

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

**IN RE: THE MARRIAGE OF**

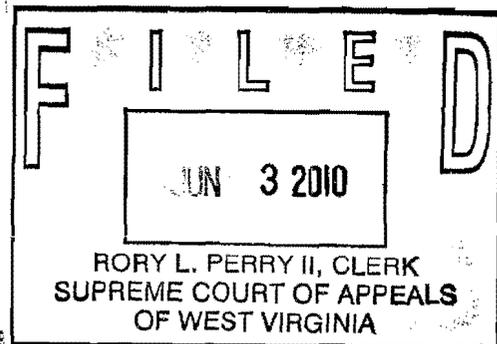
**JEWELL K. WHITTAKER,**

**Appellant/Petitioner,**

**v.**

**ANDREW J. WHITTAKER,**

**Appellee/Respondent,**



**Family Court No: 05-D-331  
(Raleigh County)  
Appeal No. 35552**

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**BRIEF OF APPELLANT JEWELL K. WHITTAKER**

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**And**

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**ANDREW J. WHITTAKER,**

**Appellee/Respondent.**

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**I. STANDARD OF REVIEW**

In reviewing a final order of a family court judge that is appealed directly to the Supreme Court of Appeals of West Virginia, findings of fact by a family court judge are reviewed under the clearly erroneous standard, and the application of law to the facts are reviewed under an abuse of discretion standard. Questions of law are review *de novo*. Syllabus Pt. 11, *Adkins v. Adkins*, 656 S.E.2d 47 (W.Va. 2007), quoting *May v. May*, 589 S.E.2d 536 (W.Va. 2003).

**II. POINTS AND AUTHORITIES RELIED UPON**

**Cases**

*Adkins v. Adkins*, 656 S.E.2d 47 (W.Va. 2007). . . . . 1

*May v. May*, 589 S.E.2d 536 (W.Va. 2003). . . . . 1

**Statutes**

*W.Va. Code §31-B-1-105 et seq.* . . . . . 13  
*W.Va. Code §48-1-233(l).* . . . . . 14  
*W.Va. Code §48-7-102* . . . . . 15

**Rules**

*Rule 28 of the Rules of Practice and Procedure for Family Court.* 12, 13

**Legislative Rules**

None.

**III. KIND OF PROCEEDING AND NATURE OF RULING**

The original final divorce was held before the Honorable Louise Staton, on March 17, 2008. The Family Court entered the Final Order under Rule 22(b). The Respondent filed an appeal of the Final Order to the Raleigh County Circuit Court on April 28, 2008.

On August 27, 2008, the Honorable Robert A. Burnside, Circuit Judge reversed the Order and remanded the matter to the Family Court for further proceedings, consistent with his memorandum which stated the Family Court lacked jurisdiction to award assets of various limited liability corporations wherein the Respondent was the sole member.

Pursuant to the remand order of Judge Burnside, the parties returned for hearing on November 7, 2008 before the Honorable Louise Staton and advised the Court that the parties had reached an agreement. The agreement was reduced to writing with signed approval and acceptance by the parties. The Final Order was filed with the Clerk’s Office on the 7<sup>th</sup> day of November, 2008. This Final Order was

contrary, the parties commenced to honor the terms of the Final Order and began exchanging items of personalty and real estate pursuant to the Final Order. The Respondent did not fully comply with the terms of the agreed Final Order and the Petitioner sought relief in the form of sanctions against the Respondent for his failure to complete the transfers which were ordered by filing a Petition for Order for Rule/Contempt in Raleigh County Family Court on the 27<sup>th</sup> day of January, 2009.

In said Petition, the Petitioner alleged that the Respondent had failed to do the following: (1) convey all of his right, title, interest and equity in certain properties that were awarded to the Petitioner; (2) transfer, convey or otherwise transfer ownership of certain closely held businesses which were to have been transferred within thirty (30) days of the Order; (3) assign all of his rights, title and interest in certain Notes to the Petitioner; (4) to execute a note to the Petitioner in the sum of Three Hundred Seventy-One Thousand Dollars (\$371,000.00) and Deed of Trust to the "Beckley Speedway" property (in lieu of attorney fees awarded to the Petitioner); and (5) to provide a full and complete accounting of monies received or owed to the Respondent or Whittaker, LLC as rent or lease payments incurred or received from March 5, 2008 to that date and then if not agreeable as to the amount owed, the Court would hear the matter for determination.

A hearing on the Petition was held on the 11<sup>th</sup> day of March, 2009, before the Honorable Louise Staten and the Judge found the Respondent to be in contempt of the order of November 7, 2008 based upon the fact the Respondent testified he was the sole member of all of the limited liability corporations involved and as such, he made all decisions pertaining to the properties held by the limited liability corporations. The Respondent objected to the Family Court ruling and on the 8<sup>th</sup> day of April, 2009 appealed the Family Court Order to the Circuit Court of Raleigh County.

Judge Burnside, Circuit Court Judge for Raleigh County, West Virginia, issued a memorandum on the 28<sup>th</sup> of April 2009 stating he was taking the matter under advisement. Finally, after urging from counsel for the Petitioner, Judge Burnside set a hearing for November 30, 2009. After the November 30<sup>th</sup> hearing, Judge Burnside reversed the Final Order of November 7, 2008 and remanded the case to the Family Court. It must be noted, the Final Order has never been appealed by either party. At the same time Judge Burnside reversed the contempt order of the Family Court of March 25, 2009.

It is the reversal of the Final Order of the Family Court and the reversal of the Family Court contempt order the Petitioner seeks relief from. Judge Burnside lacked jurisdiction to reverse the Final Order.

Basing his reversal of the contempt order on the fact that he had reversed the Final Order, compounds the Court's error.

The Circuit Court failed to consider the fact the parties had entered into a property settlement agreement before the Family Court on November 7, 2008, which was made a part of the Final Order. A Final Order which was never been appealed and the time to appeal has long since passed. Judge Burnside would not recognize the fact that the Respondent was the sole member of the limited liability corporations with absolute control and management of the limited liability corporations.

#### **IV. FACTS OF THE CASE**

The parties to this action were duly and legally married in Summers County, West Virginia, on the 7<sup>th</sup> day of May, 1966, and last cohabited together as husband and wife on the 30<sup>th</sup> day of November, 2004, in Raleigh County, West Virginia. The parties were divorced by Final Order of the Family Court of Raleigh County entered on April 1, 2008.

Thereafter, Respondent filed a Motion for Reconsideration of the Final Order on April 7, 2008 as well as an Appeal of the Final Order on April 28, 2008. On August 27, 2008, the Honorable Robert A. Burnside, Jr. issued an Order reversing the Family Court's Order and remanded the matter back to Family Court for further proceedings

consistent with his memorandum of August 27, 2008, and for such additional proceedings as are necessary to the determination of all issues remaining in this action.

Therefore, the parties returned to the Family Court for further hearing on November 7, 2008 and at that time, the parties reached an agreement as to the equitable distribution of the marital estate and said agreement was typed there in the courtroom with both parties present and composing said Order. Further, the Respondent executed said Order as having approved and agreed to the same.

On or about January 27, 2009, the Petitioner, Jewell K. Whittaker, filed a *Petition for Order for Rule/Contempt* in Raleigh County Family Court requesting that the Respondent be found in contempt of the *Final Order/Findings of Fact and Conclusions of Law* entered on November 7, 2008.

In said Petition, the Petitioner alleged that the Respondent had failed to do the following:

1. The Respondent was to convey all right, title, interest and equity in the following properties to the Petitioner within thirty (30) days of being provided the instruments of conveyance. Said conveyances shall be free and clear of any and all indebtedness or encumbrances, including, but not limited to taxes due thereon for 2007. The Respondent shall pay the real estate taxes up to March 5, 2008. All conveyances from the Respondent to the Petitioner

were to be by General Warranty Deed. Noted, the Respondent was to have the option until the midnight hour of February 15, 2009, to purchase the Glade Springs property from the Petitioner for the sum of One Million, One Hundred Thousand Dollars (\$1,100,000.00), cash in hand. Thereafter, his option shall expire:

Specific properties that were to be conveyed are:

- (a) 115 Rosehill Acres;
- (b) Willowwood Tract has, by agreement between the parties been reconveyed to the Respondent for adequate consideration as has the Robin Roost Property, U.S. 119 property, Beckley Speedway;
- (c) 603 Fairway Drive;
- (d) Jumping Branch Property in Summers County;
- (e) Flat Top Lake Property, including the furnishings and water craft;
- (f) The Stone house at Woodthrush;
- (g) The Glade Springs property, subject to the above-stated option to the Respondent;
- (h) 156 Heritage Place;
- (i) All of the Ohio Property owned by the Respondent or any of his entities, including, Whittaker, LLC or Beckley Speedway, LLC and recited into the record from the Rufus report by the tax identification numbers in Petitioner's Exhibit #1;
- (j) Patrick Street Blackburn Lot in Charleston, West Virginia;
- (k) 70 Shady Lane, St. Albans, West Virginia;
- (l) 106 Oakwood Drive, Cross Lanes, West Virginia;
- (m) Lots 13 & 14, on Smiley Drive;

- (n) Lot 2 Smiley Drive, known as the Brandi Building;
- (o) Frazier Bottom Property;
- (p) 300 Rosehill;
- (q) Collateral on JEEM note which is the real estate which was purchased by Whittaker, LLC, or Blackburn Motors, but only the real estate in Jumping Branch District on Ellison Ridge Road, and
- (r) Collateral on the Sunmine property, on Route 119 in Fayette County, consisting of approximately 245 acres in name of Whittaker, LLC, JLW, LLC and the mining permit;

2. The Respondent was to transfer, convey or otherwise transfer ownership of the following closely held businesses: (a) M & J business and property, including, three parcels situate in Putnam County deeded in the name of M & J Development, LLC on Route 35, Fraziers Bottom; (b) Mancor Industries, Inc., all of the Respondent's which is represented to be approximately 458 1/3 shares of stock. Said transfers were to be effectuated within thirty (30) days of the date of the Order.
3. The Respondent was to assign all of his rights, title and interest in the following Notes to the Petitioner:

(A) The Lisa Smith Note to the Petitioner, and to provide her with an accounting within 30 days of that date, showing the remaining balance of no less than One Million Four Hundred Thousand Dollars (\$1,400,000);

(B) The Mancor Note to the Petitioner and provide her with an accounting within thirty (30) days which will reflect the remaining balance of no less than \$325,000.00;

(C) The M&J Note valued for not less than Two Hundred Seventy Five Thousand, Sixty Two Dollars (\$275,062) to the Petitioner and provide an accounting which will reflect a balance owed thereon within thirty (30) days;

(D) The MetLife policy on the life of the Respondent, policy #N15719757 T, to the Petitioner within thirty (30) days along with any and all cash value attached thereto as of the date of transfer and the Respondent states he has done nothing to reduce the case value of the policy since the date of separation of the parties.

4. The Respondent was to pay the sum of Three Hundred Seventy One Thousand Dollars (\$371,000.00) to the Petitioner evidenced by a note to be signed by the Respondent within thirty (30) days, to be paid within five years of this date, with the right to prepay at an interest rate of 8% per annum secured by a first Deed of Trust on the Beckley Speedway property. However, the Petitioner shall sign a release for the sale of any parcel of said property under the condition the sale proceeds shall be divided equally between the parties and the Respondent shall receive credit toward the stated indebtedness. The amount shall be amortized over a 60 month period with the first payment due December 15, 2008 and payments due on the same date each and every month thereafter. Any lump sum payments will be credited, but payment schedule shall not be altered thereby.

5. The Respondent was to, within 30 days of that date, provide a full and complete accounting of monies received or owed to the Respondent or Whittaker, LLC as rent or lease payments incurred or received from March 5, 2008 to that date including the names, addresses, and phone numbers of those using the properties within this group. That accounting was to include any costs directly attributable to the property. Counsel for the Petitioner was to confer with the Respondent to determine how much, if any is owed to the Petitioner. If they are unable to agree on the amount, the Court will hear the matter for determination.

A contempt hearing was held on March 11, 2009 before Honorable Louise Staton, Family Court Judge and a proposed *Order* was submitted by Petitioner's counsel on or about March 13, 2009 under *Notice Rule 22(b)*. Respondent thereafter filed *Objections* to said proposed *Order* on or about March 16, 2009. On March 25, 2009, the Court entered the proposed *Order* of the Petitioner and on March 27, 2009 issued an *Order Denying Objections of Proposed Order*.

On April 8, 2009, the Respondent filed an *Appeal* to the *Order* entered March 25, 2009 and the Petitioner thereafter filed a *Response to said Appeal*. On April 28, 2009, the Honorable Robert A. Burnside, Jr., Circuit Judge, issued a *Memorandum* stating that the matter would be taken under advisement and if necessary, a hearing would be scheduled.

On October 7, 2009, the Judge filed a *Memorandum* setting the matter for hearing on November 30, 2009. A hearing was held on November 30, 2009, with regard to the Appeal filed by the Respondent and a *Memorandum* and *Order* entered on December 2, 2009 and is now the subject of this appeal.

The Circuit Court failed to consider that the parties returned to Family Court on November 7, 2008, and that the Respondent of his own free will agreed to transfer said properties belonging to Whittaker, LLC as part of the equitable distribution, that he aided in preparation of the Order and that he in fact signed off on said Order. Although the Circuit Court is correct in that the Family Court does not have subject matter jurisdiction to order the transfer of individual assets from an limited liability corporation because a limited liability corporation is a separate property, nothing prevents the Respondent himself from agreeing to transfer such assets to pay his share of equitable distribution and that is exactly what occurred at the hearing of November 7, 2008. Then the Family Court through their arm's length transaction has as the jurisdiction to enforce their agreement which is a part of the Court's Order.

## V. ASSIGNMENTS OF ERROR AND ARGUMENT

A. **The Circuit Court erred in reversing said *Order* entered on March 25, 2009 as it was an Order from a Contempt Hearing not the Order of November 7, 2008 that was the subject of the Circuit Court's original remand.**

The *Order* that was on appeal before the Circuit Court is the Order entered March 25, 2009 which is the result of a contempt hearing for the Respondent not complying with the family court's *Agreed Order/Findings of Fact and Conclusions of Law* entered into on November 7, 2008. This can be stated with authority because the appeal time had lapsed to appeal the November 7, 2008 *Agreed Final Order*.

The Respondent's states in his *Appeal* the following grounds:

A. Prior to Judge Staton's entry of the **Final Order from Contempt Hearing ("Order")** of March 11, 2009, I filed objections regarding the Order. (*See Exhibit 7 Attached*). Judge Staton entered the **Order** on March 25, 2009, despite my objections.

Once again, the Respondent's objections are to the *Contempt Order*, not the *Agreed Final Order* of November 7, 2008.

Pursuant to *Rule 28 of the Rules of Practice and Procedure* an appeal must be filed within thirty (30) days of entry by the Circuit Clerk. Mr. Whittaker, the Respondent, did not appeal that order. Although

difficult to follow, his *pro se* appeal dealt only with the contempt hearing. The *Final Order/Finding of Fact and Conclusions of Law* of November 7, 2008 was not addressed. Nevertheless, the Circuit Court *sua sponte* set aside the *Final Agreed Order* entered into by the parties.

**B. The Circuit Court erred in reversing the parties' Agreed Final Order in that the Circuit Court lacked jurisdiction to reverse said Order.**

Assuming *arguendo*, the Circuit Court did not incorrectly address Mr. Whittaker's appeal of the Contempt Order of March 25, 2009, the Court still lacked jurisdiction to set aside the *Agreed Final Order* of November 7, 2008.

*Rule 28 of the Rules of Practice and Procedure for Family Court* states in pertinent part:

- (a) A party aggrieved by a Final Order of a family court may file a petition for appeal to the circuit court **no later than thirty (30) days after the family court order was entered in by the Circuit Clerk's Office.**

Emphasis added.

The Circuit Court relies upon *W.Va. Code §31B-1-105 et seq.* when it opines the agreed order is unenforceable. Nevertheless, nothing in

said code prevents a sole member in a limited liability corporation from transferring assets to pay debts, or pledging said debts to pay equitable distribution.

In fact, *W.Va. Code §48-1-233(l)* is extremely broad in defining marital property to include property held in trust by a third party.

**C. The Circuit Court erred in finding that the Family Court does not have jurisdiction to adopt the parties agreement as to assets held in a limited liability corporation.**

Andrew J. Whittaker, Jr. is the sole member of Whittaker, LLC and M&J Development, LLC. As sole member of these limited liability companies, he had sole control of said companies. In fact, all funds used to purchase any limited liability corporation assets were provided through Mr. and Mrs. Whittaker during the marriage or from the lottery winning proceeds. Mr. Whittaker agreed that all assets were marital and disposable and completely under his control. As a result, Mr. Whittaker agreed to transfer from the limited liability corporations to Ms. Whittaker these assets as a part of a property settlement agreement.

Mr. Whittaker chose this action because he did not want to liquidate said companies. Thus, he agreed to transfer said assets. Relying on this agreement, ninety percent (90%) of the agreement has

already been completed. Once the parties entered into said agreement it became a binding contract as a settlement agreement. The Family Court has broad authority to enforce settlement agreements entered into by the parties. Further, they certainly have jurisdiction to adopt as its order an agreement entered into by the parties.

**D. The Circuit Court erred in ruling the Agreed Order was unenforceable.**

*W.Va. Code §48-7-102* governs equitable division of marital property in accordance with a separation agreement. In pertinent part said statute reads as follows:

. . . then the court shall divide the marital property in accordance with the terms of the agreement, unless the court finds:

- (1) The agreement was obtained by fraud, duress, or other unconscionable conduct by one of the parties; or
- (2) That the parties, in the separation agreement, have not expressed themselves in terms which if incorporated into a judicial order, would be enforceable by a court in a future proceeding.

This Honorable Court must understand approximately 90% of the agreed order is already completed and transferred. The only remaining terms to be completed as to the agreement were addressed in the Petition for Contempt and remain as follows:

1. The Respondent needs to sign and complete an Errors and Omissions Agreement. Respondent argues that he did not agree to sign such a document and states merely that upon review of the proposed Errors and Omissions Agreement that it would interfere with other lawsuits pending against Petitioner's counsel. Respondent fails to state specifically how this agreement interferes with any pending suits that may exist.
2. The Respondent still needs to provide a full and complete accounting of monies received or owed to the Respondent or Whittaker, LLC as rent or lease payments incurred or received from March 5, 2008 the present including names, addresses and phone numbers of those using the properties within this group. This accounting shall include any costs directly attributable to the property. Count for the Petitioner shall confer with the Respondent to determine how much, if any is owed to the Petitioner. If they are unable to agree on the amount, the Court will hear the matter for determination. While the Respondent has provided an accounting, the Petitioner does not believe it to be complete and does not agree as to said accounting.

3. The Respondent had agreed to assign all of his rights, title and interest to the following notes: (a) Lisa Smith Note; (2) Mancor Industries, Inc. Note; (3) JEEM, Inc.; (JLW, LLC – known in prior Orders as Note on Sunmine property; and (5) M&J Development, Inc.

The family court has the authority to enforce this agreement because it was voluntarily entered into by the Respondent who is the sole member of the limited liability corporation and he consented individually and as sole member of the limited liability corporation to said agreement. There is no one else to answer to when there is only a sole member of a corporation. As stated previously, the Respondent agreed to disburse assets of the corporation(s) as he wished to avoid liquidating said companies in order to achieve equitable distribution. The terms of this agreement are judicially enforceable because everyone understands that the Respondent had the power and authority.

To hold otherwise is to bring chaos to this case, and to make equitable distribution too burdensome when dealing with a limited liability corporation. If the Circuit Court is correct the only remedy to divide the limited liability corporation is always to dissolve said limited liability corporation.

**VI. CONCLUSION**

In conclusion, the parties have already completed and disbursed over 90% of the Agreed Order to which the Trial Court has reversed. To uphold the Trial Court's Order to allow such a reversal now would be inviting utter chaos into the lives of these people.

JEWELL K. WHITTAKER,

BY COUNSEL



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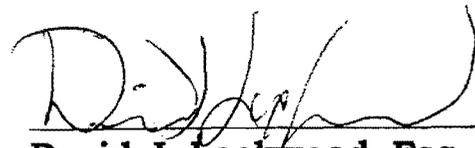
**ANDREW J. WHITTAKER,**

**Appellee/Respondent.**

**CERTIFICATE OF SERVICE**

I, David J. Lockwood, Esq., counsel for the Appellant/Petitioner, Jewell K. Whittaker, do hereby certify that on the 3 day of June, 2010, I served a true and exact copy of the following **Brief of Appellant Jewell K. Whittaker** for same via the United States Mail, postage prepaid to the following:

**Andrew J. Whittaker  
P.O. Box 33  
Rocky Gap, VA 24366**



**David J. Lockwood, Esq. (#2230)**  
Counsel for the Appellant/Petitioner