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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., dissenting:

In the instant case, there is more than sufficient evidence of record to support the family court's decision, under the clear law of this State. The majority opinion flies in the face of the scheme set forth by our legislature for dividing marital assets. Apparently the majority thinks West Virginia should be a community property state, and it may take further legislative action to correct their misapprehension.

This marriage was *not* a standard fifty/fifty marital partnership, where Mrs. Arneault was the homemaker/support mechanism and Mr. Arneault was the income earner outside the home. Although the couple lived together prior to Mr. Arneault's success (which has resulted in this dispute over the MTR Gaming stock), the Arneaults have lived and worked in separate states for more than a decade.

Since 1995, Mrs. Arneault lived in Michigan and Mr. Arneault spent the bulk of his time in West Virginia. He returned to Michigan a few days a week, being actively involved in various activities with his children, including coaching his son's teams in various sports, such as football, wrestling, basketball, and baseball, and performing household duties, while Mrs. Arneault engaged in her counseling business. Mrs. Arneault only visited West Virginia perhaps three times in ten years. The couple's children are now both emancipated

adults and Mrs. Arneault, who received her masters' degree in 1971, works in her consulting business, which she has maintained on a full-time basis since 1995. There was no evidence that Mrs. Arneault's choices regarding work were compelled by Mr. Arneault or the couple's circumstances. Rather, since 1995, the couple pursued separate lives in separate states.

There is no evidence to support Mrs. Arneault's assertions that she provided substantial assistance in Mr. Arneault's success with MTR Gaming. For example, there is no evidence of record that Mrs. Arneault was a host for her husband's business functions. When Mr. Arneault accumulated the stock which is the subject of this appeal, Mrs. Arneault lived in Michigan and Mr. Arneault lived and worked in West Virginia. Other than residing in the couple's Michigan home while Mr. Arneault toiled in West Virginia, Mrs. Arneault had nothing to do with MTR Gaming, even long after the children had gone to college.

The record is also undisputed that much of MTR's success was due to Mr. Arneault's considerable efforts. The evidence was undisputed that Mr. Arneault is not merely an employee of MTR. He is president, chief executive officer, and chairman of the board of directors. He is also the spokesman and public persona of the corporation. SEC Rule 405 defines "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." Mr. Arneault is the single largest shareholder of MTR. Every racing and gaming commission in every state in which MTR does business requires him to become licensed as a control person. Wells Fargo Bank

conditions MTR's credit facilities on the company maintaining "key man" life insurance on Mr. Arneault in the amount of \$8 million. The family court found that Mr. Arneault nearly single-handedly created the gaming industry in West Virginia. Plainly, Mr. Arneault's role in the success of MTR Gaming has been remarkable.

Essentially, Mrs. Arneault makes a "community property" argument, contending that because she was Mr. Arneault's long-time wife, she is automatically entitled to one-half of the stock of a corporation that Mr. Arneault built irrespective of their relative contributions to the corporation.

West Virginia, however, is *not* a "community property" state. Rather, West Virginia is an "equitable distribution" state in which its legislature has prescribed various factors to be considered in making, not an "equal" distribution of marital property, but an "equitable" distribution, based primarily upon the parties' relative contributions.

In Syllabus Point 2 of *Miller v. Miller*, 216 W.Va. 720, 613 S.E.2d 87 (2005), this Court recently reiterated that "'Equitable distribution under W. Va. Code, 48-2-1, et seq., is a three-step process. The first step is to classify the parties' property as marital or non-marital. The second step is to value the marital assets. The third step is to divide the marital estate between the parties in accordance with the principles contained in W. Va. Code, 48-2-32.'" Syllabus point 1, *Whiting v. Whiting*, 183 W. Va. 451, 396 S.E.2d 413 (1990)." At issue in this case are both the second and third steps. As to the third step, division, the equitable distribution statute plainly supports the unequal distribution made in

this case by the family court.

W.Va. Code, 48-5-610(a) provides, “When the pleadings include a specific request for specific property or raise issues concerning the equitable division of marital property, the court shall order such relief as may be required to effect a just and equitable distribution of the property and to protect the equitable interests of the parties therein.” (Emphasis added.) It is because of the “equitable” nature of the division of marital property that this Court affords substantial deference to the family court judge. As long as a family court judge articulates adequate evidentiary support for an unequal, but equitable distribution of the marital estate, this Court will not interfere with the exercise of discretion in making such distribution. *See* Syllabus Point 10, *Pearson v. Pearson*, 200 W.Va. 139, 488 S.E.2d 414 (1997) (“An order directing a division of marital property in any way other than equally must make specific reference to factors enumerated in § 48-2-32(c), and the facts in the record that support application of those factors.” Syllabus Point 3, *Somerville v. Somerville*, 179 W.Va. 386, 369 S.E.2d 459 (1988).’ Syl. Pt. 6, *Wood v. Wood*, 184 W.Va. 744, 403 S.E.2d 761 (1991).”).

Formerly in *W.Va. Code*, 48-2-32(c), the equitable distribution factors are now found in *W.Va. Code*, 48-7-103 as follows:

In the absence of a valid agreement, the court shall presume that all marital property is to be divided equally between the parties, but may alter this distribution, without regard to any attribution of fault to either party which may be alleged or proved in the course of the action, after a consideration of the following:

(1) *The extent to which each party has contributed to the acquisition, preservation and maintenance, or increase in value of marital property by monetary contributions, including, but not limited to:*

(A) Employment income and other earnings;

and

(B) Funds which are separate property.

(2) *The extent to which each party has contributed to the acquisition, preservation and maintenance or increase in value of marital property by nonmonetary contributions, including, but not limited to:*

(A) Homemaker services;

(B) Child care services;

(C) Labor performed without compensation, or for less than adequate compensation, in a family business or other business entity in which one or both of the parties has an interest;

(D) Labor performed in the actual maintenance or improvement of tangible marital property; and

(E) Labor performed in the management or investment of assets which are marital property.

(3) *The extent to which each party expended his or her efforts during the marriage in a manner which limited or decreased such party's income-earning ability or increased the income-earning ability of the other party, including, but not limited to:*

(A) Direct or indirect contributions by either party to the education or training of the other party which has increased the income-earning ability of such other party; and

(B) Foregoing by either party of employment or other income-earning activity through an understanding of the parties or at the insistence of the other party.

(4) The extent to which each party, during the marriage, may have conducted himself or herself so as to dissipate or depreciate the value of the marital property of the parties: Provided, That except for a consideration of the economic consequences of conduct as provided for in this subdivision, fault or marital misconduct shall not be considered by the court in determining the proper distribution of marital property.

As held in the family court judge's order, Mrs. Arneault did almost nothing to refute the substantial evidence presented by Mr. Arneault which supported the thirty-five/sixty-five division of the stock. Consequently, there is a paucity of discussion in the majority opinion regarding her contributions to the marriage or the corporation.

No details are provided about Mrs. Arneault's contributions to MTR Gaming because Mrs. Arneault made no contributions to MTR Gaming. Few details are provided about Mrs. Arneault's contributions to the marital home and child rearing because third parties provided many housekeeping and childcare services, and despite Mr. Arneault's business travel, he shared the parenting duties. There is no evidence that Mrs. Arneault ever sacrificed her career for Mr. Arneault's. Instead, as was noted, Mr. Arneault's career involved great sacrifice on his part in leaving the marital residence to earn a living which allowed Mrs. Arneault to enjoy a comfortable lifestyle and to pursue her far less lucrative business interests. In contrast to the overwhelming evidence of Mr. Arneault's sacrifices, there was *no* evidence of Mrs. Arneault's sacrifices.

Rather, Mrs. Arneault took the position that as Mr. Arneault's long-time wife, she was automatically entitled to one-half of everything, including the subject stock, and contrary to this Court's previous cases, she argues that the Section 103 factors apply only "in some extraordinary circumstance" or in "peculiar cases."

The statute, of course, does not require a finding that a case is "extraordinary" or "peculiar" before a court can find facts warranting an equitable distribution that is not equal. If the legislature had so desired, it surely could and would have done so. Rather, the legislature provided the factors set forth in Section 103 as the *measuring stick* for rebutting the presumption of equal distribution. As long as the law of this State includes the Section 103 factors, each and every divorce litigant is entitled to attempt to rebut the presumption of equal distribution. This Court, in turn, should not disturb a finding that a presumption has or has not been rebutted unless it finds that the lower court abused its discretion in applying the Section 103 factors to the particular facts of each case.

Once a litigant, like Mr. Arneault, rebuts the presumption of equal division by demonstrating that the evidence satisfies the statutory criteria for an unequal division, the burden shifts to the other party to adduce evidence that the statutory criteria support an equal division. In this case, rather than presenting any evidence, Mrs. Arneault essentially argued and continues to argue for "judicial nullification" of the equitable distribution statute in favor of fifty/fifty presumption that can never be rebutted. Mrs. Arneault likens a marriage to a law partnership whereby both parties are entitled to share in the good fortune of the other.

Law partnerships, however, are governed by written partnership agreements that force whatever division of good or bad fortune the parties decide or other under governing statutory law.

The West Virginia Legislature, however, has not created a “marital partnership” in which each partner, whatever their relative contributions, is always entitled to share equally in the good fortune of the other. Rather, as this Court stated in *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995), “Thus to be equitable, the division need not be equal, but as a starting point, equality is presumptively equitable.” (Emphasis added.)

The *Burnside* Court further noted in footnote 24 that:

[U]nder this statute there is no absolute requirement that each item of marital property be distributed on an equal basis; rather, property acquired during the marriage may be distributed in a manner consistent with the statutory policy that reflects fairness and equity . . . to mould a decree appropriate to a given situation with equity being its ultimate goal.

Even one of Mrs. Arneault’s own attorneys, while a Justice on this Court, filed a dissenting opinion in which he advocated that an *unequal distribution of a family farm was appropriate under the circumstances presented*. See *Tallman v. Tallman*, 183 W.Va. 491, 501, 396 S.E.2d 453, 463 (1990) (Neely, C.J., dissenting); see also, *Metzner v. Metzner*, 191 W.Va. 378, 388, 446 S.E.2d 164, 175 (1994) (Neely, J., concurring in part and dissenting in part) (“Now that the goose is cooked, Mrs. Metzner wants her share, but Mrs. Metzner did not pay for the goose, the fuel to cook it, the sauce to flavor it or even the pot to cook it in. The majority awards Mrs. Metzner the tender breast of the goose merely because the goose

happened to wander into Mr. Metzner's yard while Mr. and Mrs. Metzner were still married.").

In the instant case, there is sufficient evidence of record to support the family court's decision. With the concurrence of the parties, the family court bifurcated the case and conducted a two-day mini-trial devoted exclusively to the equitable distribution issue. The parties were not limited as to time or the number of witnesses they could present. The judge even held court over the weekend to accommodate the parties' desire for a swift resolution. Unquestionably, Mrs. Arneault had her day in court with respect to the distribution issue. The record simply does not support Mrs. Arneault's contention that theirs was a "standard marriage." More importantly, the record supports the family court's conclusion that Mr. Arneault's sole and unique contributions to the success of MTR, and Mrs. Arneault's lack of involvement in the business, supported a thirty-five/sixty-five distribution of its stock.

In a thirty-page February 20, 2004 order, the family court detailed the overwhelming testimony of credible witnesses concerning Mr. Arneault's impact on MTR and its prospects, as well as the gaming and tourism industry in West Virginia in general. Louis Southworth, a well-known Charleston attorney and lobbyist, testified that Mr. Arneault's work was "primarily responsible" for the various pieces of legislation over a period of years that permitted gaming in West Virginia, "allowing MTR to skyrocket." Indeed, Mr. Southworth testified that "but for him [Mr. Arneault], (the 1994 legislation)

would not have passed.”

The court heard testimony from Rose Mary Williams, MTR’s director of racing and an employee of Mountaineer Park since 1977, who explained that once gaming legislation was passed, it was Mr. Arneault’s strategy to market the resort through “infomercials” that was the “turning point in the company’s success.” The testimony was undisputed that when he took over as president and CEO in April of 1995, the company had revenues of \$25 million and that, as of 2004, the company had some \$300 million in revenue, and that Ted Arneault was primarily responsible for the company’s meteoric growth.

For her part, Mrs. Arneault agreed that she had absolutely no involvement in the company’s business, and that she made no contributions, by virtue of non-monetary means, to the success of the business. “She was rarely in the State of West Virginia, and thus rarely at the site of the casino/resort.” No matter how many times Mrs. Arneault alleges in her petition that she was a “corporate spouse” who made substantial sacrifices to ensure the success of her husband’s business, it cannot make it true, and the family court’s allocation of stock cannot be said to be unjust in light of her lack of contribution.

While married to Mr. Arneault, Mrs. Arneault reaped the benefits of his success and would be a multi-millionaire under the judgment of the Circuit Court of Hancock County. It is simply inequitable for her also to receive fifty percent of the stock in light of her negligible contribution to the success of the company, merely as the result of

her status as his wife. MTR is not a “lottery ticket,” the cost of which was purchased with marital funds and the equal division of which would be equitable. Rather, the overwhelming evidence was that Mr. Arneault was the heart and soul of MTR and it was his extraordinary personal efforts that built the company into what it is today. Even Mrs. Arneault’s own expert, Dan Selby, testified as follows:

He’s actually quite an amazing evolving human, I mean, he’s got tremendous demeanor, he’s developed incredible expertise in numerous fields, he’s developed what seems to me to be a very learned financial background that he is able to deal in all sections of level of financial indices. He’s dealing with bankers, he’s dealing with the public, he’s dealing with managerial aspects. He’s developed a personage that, obviously, from what I have heard in testimony, is a – is an incredible salesman. So in essence, he’s developed an intellectual cap – capital and expertise through an evolutionary stage. It looks like he’s exercised his capacity wonderfully.

On the one hand, Mrs. Arneault provided homemaker services over the years.

On the other hand, even Mrs. Arneault conceded that Mr. Arneault was a devoted, involved father, coached his son’s athletic teams, and, despite necessary business travel, made it home frequently and nearly every weekend while either child was living at the family home. Based upon all of the evidence, the family court wisely determined that the thirty-five/sixty-five split was “equitable,” based upon the relative contributions of the parties, and this Court should not interfere with this discretionary judgment.

While it is true that the family court focused on the factors set forth in Sections 103(1)(A) and (2)(E) – how could she not, given Mr. Arneault’s monetary contribution was

seventy-two times that of Mrs. Arneault and he managed all of the finances, including obtaining the loans necessary to exercise the stock options in the first place – it is equally clear that the family court judge carefully considered each of the statutory factors. The judge sifted and weighed the evidence. Some factors favored Mr. Arneault; others favored Mrs. Arneault; some such as Section 103(1)(b) had no bearing at all. The family court judge even noted that had she limited her consideration to the factors in 103(1)(a) and (2)(E), Mr. Arneault would receive virtually all of the marital estate. The family court determined, based upon some of the other Section 103 factors, that Mrs. Arneault had made “substantial” contributions to the marriage and therefore awarded her a “substantial” portion of the marital estate.

The Section 103 factors require a determination based on the totality of the circumstances. Here, Mr. Arneault’s direct responsibility for the acquisition, maintenance, and appreciation of the MTR stock through his sole efforts, coupled with Mrs. Arneault’s complete absence from the scene at MTR, Mr. Arneault’s sharing of the household and parenting duties, and encouragement and support (financial and otherwise) for Mrs. Arneault’s consulting business were substantial factors weighing in his favor.

In considering the merits of Mrs. Arneault’s appeal, this Court should consider the following factors, used by courts in cases around the country in similar circumstances:

- (1) Mrs. Arneault failed to introduce any evidence that she made major contributions to the marital estate as a result of her efforts as a “corporate spouse;”

- (2) She failed to introduce any evidence that she was a full-time homemaker;
- (3) She failed to introduce any evidence that she routinely accompanied Mr. Arneault to conventions and social gatherings of MTR;
- (4) She failed to introduce any evidence that she was so involved in the dealings of MTR that for all intents and purposes she was considered an employee;
- (5) She failed to introduce any evidence that she entertained MTR customers and other business associates in social and business settings;
- (6) She failed to introduce any evidence that she suffered an increased workload and extensive social duties as a result of Mr. Arneault's work at MTR;
- (7) She failed to introduce any evidence that she hosted events related to the business of MTR;
- (8) She failed to introduce any evidence that her entertainment duties expanded with Mr. Arneault's corporate responsibilities;
- (9) She failed to introduce any evidence that she traveled extensively with Mr. Arneault to numerous cities for business purposes;
- (10) She failed to introduce any evidence that she in any way was a sounding board for Mr. Arneault, giving advice and guidance to him;
- (11) She failed to introduce evidence that during the course of the marriage Mr. Arneault frequently shared information with her about business dealings, daily experiences, and/or asked for advice in a wide variety of circumstances;
- (12) She failed to introduce any evidence that she played any role (significant or otherwise) in the financial aspects of MTR

or Mountaineer Park, in addition to serving as a “homemaker;”

(13) She failed to introduce any evidence that she performed all the typical duties of a wife, parent, and homemaker and still demonstrate that she made an actual economic contribution to the marital estate; and

(14) She failed to introduce any evidence that there is a direct link between her business efforts and the ultimate value of the MTR stock.

It appears that Mrs. Arneault had a full and fair opportunity to present such evidence, but did not do so. She gave the family court virtually nothing, other than the talismanic argument that as Mr. Arneault’s wife, she was entitled to fifty percent of everything. Mrs. Arneault certainly had competent counsel who could have developed a record to refute Mr. Arneault’s contention that he was entitled to more than fifty percent of the MTR stock. Instead of evidence, however, she requested this Court’s intervention in the face of a clear and unambiguous statute to ignore the evidence and award to her what would be a windfall.

What the legislature has instructed is that when the efforts of one spouse are disproportionate to the efforts of another spouse with respect to the acquisition of marital assets, the efforts of the first spouse are *not to be ignored* in the *equitable* distribution of the marital assets; otherwise, slough and neglect would prevail over industry and diligence. The family law judge recognized, based on overwhelming evidence, that Mr. Arneault’s contributions to the acquisition and appreciation of the stock were so profound and unique and Mrs. Arneault’s contributions were relatively negligible as to justify a relatively unequal

distribution of the subject stock.

Because Mrs. Arneault's contribution to the subject stock was negligible, she understandably attempted to leverage whatever homemaker services she provided that were not provided by housekeepers, nannies, and other service providers. Mrs. Arneault's reliance on *Mayhew v. Mayhew*, 197 W.Va. 290, 475 S.E.2d 382 (1996), however, for the proposition that "workplace" work and "home place" work must be valued equally, even where they are not equal, is misplaced. The family court's order soundly and thoroughly distinguishes that case. As the family court noted, the *Mayhew* court acknowledged that the two types of work are equated only if the court does not find that one or more of the Section 103 factors requires a contrary finding, thus rebutting the presumption. Therefore, the family court reasoned, *Mayhew* is consistent with Justice Cleckley's decision in *Burnside*, which, while acknowledging that in general equitable distributions will be equal, left ample room under the Section 103 factors to alter that distribution.

Mayhew is further distinguishable on the facts. In *Mayhew*, the wife during the course of the marriage would take the children to the husband's business (a car dealership), cook, and take dinner to the husband when he had to work late, was active in community organizations to aid the husband's business, and actually worked at the dealership without compensation prior to the birth of the children. In other words, Mrs. Mayhew was the proverbial "corporate spouse." Mrs. Arneault was not. Indeed, she rarely set foot in West Virginia. This irrefutable fact is at the heart of the family court's decision.

There are spouses, both husbands and wives, whose contributions to the success of their spouse's businesses are more or less, particularly considering their other contributions to the marriage, such as homemaker services, equal. For those spouses, they absolutely deserve a fifty percent distribution of the value of those businesses. Where one spouse, however, as in the instant case, is so instrumental in building a business, and the other spouse's contributions are relatively insignificant, an unequal distribution of the value of that business is appropriate. Had Mrs. Arneault, in reality, served the role of "corporate spouse" that she alleges, she might be entitled to half of the value of MTR stock.

In most cases, in the ordinary circumstances of divorce – which is that neither party can afford it – a relatively strict application of the presumption of equal distribution may be more appropriate. "Let both parties suffer equally" is not an unreasonable principle. But when the "super rich" start dividing things up, and even a person with the shorter end of the stick will be "rich" after a divorce, then it is less harmful to let the equities have their way. The majority opinion is therefore additionally deficient in its discussion of equitable distribution because it pretends that the enormous wealth that Mr. Arneault has amassed through his work is just like the "house and pension and savings" that ninety-nine percent of us have.

The majority would have done well to consult a 2001 article in the *Journal of the American Academy of Matrimonial Lawyers* by Mosby Kisthardt and Nancy Levit, "High Income/High Asset Divorce: An Annotated Bibliography," listing scores of scholarly

articles. Hopstein, Weiner and Marrone take on the challenge in another *Journal of Matrimonial Lawyers* article in 2001: “The Big Case: Issues in High Income/High Asset Cases.” Another article, “Wealthy Wives’ Tales,” by Debra Baker, appears in the 1998 *ABA Journal*. The majority opinion could, of course, have cited to or reflected a study of the materials in these articles, if it wanted to recognize the super rich status of the Arneaults. But not a glimmer of such recognition appears in the opinion. We could be talking about a family that owns a small dry cleaning business in Webster Springs! A review of these articles suggests that where one party to a marriage has by extraordinary personal effort amassed great wealth, while the other party’s contributions to the amassment of wealth have not been of an equally extraordinary nature, the party principally responsible for the existence of the wealth should receive a somewhat greater share.

This dissent will conclude by quoting a sentence from the majority opinion that illustrates the kind of superficial and speculative rhetoric upon which the majority purports to ground its overturning of a well-reasoned lower court decision that is thoroughly supported by evidence and law.

The majority says:

Mrs. Arneault earned a professional license and a graduate degree after the marriage commenced. It is *very conceivable* that this accumulation of knowledge, after the commencement of the marriage, *led to the development of Mr. Arneault’s innate abilities*. [emphasis added].

To this caliber of judicial reasoning, the only possible response is amazed

speechlessness. Accordingly, I dissent.¹

¹I do not address other issues discussed in the majority opinion.