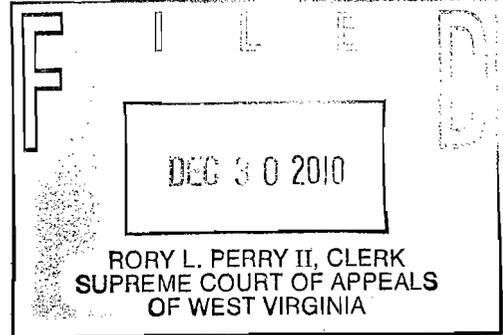


IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

CASE NO: 35675



BRIAN MAYES,

PETITIONER, APPELLEE

v.

MYLA MAYES,

RESPONDENT, APPELLANT

APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR APPEAL

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2. Whether the Court erred in assigning a value of \$1,760.00 to the family business. 5

3. Whether the Family Court's Final Order on Equitable Distribution is erroneous in respect to the assignments of error heretofore set forth in that it is: (1) arbitrary, capricious, an abuse of discretion, and not in conformity of the law; (2) unsupported by substantial evidence; and, (3) unwarranted by the facts. 5

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v.

MYLA MAYES,

RESPONDENT, APPELLANT

APPELLANT'S BRIEF

This brief is submitted by the Appellant, Myla Mayes, pursuant to the order of this Honorable Court entered November 24, 2010 and received by Appellant's counsel December 1, 2010, in the above-cited matter.

I. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

This matter arises out of a Petition for Divorce that was filed by the Petitioner, Brian Mayes, in the Family Court of Cabell County, West Virginia. Hearings in this action were held on April 9, 2008, August 6, 2008, September 11, 2008, October 20, 2008, August 31, 2009, and November 12, 2009, all of which were held before the Honorable Ronald E. Anderson, Family Court Judge for Cabell County, West Virginia. Petitioner and Respondent were granted a divorce by order dated and entered October 21, 2008, said order being entitled, "*Final Divorce Order and Holding in Abeyance Decision on Equitable Distribution Until Lawyers Brief Marital Property as to the Home and Business.*" Thereafter, the parties hereto submitted Memorandums and proffers as to the valuation of the marital business, taxes due, and outstanding student loans and the house. The Court,

after consideration of the aforesaid, entered a "*Final Order on Equitable Distribution*" on October 26, 2009. Respondent (Appellant herein) filed a Petition for Appeal in the Circuit Court of Cabell County, West Virginia on the 25th day of November, 2009, regarding the aforesaid Family Court Order relating to equitable distribution. Thereafter, on January 4, 2010, an "*Order Affirming Family Court Judge*" was entered by the Honorable Alfred E. Ferguson, Judge of the Circuit Court of Cabell County, West Virginia. It is the "Order Affirming Family Court Judge" entered January 4, 2010 and, more specifically, the underlying Family Court Order entered October 26, 2009 that the Respondent below, Appellant herein, has filed the instant appeal.

II. STATEMENT OF THE FACTS OF THE CASE

Petitioner (Appellee herein) and Respondent (Appellant herein), although not legally married until the 6th day of February, 2006, lived together and presented themselves to the public as husband and wife since on or about the year 1995 until they separated on or about September 1, 2007. Their first child, Jacob Mayes, was born on August 29, 1995. The parties are parents of two additional children; namely, Brianna Mayes, born October 15, 2006, and Isabella Mayes, born August 23, 2007. From 1995 until their separation, the parties pooled their financial resources, obtained property and incurred indebtedness.

The disputed facts of this case, insofar as equitable distribution is concerned, center around the valuation of a partially constructed marital home and the valuation of the family business known as JTM Masonry, LLC. Petitioner, Brian Mayes, submitted a real estate appraisal to the Court relating to the marital home as prepared by Appraiser, Jeremy Kimble. Mr. Kimble opined that the value of the marital home was \$45,000.00. Respondent, Myla Mayes, disagreed with the aforesaid valuation and tendered her own appraisal of said property as prepared by Appraiser, William R. Tatterson. Mr. Tatterson opined that the value of the marital home was \$85,000.00 as

of January 14, 2009. As shall be shown below, the aforementioned Family Court appeared to simply take the appraisal provided by Appellee on its face without regard and findings as to the appraisal submitted by Appellant.

The disputed facts of this case concerning the valuation of the marital business that was divided between the parties center around the validity of the Family Court's valuation of said marital business. The 2006 Federal Income Tax Return as filed by Appellee Brian Mayes lists income from JTM Masonry, LLC in the sum of \$97,510.00. The Family Court, in its order dated November 26, 2008, determined that the business was marital and that the bulk of the value of the business consisted of Brian Mayes' goodwill. The Family Court further found that the only assets of the business were two mixers and a trailer, the value of which would be equally divided between the parties. Appellant herein, Myla Mayes, contended that the business owned substantially more assets as follows:

2	16 foot trailers	\$5,000.00
2	Masonry Saws	7,778.00
2	Brick Saws	4,638.00
2	Tow Behind Mixers	7,000.00
100	Scaffolding Sets	5,000.00
400	Scaffolding Boards	16,000.00
10	Trowlers	250.00
10	Strikers	100.00
1	Hand Held Cocrete Saw	300.00
5	Brick Hammers	<u>125.00</u>

Total: \$46,191.00

Appellee Brian Mayes proffered to the Family Court that the subject businesses' value was \$1,000.00. Once again, the Family Court appeared to accept the Appellee's valuation of the subject business without findings and giving any regard or consideration to the valuation proffered by Appellant.

The Family Court, in its "Final Order on Equitable Distribution" entered October 26, 2009, appeared to wholly agree with the valuations pertaining to said home and said business proffered by Appellee in affixing the value of the marital home to be \$45,000.00 and the value of the marital business to be \$1,760.00.

The final issue that is the subject of the instant appeal centers around the failure of the Cabell County Family Court to award Appellant attorney fees. The Family Court, in a prior Order entered November 26, 2008, awarded attorney fees in the sum of \$1,500.00 to Richard Vital, a previous attorney for Appellant. This award was based upon a discrepancy in the income of the parties. Myla Mayes, in her Memorandum Regarding Equitable Distribution, requested an additional award of attorney fees in the sum of \$6,000.00. The Family Court, in its Final Order on Equitable Distribution, ordered that "Both parties shall be held responsible for their own attorney fees." This ruling was issued in light of evidence offered in the form of a W-2 for 2008 that provides for her total income at \$195.00. Also proffered was evidence that in the year 2009, Appellant was working part time and had earned only \$1,226.25 from January 1, 2009 to August 21, 2009. The total amount of attorney fees incurred by Appellant, after termination of her initial counsel, Richard Vital, is \$8,216.57. A substantial portion of the aforesaid fees were incurred in defending an unfounded claim wherein Appellee alleged improper conduct on Appellant's behalf in front of the children. The Court ultimately denied the relief requested by Mr. Mayes. The Federal Income Tax Return filed by Brian Mayes for the year 2006 discloses that his total income for that year was \$119,413.00, consisting of wages of \$21,903.00 and income from his business (JTM Masonry, LLC) of \$97,510.00. Despite the stark contrast between the income of the parties, the Cabell County Family Court ruled that Appellant was entitled to no further attorney fees.

**III. ASSIGNMENTS OF ERROR RELIED UPON ON
APPEAL AND THE MANNER IN WHICH THEY
WERE DECIDED BY THE LOWER TRIBUNAL.**

1. Whether the Court erred in calculating equitable distribution of marital property by failing to place a value of \$85,000.00 on the partially built home and by placing a \$45,000.00 value on said partially built home.
2. Whether the Court erred in assigning a value of \$1,760.00 to the family business.
3. Whether the Family Court's Final Order on Equitable Distribution is erroneous in respect to the assignments of error heretofore set forth in that it is: (1) arbitrary, capricious, an abuse of discretion, and not in conformity of the law; (2) unsupported by substantial evidence; and, (3) unwarranted by the facts.
4. Whether the Court erred in not awarding additional attorney fees to Myla Mayes.

IV. POINTS AND AUTHORITIES RELIED UPON

1. West Virginia Code § 48-7-106
2. West Virginia Code §48-1-305(a)
3. Rules of Civil Procedure 52(a)
4. Maxey v. Maxey, 195 W.Va. 158, 464 S.E. 2d 800 (1995)
5. Zanke v. Zanke, 185 W.Va. 1, 404 S.E. 2d 92 (1991)
6. Stuck v. Stuck, 218 W.Va. 605, 625 S.E. 2d 367 (2005)
7. Chafin v. Chafin, 202 W.Va. 616, 505 S.E. 2d 679, 687 (1998)
8. Summers v. Summers, 195 W.Va. 224, 465 S.E. 2d 224 (1995)
9. Arnealt v. Arnealt, 605 S.E. 2d 590, 216 W.Va. 215, (2004)

V. STANDARD OF REVIEW

"In reviewing challenges to findings made by a family law master that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review", Maxey v. Maxey, 195 W.Va. 158, 464 S.E. 2d 800 (1995).

VI. DISCUSSION OF LAW

I. THE COURT ERRED IN CALCULATING EQUITABLE DISTRIBUTION OF MARITAL PROPERTY BY FAILING TO PLACE A VALUE OF \$85,000.00 ON THE PARTIALLY BUILT HOME AND BY PLACING A VALUE OF \$45,000.00 ON SAID PARTIALLY BUILT HOME.

Prior to the Family Court's judicial determination that the parties' marital home would be valued at \$45,000.00 for the purposes of equitable distribution, both Appellant and Appellee herein filed briefs that contained appraisals of said home performed by licensed appraisers. Appellant's licensed appraiser, Mr. William Tatterson, opined that the market value of the home to be \$85,000.00 as of January 14, 2009. Appellee's licensed appraiser, Jeremy Kimble, opined that the market value of the home was \$45,000.00 as of September 15, 2009. In determining what value to affix to the home, the lower court adduced no testimony from either appraiser. The Court, in its opinion signed the 15th day of September, 2009, as embodied within the Final Order of Equitable Distribution entered the 26th day of October 2009, found that the partially built home had a value of \$45,000.00. Neither the Opinion or the Final Order contained specific findings of facts setting forth the basis for the Court's adoption of the valuation offered by Appellee. Absolutely no factual basis was provided to explain the lower court's arbitrary acceptance of the appraisal advanced by Appellee.

In Maxey v. Maxey, 195 W.Va. 158, 464 S.E. 2d 800 (1995), it is stated:

"In reviewing challenges to findings made by a family law master that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review."

The Family Court's seemingly unreasoned and unsupported determination that the subject marital home's value of \$45,000.00 as contained in the Final Order on Equitable Distribution evokes an abuse of discretion standard by this Tribunal. The factual findings, leading up to said Final Order evokes a clearly erroneous standard. Under either standard of review, it is contended that the Family Court's adoption of the appraisal offered by Appellee without any factual basis as to why the adopted appraisal took precedent over the Appellant's appraisal constitutes a reversible decision requiring remand.

West Virginia Revised Code § 48-7-106 provides, "In any order which divides or transfers the title to any property determines the ownership or value of any property, designates the specific property to which any party is entitled or grants any monetary award, the Court shall set out in detail its findings of fact and conclusions of law and the reasons for dividing the property in the manner adopted". (Emphasis Supplied). In addition, Rule 52 (a) of the West Virginia Rules of Civil Procedure requires the Court to find the facts specifically and state separately its conclusions of law. In a case dealing specifically with the subject of equitable distribution wherein a Circuit Court terminated a husband's future alimony obligations without making specific factual findings on the issue, this Court, referring to Rule 52(a), held " . . . that the termination of the alimony without specific factual findings on the issue was improper . . ." and the case was remanded for a hearing and appropriate findings. Zanke v. Zanke, 185 W.Va. 1, 404 S.E. 2d 92 (1991). See also, Stuck v.

Stuck, 218 W.Va. 605, 625 S.E. 2d 367 (2005). This Court likewise expressly held in Chafin v. Chafin, 202 W.Va. 616, 505 S.E. 2d 679, 687 (1998), that "in any order which divides or transfers the title to any property, determines the ownership or value of any property, designates the specific property to which any party is entitled or grants any monetary award, the court shall set out in detail its findings of fact and conclusions of law, and the reasons for dividing the property in the manner adopted". (Emphasis Supplied).

The opinion issued by the Family Court dated September 15, 2009 appears to run afoul of the express directives of West Virginia Code § 48-7-106, West Virginia Rule of Civil procedure 52(a), and the previous and consistent rulings of this Court. This opinion merely stated that the subject home had a value of \$45,000.00 as advanced by Appellee's appraiser. The Final Order on Equitable Distribution issued on October 26, 2009 also merely concludes that the value of the home is \$45,000.00. Neither the opinion nor subsequent Order contains specific findings relating to why Appellee's appraisal was adopted as opposed to Appellant's appraisal. It is contended that the lack of a factual basis as to why the lower court disregarded the appraisal proffered by Appellant and adopted the appraisal proffered by the Appellee, and the underlying reasons and methods of determining said value, constitutes an abuse of discretion and is clearly erroneous. Without providing specific findings as to how and why the house was valued at \$45,000.00, the determination of \$45,000.00 as the value of the home appears to be arbitrary and capricious. If a lower court is asked to choose between two competing appraisals when determining the value of property for the purposes of equitable distribution, in doing so, the lower court should be required to explain to the aggrieved party upon what basis the prevailing appraisal was adopted.

II. THE COURT ERRED IN ASSIGNING A VALUE OF \$1,760.00 TO THE FAMILY BUSINESS.

In addition to valuing the marital home as described above, the lower court was also required to place a value on the assets of the family business for the purposes of equitable distribution. Once again, the lower court simply decided to honor the valuation offered by Appellee rather than that offered by Appellant. As this valuation was an essential element of the Final Order on Equitable Distribution issued October 26, 2009, the lower court was also required, under the case law and statutory authority advanced in the section immediately above, to provide specific and detailed findings of fact and conclusions of law upon which said decision was based.

It was the contention of Appellant that the assets of the family business substantially exceeded the listing of (2) mixers, a trowel, and a trailer to haul equipment as stated in the Final Order of Divorce entered October 21, 2008 and a subsequent Order entered November 26, 2008. The total value of the subject business advanced by Appellant was \$46,191.00. The total value of said business advanced by Appellee was only \$1,000.00. The Court, in its Opinion dated September 15, 2009 and Final Order on Equitable Distribution entered October 26, 2009, assigned a value of \$1,760.00 to the business and allocated it to Appellee. Based on the evidence introduced, the Court's adoption of a \$1,760.00 value for the subject business is inconceivable. The 2006 Federal Income Tax Return that is of record in this Action discloses that income in the sum of \$97,510.00 was generated by the family business known as JTM Masonry, LLC. The 2006 tax return reflects depreciation in the assets of the business as \$1,760.00. If the depreciation for 2006 was \$1,760.00, it must be concluded that the value of the business assets exceeded \$1,760.00. Although not providing a formal evaluation of the business, Rodman G. Lowe, of the firm of Basset and Lowe, Certified Public Accountants, opined as to the business having an approximate value of \$65,000.00

to \$80,000.00. (See Exhibit E as filed with the Memorandum of Respondent Myla Mayes Regarding Equitable Distribution).

As was the case with the valuation of the marital home, the lower court's Final Order on Equitable Distribution simply concludes that the business assets are valued at \$1,760.00. This appears strange in light of the evidence introduced and once again, seems to indicate that the numbers and evidence advanced by Appellee herein are arbitrarily given more authority than those advanced by Appellant. No findings of fact were offered by the lower court to support this valuation. As stated above, this arbitrary and capricious adoption of one party's valuation runs afoul of the statutory and case law fully set forth in the immediately-preceding section. Appellant is not contending that the lower court was prohibited from adopting the valuation offered by a competing party, but contends that the lower court was required to give detailed and specific reasons as to why it adopted said values. Failure to do so constitutes an arbitrary and capricious decision that should be reversed and remanded for more specific findings.

III. THE FAMILY COURT'S FINAL ORDER ON EQUITABLE DISTRIBUTION IS ERRONEOUS IN RESPECT TO THE ASSIGNMENTS OF ERROR HERETOFORE SET FORTH IN THAT IT IS: (1) ARBITRARY, CAPRICIOUS, AND ABUSE OF DISCRETION, AND NOT IN CONFORMITY OF THE LAW; (2) UNSUPPORTED BY SUBSTANTIAL EVIDENCE; AND (3) UNWARRANTED BY THE FACTS.

Appellant herein contends that the Court committed error in assigning a value of \$45,000.00 to the partially built home, thereby not taking into consideration the market value of \$85,000.00 placed on the property by her appraisal. It is contended that the Court in valuing the property at \$45,000.00 made no findings as to why the value of \$45,000.00 was assigned as opposed to \$85,000.00. In addition, the Court placed a value of \$1,760.00 on the business and did not take into account the contention of Myla Mayes that the business was worth a minimum of \$46,191.00.

No findings were made as to why the value was placed at \$1,760.00 as opposed to \$46,191.00. The Final Order on Equitable Distribution provides that after the allocation of assets and debts between the parties, Appellee herein owed the Appellant herein the sum of \$6,720.00. In the event the Court had assigned the sum of \$85,000.00 as the value of the marital home and \$46,191.00 as the value of the business, Appellant would be entitled to receive the sum of \$48,935.20 as her share of the equitable distribution. By issuing a Final Order on Equitable Distribution that was contrary to the facts submitted and completely devoid of any findings of fact, Appellant's share of equitable distribution was materially affected. This arbitrary and capricious decision by the Court should be reversed and remanded for further hearing and evidence so that a more accurate and equitable result can be reached.

IV. THE COURT ERRED IN NOT AWARDING ADDITIONAL ATTORNEY FEES TO APPELLANT HEREIN.

The lower Family Court, in a prior Order entered on November 26, 2008, awarded attorney fees in the sum of \$1,500.00 to Richard Vital, a previous attorney for Appellant herein. This award was based upon a discrepancy in income of the parties. In her Memorandum Regarding Equitable Distribution, Appellant requested an additional award of attorney fees in the sum of \$6,000.00. The Court, in the Final Order on Equitable Distribution, Ordered that "Both Parties shall be held responsible for their own attorney fees." Appellant's W-2 for the year 2008 discloses that she had income of \$195.00 for the entire year. She was working part time in 2009 and has earned \$1,226.25 from January 1, 2009 to August 21, 2009. Appellee's tax return for the year 2006 discloses that his total income for that year was \$119,413.00. In her Memorandum, Appellant contended that she had incurred \$8,216.57 in legal fees subsequent to the termination of Richard Vital as her counsel. A substantial portion of these fees were incurred defending an unfounded

claim by Appellee alleging that Appellant had engaged in improper conduct in the presence of the parties' children. The Court, after a hearing on the same, denied the relief requested by Appellee.

West Virginia Revised Code § 48-1-305 provides "Costs may be awarded to either party as justice requires and in all cases the court, in its discretion, may require payment of costs at any time and may suspend or withhold any order until the costs are paid." Section 48-1-305 likewise provides that ". . . when it appears to the court that a party has incurred attorney fees and costs unnecessarily because the opposing party has asserted unfounded claims . . . the court may order the offending party, or his or her attorney, or both, to pay reasonable attorney fees and costs to the other party." In construing this statute, this Court held,

"In determining whether to award attorney's fees, the family law master should consider a wide array of factors including the party's ability to pay his or her own fee, the beneficial results obtained by the attorney, the parties' respective financial conditions, the effect of the attorney's fees on each party's standard of living, the degree of fault of either party making the divorce action necessary, and the reasonableness of the attorney's fee request."

Arneault v. Arneault, 605 S.E. 2d 590, 216 W.Va. 215, (2004). In Summers v. Summers, 195 W.Va. 224, 465 S.E. 2d 224 (1995), a case decided under an earlier statute, this Court stated, that the purpose of statute providing for award of attorney fees in a divorce action is to enable a spouse who does not have financial resources to obtain reimbursement for costs and attorney's fees [incurred] during the course of litigation.

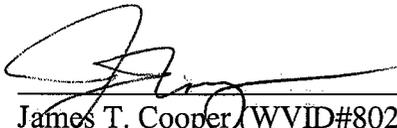
It is clear that a large discrepancy exists between the incomes of Appellant and Appellee herein. Further, a large portion of the attorney fees expended by Appellant was used in defending the unfounded claims of Appellee related to Appellant's alleged improper conduct in front of the parties' children. Appellant was also required to hire appraisers and accountants to aid in her quest for a fair and equitable distribution of marital property. Arbitrary and capricious rulings from

the lower court ultimately prevented her from the same, but the reasonableness of her attempts to persuade the lower court to distribute the martial estate fairly cannot be validly questioned. Based on the above, it is the contention of Appellant that the lower court abused its discretion by failing to award additional attorney fees to Appellant.

VII. CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, Appellant, Myla Mayes, prays that this Honorable Court set aside and amend the provisions of the Final Order on Equitable Distribution in accordance with the foregoing assignments of error; or, in the alternative, that the Court reverse and remand to the Family Court for further proceedings in this matter; that she be awarded attorney fees and costs necessitated by this appeal; that she have such other and further relief as the Court may see fit to grant.

MYLA MAYES
By Counsel



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BRIAN MAYES,

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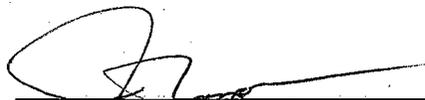
v.

MYLA MAYES,

RESPONDENT, APPELLANT

CERTIFICATE OF SERVICE

I, JAMES T. COOPER, counsel for Respondent/Appellant herein, do hereby certify that I served a copy of the foregoing *Appellant's Brief in Support of Petition for Appeal* upon D. Scott Bellomy, counsel for Petitioner/Appellee, by placing a true copy thereof in an envelope addressed to the said D. Scott Bellomy, Esq., 741 Fifth Avenue, Huntington, West Virginia 25701, and mailing same by regular United States mail, postage prepaid, on this 30th day of December, 2010.


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