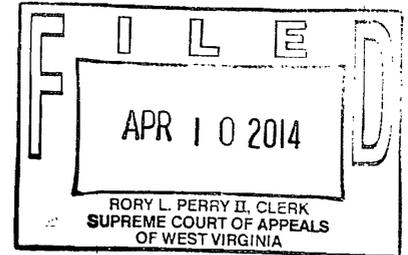


IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

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AT CHARLESTON

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DAVID J. RIFFLE, Petitioner Below,

Petitioner,

and

No. : 14-0042

SHIRLEY I. RIFFLE (now MILLER), Respondent Below,

Respondent.

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[FROM THE CIRCUIT COURT OF  
HARRISON COUNTY, WEST VIRGINIA  
(12-D-459-5 below)]

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**PETITIONER'S BRIEF**

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## ASSIGNMENT OF ERROR

The lower court did not apply the law correctly, abused its discretion, and was clearly erroneous in overturning a mutually agreed permanent restraining order provision in a Family Court's *Agreed Final Decree of Divorce* by interpreting W. Va. Code § 48-27-507 to prohibit parties represented by competent counsel in a divorce action from entering into a mutually agreed restraining order as a part of a full settlement agreement on all issues in dispute because the Family Court did not make specific findings of fact that abuse by each party had occurred, irrespective that each party testified as to their agreement regarding a mutual restraining order at the final divorce hearing, and the provision for a mutual restraining order being incorporated into an *Agreed Final Decree Of Divorce* entered by the Family Court and not appealed for Six (6) Months later. The Code does not say that such findings are necessary, but merely that when sufficient evidence of abuse is presented, a Court *must* enter a restraining order, and further, the Constitutional rights of the parties to make a contract are impaired by the lower court's holding in the long-established common practice in the Family Courts of this State.

## STATEMENT OF THE CASE

The facts in this matter are that Mr. Riffle and Ms. Miller were married on December 19, 1988, (A26) and separated on August 10, 2012 (A26). Mr. Riffle is an 82 year old man with serious and terminal health problems. The parties were divorced by an *Agreed Final Decree Of Divorce* entered on February 19, 2013 (A25). The mutual restraining order entered as a part of the said *Agreed Final Decree Of Divorce* was an agreed mutual restraining order entered into with both parties represented by competent

counsel through the final hearing. (A29 Paragraph 16 of the Agreed Final Decree stating the Court's findings as to the Agreement of the parties, and see the final hearing tape at 11:07:15 and following. The Family Court found, following the testimony and assent of the parties, that the restraining order was a mutual agreement, also see Paragraph 3 of the *Temporary Order Following Hearing Of October 9, 2012*, (A20), which was the implementation of a mutual restraining Order *in lieu of* Mr. Riffle proceeding upon his DVPO filing in Case No. 12-DV-457-5, which had been filed on August 20, 2012, which was a substantial benefit to Ms. Miller – i.e., she received the benefit of a bargain by removing her risk of being listed on the domestic violence registry).

The divorce was precipitated by Mr. Riffle's discovery that she had committed multiple frauds against him of a felony nature. Ms. Miller repeatedly violated the Orders of the Court, resulting in the torment of the health-fragile Mr. Riffle, including her harassing behavior toward the realtors of the realty agency that she had demanded be used to sell the marital residence in the agreement. The record of the Court is replete with her acting out and attempted manipulation, and her admission that she voluntarily broke the mutual restraining order (A84). Ms. Miller was found in contempt of Court by Order entered on August 27, 2013. Her behavior during that hearing toward the Court was disrespectful, aggressive and bullying, and she had to be called down by the Court several times, and this had been her conduct toward Mr. Riffle throughout the proceedings, irrespective of agreed orders.

Ms. Miller was explained her rights and time limits to an appeal of the Agreed Final Decree on the record, by the so-called "five day letter" rule of Rule 22 of the *Rules*

of *Procedure In Family Courts*, and in the decree itself (A29 at Paragraph 18). She made no effort to timely appeal or to object to the entry of the Final Decree pursuant to Rule 22. Her appeal resulting in the overturning of the agreed mutual restraining order was untimely filed Six (6) Months after the entry of the Agreed Final Decree. At the hearing of September 27, 2013, upon Ms. Miller's appeal to the Circuit Court, Ms. Miller admitted that she had made the agreement in every regard that was before the Circuit Court on appeal, but merely that she had subsequently thought about those several items (the only one before this High Court being the agreed mutual restraining order) and had subsequently changed her mind. During the hearing of September 27, 2013, when the issue of the agreed mutual restraining order of the agreed final decree of divorce was raised, the lower court stated that a Family Court in West Virginia did not have the power to issue a restraining order without a specific finding of abuse. (A88 Line 16). The Honorable Circuit Court subsequently entered an Order (A01) wherein it overturned the agreed mutual restraining order of the agreed final decree (A01, A05-A08).

It is the Circuit Court's ruling upon the agreed mutual restraining order that is the subject of this appeal.

### **SUMMARY OF ARGUMENT**

The petitioner was denied substantive and Constitutional rights he had to a enter into a contract (an agreement set forth orally upon the record of the Family Court and memorialized in writing in an Agreed Final Decree of Divorce) when the Circuit Court, upon the untimely appeal of Ms. Miller, found that, contrary to the daily practice of Family Courts throughout this State for decades, the Family Court did not have the

authority to enter an *agreed mutual restraining order* between the divorcing parties without making specific findings of abuse by each of the parties. The lower court misapplied the statutes of domestic violence protective order actions to divorce actions resulting in an inequity where Mr. Riffle was denied a "bought peace" for which he longed through irrevocable concessions in the final agreement of the parties that may never be revisited.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The undersigned counsel requests that the High Court allow oral argument as necessary and or helpful in this matter pursuant to the criteria of Rule 18(a).

### **ARGUMENT**

#### Standard Of Review

All of the issues appearing before this Court are legal issues. Therefore, the standard of review before the Honorable High Court is *de novo*. "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. *Questions of law are subject to de novo review.*" Syllabus point 2, *Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997)(emphasis added).

#### The Circuit Court's Holding

The Circuit Court held that "...the family court abused its discretion in ordering a mutual restraining order in the final divorce decree without specific findings of abuse by

either spouse. In judgments ordering divorce, it is mandatory for the court to enjoin an offending party from molesting or interfering with the other when allegations of abuse have been proved. See W. Va. Code § 48-5-608(a). No such findings of abuse by either Mr. Riffle or Ms. Miller were ever made by the family court. Furthermore, although the code section is concerned with domestic violence, W. Va. Code § 48-27-507 prohibits mutual protective orders unless both parties file a petition and have proven the allegations of domestic violence by a preponderance of the evidence." (A08). In short, then, there is nothing cited in the reasoning of the Honorable Circuit Court that *prohibits* the entry of an agreed mutual restraining order in an Agreed Final Decree of Divorce. Code § 48-5-608(a) cited says when a Family Court *must* enter a restraining order. The other provision cited prohibiting mutual restraining orders being entered (Code § 48-27-507) is admitted by the Circuit Court as applying only in domestic violence protective order actions, and therefore is no authority in divorce actions. "If A, then B" does not imply "B only upon A." Nor should the wholly different species of domestic violence petition - different in scope, necessary factual basis, and relief available, a species where there should rightly be absolutely *no* bargaining process, preclude the different genre of divorcing parties with no children to chose to have no contact with one another.

Code § 48-5-601 "Relief that may be included in final order of divorce" "In ordering a divorce, the court may order additional relief, including, but not limited to, the relief described in the following sections of this part 6." As part of a divorce action, a Family Court may:

"48-5-509 Enjoining abuse, emergency protective order

(a) The court may enjoin the offending party from molesting or interfering with the other, or otherwise imposing any restraint on the personal liberty of the other, or interfering with the custodial or visitation rights of the other. This order may enjoin the offending party from:

(1) Entering the school, business or place of employment of the other for the purpose of molesting or harassing the other;

(2) Contacting the other, in person or by telephone, for the purpose of harassment or threats; or

(3) Harassing or verbally abusing the other in a public place...." (Emphasis added).

So, it is respectfully asserted that the lower court's core reasoning in this matter was based upon an overgeneralization.

### The Contractual Power

Divorcing parties coming to a full agreement on all issues give and take, make demands and concessions. An agreed final decree of divorce must be evaluated as a whole by a Family Court as to its overall equity. It is patently unfair for an appellate court to disregard a particular part of an agreement determined ruled equitable by a trial court and to maintain the remainder, because the party that the disregarded (overturned) provision of the agreement meant the most to does not get relieved of the concessions that they made in the agreement. It is paramount to a court-ordered breach of contract.

There is still a Constitutional right to contract (See generally *Neff v. Holley*, 132 W.Va. 468, 52 S.E.2d 386 (W.Va., 1949); *Dorr v. Chesapeake*, 88 S.E. 666, 78 W.Va. 150 (W.Va., 1916)), and a divorce with no children is paramount to a pure business negotiation. The petitioner's rights of contract have been violated.

## The Impact of Upholding The Ruling Of The Circuit Court

There has to be a point in day-to-day administration of the Courts that rulings become permanent.

The key to the entire instant concern is that it was agreed by the parties, and that the Family Court did nothing out of the ordinary or illegal. An agreement to the entry of a mutual restraining order is an assent by the parties to the facts establishing the necessity for such a restraining order. It is a stipulation to said facts by the parties. The enumeration of those facts is not necessary, and would be contrary to the efforts of all professionals involved to achieve any agreed, peaceful resolution to a divorce. The parties herein agreed that it was in each of their best interests (mutual, agreed) that a restraining order be entered. Such stipulations as to the provisions of Orders of all kinds occur in all levels of Courts in West Virginia, and the burden upon the judiciary and the parties to craft specific findings would impair the ability to process cases efficiently. Further, if the lower court's ruling is upheld, then the adverse impact upon existing such orders in thousands of divorces where parties have had confidence for years in that restraint provision are in effect to protect would be devastating.

Critically important here is the fact that Ms. Miller is not disputing that she agreed to the entry of the mutual restraining order, she just thought about it months later and decided that she did not want it – well after the appeal period expired. She was really seeking a modification from a different Judge, and an untimely appeal is not the proper forum for a modification. The burden on the court system of allowing litigants – even *pro se* litigants on appeal, to behave in such a manner - to have issues established by law and the expiration of the appeal time to be revisited because parties change their

minds would be devastating and slow down the administration of justice.

The lower court's ruling in this matter, without clear legal precedent, was, respectfully, an abuse of discretion.

### CONCLUSION

Fairness, the Constitutional right to contract, the statutes, and the case law of this State all demand that the lower Court's decision be overturned such that the provisions of the agreed mutual restraining order of the Agreed Final Decree of Divorce be ruled to have full legal effect.

Respectfully submitted,  
David J. Riffle, Petitioner Below,  
Petitioner,  
By Counsel,



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