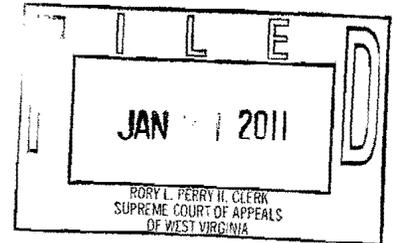


IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

CASE NO. 35675



BRIAN MAYES,

PETITIONER/APPELLEE,

V.

MYLA MAYES,

RESPONDENT/APPELLANT,

APPELLEE'S BRIEF IN CONTRA OF PETITION FOR APPEAL

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V.

MYLA MAYES,

Respondent/Appellant,

APPELLEE'S BRIEF IN CONTRA OF PETITION FOR APPEAL

This brief is submitted by the Appellee, Brian Mayes, pursuant to the Order of this Honorable Court entered November 24, 2010 and received by Appellee's counsel December 1, 2010, in the above-styled matter.

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. KIND OF PROCEEDING AND NATURE OF RULING

This is an appeal of an *Order Affirming Family Court Judge* entered on January 4, 2010, by the Circuit Court of Cabell County, the Honorable Alfred E. Ferguson, Circuit Judge, presiding as well as the underlying Family Court Order entered on October 26, 2009.

III. FACTS OF THE CASE

The parties to this action were duly and legally married in Mason County, West Virginia, on the 6th day of February, 2006, and last cohabited together as husband and wife on the 1st day of September, 2007, in Mason County, West Virginia. The parties were divorced by Final Order of the Family Court of Cabell County entered on October 21, 2008 and a subsequently on October 26, 2009, the Court entered a *Final Order on Equitable Distribution*.

Thereafter, Appellant/Respondent filed a *Petition for Appeal* and on January 4, 2010, the Circuit Court entered an *Order Affirming Family Court Judge*. Appellant/Respondent states in this Appeal that while the Family Court found that the only assets of the business were two mixers and a trailer she contended that the business owned substantially more assets and lists them in this Appeal. However, it is clear from review of the record, Ms. Mayes never submitted any of these numbers at the final hearing nor did she have any expert testimony to prove otherwise.

IV. APPELLANT'S ASSIGNMENTS OF ERROR AND ARGUMENT

- 1. The Court did not err in calculating equitable distribution of marital property by failing to place a value of \$85,000.00 on the partially built home and placing a value of \$45,000.00 on said partially built home.**

The Family Court did not err in calculating equitable distribution of marital property as it was presented with two separate appraisals of an uncompleted stick built home. After consideration, the Court chose the lesser of the two appraisals; however, nothing in the Appellant/Respondent's Appeals states why the Court should have chose the higher valued appraisal over the lesser.

- 2. The Court did not err in assigning a value of \$1,760.00 to the family business.**

Further, the value of the business was determined based upon the evidence and testimony presented at the time of the trial. The Appellant/Respondent presented no additional evidence or expert testimony and made no contentions of additional assets until well after the final hearing. Further, in her initial Appeal was the first time these numbers were ever presented and in doing so, merely presents a list of her estimated values of those assets and not that of an expert. Nor did she at trial or ever today does she present any evidence that proves that the alleged assets were marital. As this Appellee/Petitioner stated previously in his response to her Appeal to the Circuit Court, this is an attempt to relitigate issues that have already been brought before the Court and therefore are *res judicata*.

3. The Family Court's final order on equitable distribution is not 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 to the law; (2) unsupported by substantial evidence; and (3) unwarranted by the facts.

The Family Court's final order on equitable distribution is not erroneous because it is based upon the evidence presented at trial with Appellant/Respondent's former counsel. Appellee/Petitioner presented testimony as to values; however, the Appellant/Respondent presented no testimony or evidence as to values. Therefore, the Family Court's order on equitable distribution is not arbitrary, capricious, and abuse of discretion, and nor was it not in conformity to the law.

4. The Court did not err in not awarding additional attorney fees to Myla Mayes.

The Court did not err in awarding additional attorney fees as she was fully awarded her full attorney fees at the final divorce hearing. Since that final hearing, she has obtained new counsel and has filed numerous petitions and appeals on which she cannot and has not prevailed. The Appellant/Respondent has attempted to present new numbers and make up numbers; however, she has never presented any actual evidence to the Court. As these petitions have been unfounded, the Court in its discretion found no need to award additional attorney fees. The Court should not award her contumacious and litigious behavior by awarding her attorney fees.

V. CONCLUSION

WHEREFORE, the Petitioner/Appellee prays that the Court dismiss this Appeal and uphold the Trial Court's Order.

BRIAN MAYES,

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CERTIFICATE OF SERVICE

I, D. Scott Bellomy, Esq., do hereby certify that on the 7th day of *January, 2011* served a true and exact copy of the foregoing *Appellee's Brief in Contra of the Petition for Appeal* via the United States Mail, postage prepaid, to the following:

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