers to the same affidavit.) App. 94, ¶ 23, contains a reference to Petitioner's Trial Exhibit 9, which was admitted in evidence below, but as far as the undersigned can determine, Exhibit 9 is not in the Appendix. Counsel has nonetheless reviewed Exhibit 9, which shows only a Treasury Direct account in the Wife's name with a balance of $75,000 as of August 26, 2004. The Wife's brief fails to explain how Exhibit 9 supports her claim that the Husband transferred "sole ownership of his US Treasury Direct Securities" (amounting to some $2,000,000) to her in 1994, in Florida. So far as counsel can determine, Exhibit 9 sheds no light whatsoever on that claim.[1]

Finally, the Wife did not include either the audio recordings or transcripts of the final hearing in the Appendix. In this case, which is all about money, she did not include the parties' financial statements.[2] Neither (with an exception or two) did she include the approximately two dozen exhibits admitted at the trial of the case.[3]

Apparently the Wife prefers to base her appeal on material other than what was presented in open court below. This Court may therefore rightly conclude that the Wife does not view the trial record as helpful to her case.

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[1] Because the undersigned does not view Trial Exhibit 9 as germane to any issue raised on appeal, it is not being filed with this brief.

[2] The Husband is filing as a Supplemental Appendix the parrties' financial statements.

[3] For unknown reasons the Wife has listed (in the first column in the Appendix Table of Contents) an exhibit number for each document contained in the Appendix. As far as counsel can determine, these exhibit numbers are never again referred to. They do not correspond to the exhibits admitted at the trial of the case, or anywhere else below.

RESPONSE TO ASSIGNMENTS OF ERROR AND ARGUMENT

Assignment of Error 1: "Clean Hands"

The Wife apparently argues that the Husband's alleged conduct involving a non-party (his spouse previous to the Petitioner in this case) can constitute "unclean hands," so as to entitle the Wife to the benefit of that doctrine. Her argument seems to be that the family court should have applied the equitable clean hands doctrine against the Husband, based on his alleged conduct toward a stranger to the case (the previous spouse), and that the family court should therefore have deprived the Husband of any assets. This argument is consistent with the Wife's effort to manufacture a reason why the Husband would have gifted Two Million Dollars to her shortly after their marriage (she argues that he did it to protect the asset from the previous spouse's law suit), but it is not a sound legal argument. The Wife lacks standing to assert the Husband's purported bad conduct toward a stranger to this case.[4]

The family court rejected the claim that the Husband gifted his new Wife the approximately $2 Million she now has in a bank in the South Pacific, based primarily on its assessment of the credibility of the parties. *See* the Final Order. The evidence was that the Wife, in collusion with her attorney, placed the funds in question in a "Cook Islands Trust" so as to put the money beyond the Husband's reach, indeed beyond the reach of the courts of the United States. The Wife therefore lacks standing to invoke the clean hands doctrine on the additional basis that she herself lacks clean hands. And unlike the conduct she alleges the Husband engaged in, the Wife's illicit conduct is directly related to the Husband and to this case.

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[4] The Wife's brief claims that the record establishes that "Gilmore's transfer of the US Treasury Securities to the Petitioner was a fraudulent conveyance." The record establishes no such thing, nor does the brief inform the reader what in the record supports the claim. In any event the Wife apparently is not claiming that a fraud was perpretated against her, but against a previous spouse. *See* the discussion in the text.

Assignment 2: Validity of Prenuptial Agreement

In determining the validity of the prenuptial agreement, the family court applied the correct legal standard under *Ware v. Ware*, 224 W.Va. 599, 687 S.E.2d 382 (2009). *See* Final Order, App. 1, at App. 4. In any event, the family court found explicitly that, as a factual matter, the Husband did not intend to make, and did not make a gift of $2 Million to the Wife. Because the evidence was undisputed that the Husband entered the marriage with those funds, they were separate property at the time the marriage commenced. Even if the prenuptial agreement were found invalid, the Wife still failed to prove below that their status as separate property was changed by the purported gift.

Assignment 3: Alleged Non-Compliance with Terms of Prenuptial Agreement

Counsel for the Husband is unaware that this argument was ever presented below, other than in the Wife's proposed final order, submitted after the final hearing. The Wife did not transcribe the hearings below, nor did she make the video recordings from below part of the Appendix. The Wife cites only the prenuptial agreement itself in support of Assignment 3. Petitioner's brief at p. 27.

The Wife's argument on Assignment 3 is apparently that, having protected his separate property by means of the prenuptial agreement, the Husband was required to make a written claim for his separate property in order to be entitled to it under the agreement. This argument is specious and tautological. There is no basis in logic, and certainly none in the law of contracts, to support such an argument.

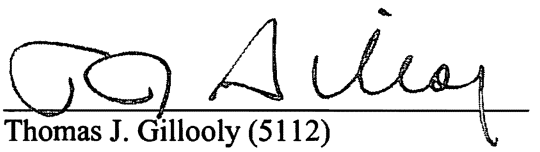
CONCLUSION

For the reasons set forth above, the Husband seeks dismissal of the Wife's appeal and affirmance of the order entered below.

Respectfully submitted November 11, 2014.

BOYD GILMORE,

By Counsel

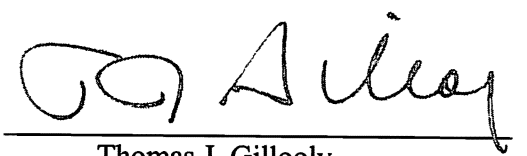


Thomas J. Gillooly (5112)
P.O. Box 3024
Charleston, WV 25331
304 546-7228
fax 720-2276
tgillooly@gmail.com
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2014, I served the foregoing document by mailing a copy to:

Michael D. Weikle
51 Gibson Court
Tiffin, OH 44883



Thomas J. Gillooly