

IN THE SUPREME COURT OF APPEAL OF WEST VIRGINIA

**In Re:
The Marriage of:**

**JEWELL K. WHITTAKER,
Appellant/Petitioner**

And

**Civil Action No.: 05-D-331-S
(Raleigh County)
Appeal No.: 35552**

**ANDREW J. WHITTAKER,
Appellee/Respondent.**

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BRIEF OF APPELLEE ANDREW J. WHITTAKER

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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 direction standard. Questions of law are reviewed *de novo*. Carr v. Hancock, 216 W.Va. 474, 476, 607 S.E.2d 803, 805 (2004).

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II. KIND OF PROCEEDING AND NATURE OF RULING

On March 17, 2008, a Final Divorce Hearing was held before the Honorable Louise G. Staton, Family Court Judge for Raleigh County, West Virginia, and a Final Order was entered under Rule 22(b) of the *West Virginia Rules of Practice and Procedure of Family Court*. 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, Jr., Circuit Court Judge for Raleigh County, West Virginia, reversed the Order and remanded the matter to the Family Court for further proceedings, consistent with his Memorandum stating the Family Court lacked subject matter jurisdiction to award assets of various limited liability companies wherein the Respondent, Andrew J. Whittaker (hereinafter referred to as “Respondent” or “Mr. Whittaker”), was the sole member.

On November 7, 2008, the parties returned to Family Court pursuant to the remand order of Judge Burnside and appeared again before the Honorable Louise Staton. At the hearing the parties advised the Court they had reached an agreement. Judge Staton required that all parties remain in the courtroom while the agreement was reduced to writing for a period of almost four (4) hours. The

agreement was signed by all parties and the Final Order was filed with the Clerk's office on the same day. Thereafter, Petitioner, Jewell K. Whittaker (hereinafter referred to as "Petitioner" and "Mrs. Whittaker"), and Respondent began exchanging items of personalty and real estate pursuant to the Final Order.

On January 27, 2009, Petitioner filed a Petition for Order for Rule/Contempt in Raleigh County alleging that 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 to the amount owed, the Court would hear the matter for determination.

On March 11, 2009, a hearing on the Petition was held before the Honorable Louise Staton and Respondent was found to be in contempt of the Final Order from November 7, 2008. The Family Court based its decision upon the fact the Respondent testified that he was the sole member of all of the limited liability companies involved and that he made all decisions pertaining to the properties held. According to the Family Court, the Respondent could thus be required to perform the aforementioned conditions on behalf of the limited liability companies.

On April 8, 2009, Respondent objected to the Family Court's Contempt Order and appealed to the Circuit Court of Raleigh County. On April 28, 2009, Judge Burnside issued a Memorandum stating he was taking the matter under advisement. A hearing was held on November 30, 2009, and Judge Burnside reversed the Final Order of November 7, 2008 and remanded the case to the Family Court. Judge Burnside also reversed the Contempt Order of the Family Court of March 25, 2009, stating that the family court misunderstood the purpose of the remand:

to take evidence necessary to evaluate Mr. Whittaker's distributional interest for the purpose of marital distribution. That evidence might of necessity require an itemization of the properties, and the values thereof, of Whittaker, LLC, but only for the purpose of evaluation of Mr. Whittaker's distributional interest, and not for direct distribution of those assets.

See Memorandum Order dated December 1, 2009, pg. 3.

Petitioner is seeking relief from the reversal of the Final Order of the Family Court and the reversal of the Family Court Contempt Order, alleging that Judge Burnside lacked jurisdiction to reverse the Final Order. Petitioner alleges 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 part of the Final Order, that the Final Order was never appealed and the time to appeal has passed, and that Judge Burnside would not recognize the fact that the Respondent was the sole member of the limited liability corporations with absolute control and management. However, upon reading the December 1, 2009, Memorandum Order of Judge Burnside, it is apparent that all of these issues were taken into consideration. In the December 1, 2009 Memorandum Order, Judge Burnside, clearly states the following:

The fact that the parties apparently agreed to the entry of an order that requires this distribution does not help. The parties are permitted to agree to transfer of the assets of an LLC for any purpose, including, the satisfaction of a claim of marital distribution. The problem that creates is that if they make such an agreement, the Family Court does not have the subject matter jurisdiction to incorporate such an agreement into an order enforceable by the Family Court's contempt powers, because the Family Court may reach no further than the marital assets.

See Memorandum Order dated December 1, 2009, pg. 3.

Petitioner states that it must be noted that the Final Order has never been appealed by either party and although that may be correct, it is irrelevant because

Judge Burnside found the first Order void for lack of subject matter jurisdiction, just as the Court found the November 7, 2008 Order void. Alternatively, Mr. Whittaker would have been deprived of his due process rights if his appeal had never been heard because he was never provided a copy of the Final Order. This issue was addressed at the March 11, 2009 Contempt Hearing, and neither Mrs. Whittaker's attorney nor Judge Staton refuted the fact that Mr. Whittaker was never provided with a copy of the Order. In fact, after Mr. Whittaker represented that he had to go to the Courthouse and purchase his own personal copy, Judge Staton acknowledged that the clerk's office had been encountering problems with providing copies of Orders.

Judge Burnside also recognized even if Respondent is the sole member of Whittaker, LLC, in the absence of a statutory distinction between a multiple member and single member LLC, the relationship between the member and the assets of the LLC is the same irrespective of whether it is a single – or multiple-member LLC. Respondent's ownership interest in an LLC in which he is a member is limited to his distributional interest and it is only that interest that is subject to the power of the family court to distribute as a marital asset. As a result, the Family Court's Final Order of November 7, 2008, is void for lack of subject matter jurisdiction.

IV. STATEMENT OF THE FACTS

On May 7, 1966, the parties were married in Summers County, West Virginia. The parties lived together in Raleigh County as husband and wife until November 30, 2004, at which time they separated and ceased all cohabitation. On April 1, 2008, a Final Order of Divorce was entered. On April 7, 2008, Respondent filed a Motion for Reconsideration of the Final Order and on August 27, 2008, the Honorable Robert A. Burnside, Jr. reversed the Family Court's Order finding that the Family Court did not have the subject matter jurisdiction to order the transfer of assets that are not a part of the marital estate and remanded the matter back to Family Court.

On November 7, 2008, the parties appeared in front of the Honorable Judge Staton and an Agreement was prepared during that hearing as to the equitable distribution of the marital estate. On January 27, 2009, the Petitioner filed a Petition for Order for Rule/Contempt in the Family Court of Raleigh County requesting Respondent be found in contempt of the Final Order that was entered on November 7, 2008.

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

1. 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, 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. 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:

Petitioner alleges 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. 199 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 and 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 the 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 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 thirty (30) days of that date, showing the remaining balance of no less than One Million Four Hundred Thousand Dollars (\$1,400,000.00);

(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 (\$275,062.00) 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 #N15719757T to the Petitioner within thirty (30) days along with any and all cash value attached thereto as of the date of transfer.

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 (5) 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.

On March 11, 2009, a Contempt Hearing was held before Judge Staton and on March 13, 2009, a proposed Order was submitted by Petitioner's counsel under Notice Rule 22(b) of the *West Virginia Rules of Practice and Procedure of Family Court*. On March 16, 2009, Respondent filed Objections to the proposed Order but on March 27, 2009, the Court entered the proposed Order and issued an Order

Denying Objections of Proposed Order. On April 8, 2009, the Respondent filed an Appeal to the Order entered on March 25, 2009 and Petitioner filed a Response to said Appeal. On April 28, 2009, Honorable Robert A. Burnside, Jr. 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, regarding the Appeal filed by the Respondent. On December 2, 2009, Judge Burnside issued a Memorandum and Order stating that upon remand, the family court repeated the same error, and in disregard of the remand instructions entered on November 7, 2008, entered an Order that again directed Respondent to transfer to Petitioner assets that belong to the LLC and that are thereby not part of the marital estate. It is this Memorandum and Order that is now the subject of this appeal.

V. ASSIGNMENTS OF ERROR AND ARGUMENT

A. THE FAMILY COURT LACKED SUBJECT MATTER JURISDICTION TO ORDER WHITTAKER, LLC, TO TRANSFER CERTAIN PROPERTIES UNTO THE APPELLANT AND THE FINAL ORDER DATED NOVEMBER 7, 2008.

Judge Burnside's decision to reverse the Final Order entered by the Family Court on or about November 7, 2008 was not erroneous, despite the fact that neither party ever appealed the Final Order, because the Family Court lacked

subject matter jurisdiction to require Mr. Whittaker to transfer or dispose of certain properties and assets owned by Whittaker, LLC.

“To enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction.” Syl. Pt. 3, State ex rel. Smith v. Bosworth, 145 W.Va. 753; 117 S.E.2d 610 (1960). “This Court has previously defined jurisdiction as “the power of a court to speak the law, both in terms of formulating laws of general application and in terms of applying the law to individual cases.” Eastern Associated Coal Corp. v. Doe, 159 W.Va. 200, 207; 220 S.E.2d 672, 678 (1975).

A family court’s subject matter jurisdiction with respect to the distribution of property is limited to the distribution of “marital property.” *See*, W.Va. Code §51-2A-2(15); *see also*, W.Va. Code §48-7-101, *et seq.* The West Virginia Legislature has defined “marital property” as follows:

All property and earnings acquired by either spouse during a marriage, including every valuable right and interest, corporeal or incorporeal, tangible or intangible, real or personal, regardless of the form of ownership, whether legal or beneficial, whether individually held, held in trust by a third party, or whether held by the parties to the marriage in some form of co-ownership such as joint tenancy or tenancy in common, joint tenancy with the right of survivorship, or any other form of shared ownership recognized in other jurisdictions without this state[.]

W.Va. Code §48-1-233(1) (emphasis added).

Thus, pursuant to the powers and authority bestowed by the West Virginia Legislature, the Family Court's jurisdiction regarding the distribution of property was limited only to property and assets owned and acquired by Mr. Whittaker and Mrs. Whittaker during their marriage. It does not extend to property and assets owned by businesses or other legal entities which may be affiliated with either of the party.

The plain language of W.Va. Code §31B-2-201 provides that "[a] limited liability company is a legal entity distinct from its members." Furthermore, W.Va. Code §31B-5-501, which is entitled "Member's distributional interest," unequivocally states that "[a] member is not a co-owner of, and has no transferable interest in, property of a limited liability company."

As a separate legal entity, a limited liability company is capable of owning its own properties and assets. Furthermore, because a limited liability company is separate and distinct from its members, the properties and assets of a limited liability company belong to the company itself, not to the individual members. Thus, the properties and assets owned by Whittaker, LLC, and other limited liability companies belong exclusively to the companies, not to Mr. Whittaker, and Mr. Whittaker personally possesses no transferable interest in the properties or assets of the limited liability companies. Thus, the Family Court possesses no jurisdiction or authority to legally direct, mandate, or otherwise force Mr.

Whittaker to transfer any properties or assets owned by the limited liability companies, to Mrs. Whittaker.

W.Va.Code § 48-7-105 offers instructions regarding the equitable distribution of a marital estate's ownership interest in a business entity.

Specifically, W.Va.Code § 48-7-10:

directs the court to (1) “give [a conditional] preference to the retention of the ownership interests; (2) consider the party who has the “closer involvement” with, “larger ownership interest” in, or “greater dependency” on such business; (3) further consider “the effects” that a “transfer or retention” of such ownership interests would have on the business, itself; and (4) secure the rights of the parties to receive that to which they are equitably entitled under this provision, either through an in kind transfer of the ownership interests or by the transfer of money or other property of equivalent value.

Syl Pt. 6, Arneault v. Arneault, 219 W.Va. 628; 639 S.E.2d 720 (2006), *quoting*,

W.Va.Code § 48-7-105

This Court has previously stated that “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” Syl Pt. 2, State v. Elder, 152 W.Va. 571; 165 S.E.2d 108 (1968). The statutes referenced hereinabove are without ambiguity, and the language of the statutes makes it clear that a family court's jurisdiction over the distribution of property is limited to the distribution of “marital property.” It is likewise clear that the properties and assets of a limited liability company belong to

the company, not its members, and therefore do not constitute “marital property” over which a family court would have jurisdiction.

Apparently ignoring the unambiguous language of W.Va. Code §31B-2-201, Mrs. Whittaker contends that the Family Court in the case *sub judice* acted within its power and jurisdiction when it ordered Mr. Whittaker to transfer the subject properties and assets. She argues that Mr. Whittaker possesses the authority to transfer said properties and assets because he is the sole member of the limited liability companies. Notwithstanding the fact that Mrs. Whittaker’s statement that Mr. Whittaker is the only member of the limited liability companies is inaccurate, the West Virginia Legislature drew no distinction between single member and multiple member limited liability companies when it adopted the Uniform Limited Liability Company Act. W.Va. §31B-2-202 provides that “[o]ne or more persons may organize a limited liability company.” At no point, however, did the West Virginia Legislature elect to make any distinction between the legal characteristics and attributes of a single member limited liability company and a multiple member limited liability company.

Mrs. Whittaker contends that Judge Burnside failed to “recognize the fact that [Mr. Whittaker] was the sole member of the limited liability [companies].” *See, Brief of Appellant Jewell K. Whittaker, pg. 5.* This contention wholly ignores the actual language of Judge Burnside’s Order dated December 1, 2009 wherein he

accurately applied the above-referenced statutes to conclude that no distinction exists between a single member LLC and a multiple member LLC. Specifically, Judge Burnside concluded that “in the absence of a statutory distinction between a multiple member and single member LLC, the relationship between the member and the assets of the LLC is the same irrespective of whether it is a single- or multiple member LLC.” *Memorandum Order Dated December 1, 2009, pg. 2.* Clearly, Judge Burnside cannot be charged with abusing his discretion for properly applying statutory authority to the facts of the case *sub judice*.

As also noted by Judge Burnside, if Whittaker, LLC, were to transfer properties and assets outside the course of normal business for the purpose of satisfying the Family Court’s mandate, then the judgment collection remedies of properly perfected judgment creditors of Whittaker, LLC, could follow any properties and assets transferred by Whittaker, LLC. Mrs. Whittaker argues that any result other than enforcement of the Final Order from November 8, 2009 would “bring chaos to this case.” *See, Brief of Appellant Jewell K. Whittaker, pg. 17.* Mrs. Whittaker’s statement wholly ignores the utter bedlam which could result if this matter is not handled according to the specific guidelines set forth by the West Virginia Legislature and this Honorable Court, especially in consideration of the fact that judgment creditors of Whittaker, LLC, could potentially be forced to pursue claims against Mrs. Whittaker and her estate for the foreseeable future. It is

for this reason that this Honorable Court and the West Virginia Legislature have previously determined that when distributing business interests as marital property, only a spouse's interest in the business may be considered, and the non-owning spouse is required to assume all of the companies' liabilities together with their assets.

Mrs. Whittaker states the Court must understand approximately 90% of the agreed order is already completed and transferred and that the only remaining terms to be completed as to the agreement are:

1. The Respondent needs to sign and complete an Errors and Omissions Agreement; and
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 to the present including names, addresses and phone numbers of those using the properties within the group. This accounting shall include any costs directly attributable to the property.

Addressing the first issue, Mr. Whittaker did not agree to sign the document because it will interfere with other lawsuits that are pending against Petitioner's counsel. Namely, signing the document is contrary to Mr. Whittaker's interest and only for Petitioner's counsel's benefit, as it would potentially release him from

liability in other matters pending between Mr. Whittaker and Petitioner's counsel. As for the second issue, Mr. Whittaker has provided an accounting of this information. Petitioner does not believe it to be a complete accounting, but as Judge Burnside directed, this was what was to be addressed by the Family Court upon remand. Again, Mr. Whittaker was under no obligation to supply this information since Judge Burnside determined both Final Orders were void.

Judge Burnside did not abuse his discretion by declaring that the Family Court's Final Order dated November 7, 2008 was void for lack of subject matter jurisdiction. As demonstrated hereinabove, the Family Court clearly lacked appropriate subject matter jurisdiction to order that Mr. Whittaker transfer and/or dispose of certain properties and assets owned by the limited liability companies. It is because of situations like those which have arisen in the present case that circuit courts are to serve as intermediate courts of appeal between family courts and this Honorable Court. Because Judge Burnside's decision to reverse the Final Order dated November 7, 2008 and remand this matter for further proceedings was an accurate application of the laws of the State of West Virginia, Judge Burnside's Order dated December 1, 2009 should not be reversed.

B. JUDGE BURNSIDE POSSESSED THE AUTHORITY TO CONCLUDE THAT THE FAMILY COURT LACKED SUBJECT MATTER JURISDICTION BECAUSE SUBJECT MATTER JURISDICTION CANNOT BE WAIVED.

Mrs. Whittaker argues that Judge Burnside's conclusion that the Family Court lacked subject matter jurisdiction to require the transfer of certain properties and assets from the limited liability companies is irrelevant because the order was based upon an ancillary agreement voluntarily entered into by the parties. The mere fact that the parties entered into such an agreement at the Family Court's insistence is not sufficient grounds to cloak the Family Court with subject matter jurisdiction in this matter. Notwithstanding the suspect circumstances surrounding the Family Court's requirement that the parties remain in her courtroom until they reached such an agreement, the fact that the parties may have voluntarily entered into such an agreement is of no consequence because subject matter jurisdiction cannot be waived. Indeed, even if Mr. Whittaker had entered into an agreement which specifically stated that he surrendered to the Family Court's authority and acquiesced that it had subject matter jurisdiction, such an agreement would have been a nullity as subject matter jurisdiction cannot, under any circumstances, be waived.

“[I]t is fundamental doctrine that ‘jurisdiction of the subject-matter can only be acquired by virtue of the Constitution or of some statute.’” Cruikshank v. Duffield, 138 W.Va. 726, 734; 77 S.E.2d 600, 604 (1953), *quoting*, Shelton [&

Luck] v. Sydnor, 126 Va. 625, 102 S.E. 83. In State ex rel. Smith v. Thornsbery, 214 W.Va. 228; 588 S.E.2d 217 (2003). Furthermore, “[c]onsent of parties cannot confer upon a court jurisdiction which the law does not confer, or confers upon some other court, although the parties may . . . submit themselves to the jurisdiction of the court.” Syl. Pt. 4, State ex rel. Hammond v. Worrell, 144 W.Va. 83, 106 S.E.2d 521 (1958), *overruled on other grounds by* Patterson v. Patterson, 167 W.Va. 1; 277 S.E.2d 709 (1981), *citing*, Syl Pt. 2, Yates v. Taylor County Court, 47 W.Va. 376; 35 S.E.2d 4 (1900). Stated alternatively, consent or acquiescence cannot confer subject matter jurisdiction. Id.

“Lack of jurisdiction of the subject matter may be raised in any appropriate manner and at any time during the pendency of the suit or action.” McKinley v. Queen, 125 W.Va. 619, 625; 25 S.E.2d 763, 766 (1943). “Unlike personal jurisdiction, subject-matter jurisdiction may not be waived or conferred by consent and must exist as a matter of law for the court to act.” State ex rel. Smith v. Thornsbery, 214 W.Va. 228, 233; 588 S.E.2d 217, 222 (2003), *citing*, Syl. Pt. 6, State ex rel. Hammond v. Worrell, 144 W.Va. 83, 106 S.E.2d 521 (1958), Syl. Pt. 3, Charleston Apartments Corp. v. Appalachian Electric Power Co., 118 W.Va. 694, 192 S.E. 294. Because subject matter jurisdiction must exist as a matter of law, the absence of subject matter jurisdiction can be raised at anytime, including before this Court or upon this Court’s own motion. *See, Id.* In fact, this Honorable

Court has specifically stated that it “will reverse a trial court which exceeds its lawful jurisdiction.” *Id.*, *citing*, Syl. Pt. 3, Hinkle v. Bauer Lumber & Home Bldg. Center, Inc., 158 W.Va. 492; 211 S.E.2d 705 (1975).

The fact that the parties entered into an ancillary agreement pursuant to which Mr. Whittaker purportedly consented to the transfer of certain properties and assets owned by the limited liability companies is immaterial and irrelevant in the discussion of subject matter jurisdiction. As set forth hereinabove, subject matter jurisdiction was not waived and was never obtained by consent of the parties. Thus, as discussed in greater detail herein below, the Final Order and the accompanying agreement between the parties was void.

C. THE FACT THAT THE FINAL ORDER FROM NOVEMBER 7, 2008 WAS NEVER APPEALED BY EITHER PARTY IS IRRELEVANT AND INCONSEQUENTIAL BECAUSE THE ORDER WAS VOID.

The Appellant goes to considerable lengths arguing that Judge Burnside lacked the jurisdiction to reverse the Final Order from November 7, 2008 because the order was never appealed by either party.¹ The Appellant fails to acknowledge that the Final Order was void because the Family Court lacked subject matter jurisdiction to compel the Appellee to transfer assets from Whittaker, LLC.

¹ It should be noted however that Mr. Whittaker was never provided a copy of the Final Order and this was never refuted by Mrs. Whittaker’s counsel nor Judge Staton. In fact, Mr. Whittaker had to go to the Courthouse and purchase his own copy of the Order. At the March 29, 2009, Hearing, Judge Staton even went so far to recognize certain issues with the Clerk’s Office not providing copies to parties.

“It has been said that ‘[a] judgment is void . . . if the trial court that rendered judgment lacked subject matter jurisdiction, jurisdiction over the parties, or in circumstances in which the court's action amounts to a plain usurpation of power constituting a violation of due process.’” FN. 13, Hatfield v. Painter, 222 W.Va. 622; 671 S.E.2d 453 (2008), *quoting*, Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 60(b)(4) (2000). Stated alternatively, “[w]here a court is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity, and are a mere nullity and void, not voidable, even prior to reversal, whether the lack of jurisdiction appears on the face of the record or by proof out-side of it[.]” Cruikshank v. Duffield, 138 W.Va. 726, 734; 77 S.E.2d 600, 604 (1953), *quoting*, 21 C.J.S., Courts, §116.

This Court has explained that “[t]he urgency of addressing problems regarding subject-matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void. Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals, 222 W.Va. 252, 257; 664 S.E.2d 137, 142 (2008), *quoting*, State ex rel. Termnet Merchant Services, Inc. v. Jordan, 217 W.Va. 696, 700; 619 S.E.2d 209, 213 (2005). Thus, to the extent that a court exceeds “its authority, or its jurisdiction, over the subject-matter embraced in [its] decrees, they are absolute nullities, and may be impeached directly or collaterally by all persons, anywhere, at any time, or in any manner, and may be declared void

by every court in which they are called in question. Cruikshank v. Duffield, 138 W.Va. 726, 734-735; 77 S.E.2d 600, 604-605 (1953), *citing*, Wade v. Hancock, 76 Va. 620, 1882 WL 6053 (Va. Sep 12, 1882); Seamster v. Blackstock, 83 Va. 232, 2 S.E. 36, 5 Am.St.Rep. 262 (1887); Neale v. Utz, 75 Va. 480, 1881 WL 6284 (Va. Mar Term 1881); Shelton [& Luck] v. Sydnor, 126 Va. 625, 102 S.E. 83 (1920); State v. Huber, 129 W.Va. 198, 40 S.E.2d 11, 168 A.L.R. 808 (1946); Perkins v. Hall, 123 W.Va. 707, 17 S.E.2d 795 (1941); Petry v. Shinn, 120 W.Va. 20, 196 S.E. 385 (1938); Click v. Click, 98 W.Va. 419, 127 S.E. 194 (1925); Norfolk & W. R. Co. v. Pinnacle Coal Co., 44 W.Va. 574, 30 S.E. 196, 41 L.R.A. 414 (1898).

Because the Family Court lacked subject matter jurisdiction to require Mr. Whittaker to transfer or dispose of certain properties or assets owned by the limited liability companies, the Final Order entered on November 7, 2008, together with the ancillary agreement incorporated therein, is void and carries no legal force or effect. As such, any and all arguments advanced by Mrs. Whittaker in her appeal are irrelevant. The Final Order entered on November 7, 2008, just like the order previously entered by the Family Court on April 7, 2008, was void. It should be noted that, pursuant to a Memorandum Order dated August 27, 2008 and revised on September 2, 2008, Judge Burnside reversed and remanded the Family Court order from April 7, 2008 for the same reasons discussed herein. For reasons known only to the Family Court, however, the issues and deficiencies raised by

Judge Burnside were not addressed on remand. The Family Court's failure to address said issues and deficiencies were acknowledged in Judge Burnside's Memorandum Order from December 1, 2009 when he explained the following:

Confirming the [circuit] court's announcement to the parties at the appeal hearing on November 30, 2009, the family court's order following remand suffers from the same jurisdictional defect as the first order, specifically, that the family court does not have the subject matter jurisdiction to order the transfer of assets that are not part of the marital estate. As carefully explained in this court's remand memorandum and order of August 27, 2008, Mr. Whittaker's interest in any LLC in which he is a member is limited to his distributional share, as he has no transferable interest in the assets of the LLC. The family court has the power to determine whether that distributional share, or a portion thereof, is subject to marital distribution and may make such orders as are necessary to accomplish that distribution. But the family court does not have the subject matter jurisdiction to direct a member of an LLC to transfer assets of the LLC for marital distribution because the LLC's assets are not marital assets.

See, Memorandum Order Dated December 1, 2009, pg. 2.

After reiterating the points raised in his previous Order, Judge Burnside went on to conclude the following:

Upon these considerations, this court finds that the family court's order of November 7, 2008, was void for lack of subject matter jurisdiction, and for that reason the order cannot be enforced by the family court's contempt remedies. ***Inasmuch as an appeal from that order was not filed, this court could not have discovered until the filing of the appeal from the contempt order that the family court on remand had again acted outside its subject matter jurisdiction.*** Upon the discovery that the family court had repeated its error in the entry of an order that was not within the family court's limited subject matter

jurisdiction, this court now finds that the proceedings on remand were void, without effect, and did not constitute a valid remand hearing.

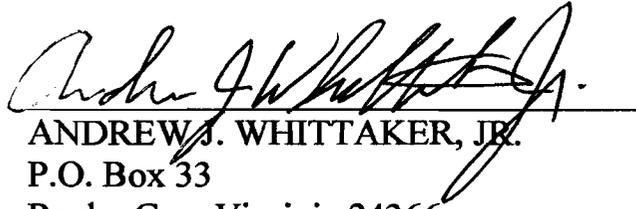
See, Id. at pg. 4 (emphasis added).

As explained by Judge Burnside and as further illustrated by the discussion of caselaw hereinabove, the fact that neither party appealed the November 7, 2008 is wholly irrelevant as that order, as well as the proceedings from November 7, 2008 following Judge Burnside's initial remand, were void. If Judge Burnside's Order contained any error, it may be that he failed to specifically define the term "void" for the purposes of aiding counsel for the Appellant and the Family Court in comprehending said Order. Black's Law Dictionary defines the term "void" as follows: "Of no legal effect; null." *Black's Law Dictionary*, 1568 (Bryan A. Garner ed., 7th ed., West 1999). Such a definition may have aided the Family Court and counsel for Mrs. Whittaker in comprehending the fact that any attempt by the Family Court to require Mr. Whittaker to transfer or dispose of properties and assets of the limited liability companies were void and unenforceable as the Family Court lacked subject matter jurisdiction over the companies' properties and assets. Thus, because the Final Order and any agreements associated therewith were void, the terms of said order carry no legal effect and are thus unenforceable by any court in the State of West Virginia.

VI. CONCLUSION

In conclusion, the parties have not reached a valid and enforceable order for marital distribution because the Orders entered on November 7, 2008 and March 25, 2009 are both void for lack of subject matter jurisdiction on behalf of the family court. Because of the above listed reasons, the Trial Court's Order should be upheld.

ANDREW J. WHITTAKER, JR.

A handwritten signature in black ink, appearing to read "Andrew J. Whittaker, Jr.", is written over a horizontal line.

ANDREW J. WHITTAKER, JR.

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IN THE SUPREME COURT OF APPEAL OF WEST VIRGINIA

**In Re:
The Marriage of:**

**JEWELL K. WHITTAKER,
Appellant/Petitioner**

And

**Civil Action No.: 05-D-331-S
(Raleigh County)
Appeal No.: 35552**

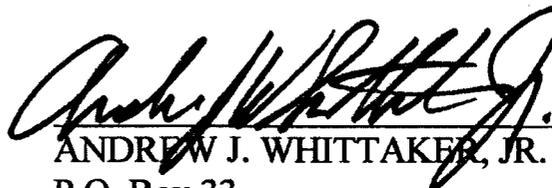
**ANDREW J. WHITTAKER,
Appellee/Respondent.**

CERTIFICATE OF SERVICE

I, Andrew J. Whittaker, Appellee/Respondent, do hereby certify that on the 1st day of July, 2010, I served a true and exact copy of the following **Brief of Appellee Andrew J. Whittaker** for the same via the United States Mail, postage prepaid to the following:

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