

13-0708

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE THE MARRIAGE OF:

JAY M. POTTER,

Petitioner,

and

**Civil Action No. 05-D-618
Judge Paul Zakaib, Jr.**

MARIA MARINO POTTER,

Respondent.

FINAL ORDER REGARDING PETITIONS FOR APPEAL

On June 24, 2011, came the Petitioner/Appellant, Jay M. Potter ("Husband"), by and through counsel, Tim C. Carrico, Esq., and came the Respondent/Appellant, Maria Marino Potter ("Wife"), in person and by counsel, Timbera C. Wilcox, Esq., for oral argument on their respective appeals.

After due consideration of each petition for appeal and the responses thereto, the Court hereby FINDS and ORDERS as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The parties were married on May 31, 1980.
2. The parties legally separated on August 7, 2003.
3. The Husband filed for divorce on March 22, 2005.
4. The Family Court entered a final divorce order on January 24, 2011.
5. Each party appealed certain aspects of the final divorce order to this Court.
6. The parties appeared before this Court on June 24, 2011, for oral argument on their respective appeals. Thereafter, by letter dated March 16, 2012, the Court

requested that the parties submit proposed orders for the Court's consideration on or before April 25, 2012.

7. The Husband asserts the following grounds for appeal:

a. Ground One: The Family Court abused its discretion by failing to grant him a hearing and conduct a proper analysis concerning his request for attorney fees and costs.

b. Ground Two: The Family Court erred in determining that the \$10,000 increase in the fair market value of the former marital residence from the date of separation, August 7, 2003, to February 22, 2010, was the Wife's separate property and not subject to equitable distribution.

c. Ground Three: The Family Court erred in awarding the Wife a Conrad credit of \$12,455, which is one half of the amount the Wife paid after the date of separation regarding the former marital residence she exclusively occupied for the expenses of home owner's insurance (2005-2010), umbrella insurance (2006-2009), and real and personal property taxes (2005-2009).

d. Ground Four: The Family Court erred by refusing to recognize under equitable distribution principals that the vehicle the Wife received pursuant to equitable distribution was worth \$9,155 more than the vehicle the Husband received; and That the Family Court abused its discretion by failing to account for this difference under the final equitable distribution in the final order.

8. The Wife asserts the following grounds for her appeal:

a. Grounds One and Three: The Wife expresses a variety of criticisms of the Final Order under this section of her petition for appeal. Her threshold

criticism is that the Family Court entered the proposed order presented by the Husband's counsel and that this constituted a prohibited "mechanical adoption of findings proposed by counsel". The Wife further contends that the content of the final order is insufficient. She asserts that the Family Court's effort to determine the net value of the marital estate is "nonsensical" and the "purported" determination "bears little resemblance to the actual record." In support of these contentions she discusses her issues concerning the Family Court's distribution of her jewelry and the equalization of the retirement accounts among other things.

b. Ground Two: The Wife was denied the right to present evidence in the form of testimony, both direct and on cross-examination.

c. Ground Four: The Family Court abused its discretion by ordering that the retirement accounts assets be equalized by the Husband making a lump sum transfer to one of the Wife's retirement accounts from one of his retirement accounts.

d. Ground Five: The Family Court abused its discretion by failing to make the Husband responsible for 100% of the outstanding balance of the mortgage existing against the former marital residence as of the date separation.

9. The only real property subject to equitable distribution by the Family Court was the marital residence, which the Wife has exclusively occupied during the eight years and eight months since the parties separated.

10. The personal property subject to equitable distribution by the Family Court consisted of various bank accounts, various retirement accounts, and assorted items of tangible personal property.

11. The Family Court proceedings did not involve issues related to minor children or alimony because no children were born of the parties' marriage; and both parties waived alimony.

12. The Family Court proceedings lasted a total of five years and ten months, from March 22, 2005, when the Husband initiated those proceedings to January 24, 2011, when the Final Order was entered.

13. The Final Hearing at issue extended for a period of three days (March 23, May 20, and May 26, 2010). Most of the testimony during those three days consisted of the Wife or the Husband responding to questions from the Court, and the proceedings did not include any cross-examination of the Wife by the Husband's counsel or any cross-examination of the Husband by the Wife's counsel.

14. At no point during the three hearing days did the Wife or her counsel ever object to the way in which the Court was conducting the hearing in general or to the lack of cross-examination in particular.

15. At no point during the three hearing days did the Husband or his counsel ever object to any testimony that the Wife was offering.

16. On June 23, 2005, the Wife requested the Family Court to order the Husband to pay "his proportionate share" of the mortgage on the marital residence.

17. There is no factual basis for the Wife's contention, expressed during the Final Hearing, that on July 25, 2005, the Family Court ordered the Husband to reimburse her for all of the marital residence mortgage payments – as opposed to his proportionate share of those payments – that she made.

18. At the time of the Final Hearing, both the Wife and the Husband had defined-contribution retirement accounts at Morgan Stanley Smith Barney, and the only requirement for a transfer of assets between the accounts of the parties was an authorization form signed by both of the parties.

Standard of Review

19. West Virginia Code § 51-2A-14 and Rules 34 and 35 of the West Virginia Rules of Practice and Procedure set forth the standards regarding a Circuit Court's review of a Final Divorce Order on appeal:

West Virginia Code § 51-2A-14:

(a) The circuit court may refuse to consider the petition for appeal may affirm or reverse the order, may affirm or reverse the order in part or may remand the case with instructions for further hearing before the family court judge.

(b) In considering a petition for appeal, the circuit court may only consider the record as provided in subsection (d), section eight of this article.

(c) The circuit court shall review the findings of fact made by the family court judge under the clearly erroneous standard and shall review the application of law to the facts under an abuse of discretion standard.

(d) If the circuit court agrees to consider a petition for appeal, the court shall provide the parties an opportunity to appear for oral argument, upon the request of either party or in the discretion of the court. The provisions of this subsection are effective until the adoption of rules by the Supreme Court of Appeals governing the appellate procedures of family courts.

(e) If the proceeding is remanded to the family court, the circuit court must enter appropriate temporary orders for a parenting plan or other allocation of custodial responsibility or decision-making responsibility for a child, child support, spousal support or such other temporary relief as the circumstances of the parties may require. If the circuit court remands the case to the family court, it must state the legal or factual issues to be considered by the family court on remand. If the family court determines that the consideration of those issues also requires consideration of

collateral or interdependent issues, the family court may also consider those other collateral or interdependent issues.

(f) The circuit court must enter an order ruling on a petition for appeal within sixty days from the last day a reply to the petition for appeal could have been filed. If the circuit court does not enter the order within the sixty-day period or does not, within the sixty-day period, enter an order stating just cause why the order has not been timely entered, the circuit clerk shall send a written notice to the parties that unless the parties both file an objection within fourteen days of the date of the notice, the appeal will be transferred to the Supreme Court of Appeals as provided in section fifteen of this article due to the failure of the circuit court to timely enter an order. The appeal shall be transferred without the necessity of the filing of any petition or further document by the petitioner.

Rule 34 of the West Virginia Rules of Practice and Procedure for Family Courts:

(a) Entry of final decision. The circuit court shall enter a final decision order within 60 days from the last day a response to the petition for appeal could have been filed, or shall enter an order stating just cause why a final decision has not been timely entered. The circuit clerk shall notify the family court judge of the entry of a final decision.

(b) Contents of final decision. A final decision may refuse the petition for appeal, may affirm or reverse the family court final order, or may affirm or reverse in part. A circuit court's final decision may be appealed to the Supreme Court of Appeals in the manner set forth in the Rules of Appellate Procedure. A remand order entered pursuant to Rule 35(a) is not a final decision for purposes of appeal.

Rule 35 of the West Virginia Rules of Practice and Procedure for Family Courts:

(a) Remand orders. An order remanding a case to a family court judge shall be entered within 60 days from the last day a response to the petition for appeal could have been filed. A remand order shall particularly identify any inadequacies in the evidentiary record; and shall indicate the specific actions to be taken by the family court judge upon remand, including the particular evidence to be taken. At the time a case is remanded the circuit court shall enter such temporary orders as the circumstances require. All remand orders shall direct the circuit clerk to provide a copy to the family court judge.

(b) Proceedings on remand. All proceedings in cases remanded to a family court judge shall be concluded within 30 days of the date of the remand order.

Husband's Ground One

20. The Husband contends the Family Court erred by denying him a hearing regarding his request for attorney fees and costs under W. Va. Code § 48-5-611(c). In support of his request, he has alleged in his Petition for Appeal facts he believes support this claim.¹ This Court finds that the Family Court did not abuse its discretion by denying the Husband a hearing on his motion for reasonable attorney's fees and costs.

West Virginia Code § 48-5-611(c), specifically provides that "reasonable attorney's fees and costs" may be awarded in Family Court "when it appears to the court that a party has incurred attorney's fees and costs unnecessarily because the opposing party has asserted unfounded claims or defenses for vexatious, wanton or oppressive purposes, thereby delaying or diverting attention from valid claims or defenses asserted in good faith".

In addition, under W. Va. Code § 48-1-305 (Suit money, counsel fees and costs) "[c]osts 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

¹The Husband alleges as follows:

The Family Court proceedings lasted a total of five years and ten months, from March 22, 2005, when the Husband initiated those proceedings to January 24, 2011, when the Final Order was entered.

On appeal, the Husband contends that the Family Court proceedings extended for almost six years because the Wife contested every issue that arose and fabricated issues that did not exist. The Husband contends that the Wife did this in furtherance of a litigation strategy designed to reduce the value of his interest in the marital residence. That strategy, according to the Husband, consisted of (a) prolonging the divorce for as long as possible; (b) expending, while she was the sole occupant of the marital residence, funds for purposes related to the marital residence; and (c) contending that, because the Husband was still co-owner of the marital residence, she was entitled to claim those expenditures as credits against the marital estate or as reductions in the value of the Husband's interest in the marital residence. The Husband contends that the purpose of this strategy was to convert his interest in the marital residence into a "wasting asset" – the longer the Wife could prevent the Husband from obtaining, via a divorce, his interest in the marital residence, the less value that interest would have when he did finally manage to obtain it.

The Husband contends the Wife took actions to unreasonably contest issues in order to prolong the Family Court proceedings. He cites many examples in his Petition.

order until the costs are paid.”

The West Virginia Supreme Court of Appeals in Grose v. Grose, syl. p. 4, 671 S.E.2d 727 (W. Va. 2008), recently discussed the standard for awarding attorney fees in domestic relations cases:

“In divorce actions, an award of attorney’s fees rests initially within the sound discretion of the family ... [court] and should not be disturbed on appeal absent an abuse of discretion. In determining whether to award attorney’s fees, the family ... [court] 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.” Syllabus Point 4, Banker v. Banker, 196 W.Va. 535, 474 S.E.2d 465 (1996).” Syllabus, Landis v. Landis, — W.Va. —, — S.E.2d —, 2007 WL 3318058 (2007).

Although the Family Court did not make detailed findings regarding the attorney fee issue, this Court finds the Family Court did not abuse its discretion in ordering each party to be responsible for the costs of his or her own attorney fees.

Husband’s Ground Two

21. That the Family Court erred by reducing the value of the Husband’s interest in the marital residence by \$10,000 attributable to the kitchen renovations. The passive versus active doctrine is a legal theory that simply allows a party to trace a marital interest into the other’s separate property. It does not permit or allow the converse, as performed by the Family Court below.

The West Virginia Supreme Court of Appeals in Mayhew v. Mayhew, 205 W. Va. 490, 519 S.E.2d 188 (1999) ruled as follows:

“We further hold that the formula for an active or passive appreciation analysis requires a determination of the following five-step test: (1) whether the property, in general, is either separate or marital property; (2) placing a value on the nonmarital property at the commencement of the action; (3) the value of the nonmarital property, before it became subject

to the active and passive appreciation analysis; (4) the circuit court calculation of the property's value at the commencement of the action, in relation to its value on the date(s) gifted; and (5) a determination as to what extent the increase in the value of the nonmarital property is active appreciation or passive appreciation. The resulting amount due to active appreciation is marital property and subject to equitable distribution."

Mayhew, S.E.2d at 200.

Under Mayhew, the passive versus active analysis stops after the first step because the former marital residence was not either party's separate property. Rather, it is both a marital asset under W. Va. Code § 48-1-233(1), and their own legal joint property under West Virginia property law. Accordingly, under Mayhew, the Family Court was clearly not permitted to use the active versus passive analysis to determine that the increase in value of the marital residence constituted the Wife's separate property.

It is important to note that W. Va. Code § 48-1-233(2), is West Virginia's statute that permits tracing. It states as follows:

"The amount of any increase in value in the separate property of either of the parties to a marriage, which increase results from: (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases net value of separate property; or (B) work performed by either both of the parties during the marriage."

Importantly, this statute clearly permits the trial court to determine that an increase in value of a separate asset is marital property, but it does not permit the trial court to determine that an increase in value of a marital asset is one of the party's separate property. For these reasons, the Family Court committed plain error by determining that an increase in value of a marital and joint asset was the Wife's separate property.

Second, the trial court erred because the testimony of the court appointed expert, Dean Dawson, did not directly attribute the \$10,000 increase in value to the renovations in the kitchen. Accordingly, even if the Mayhew analysis was applicable to this case, the Family Court erred because the Wife did not meet her burden of persuasion on this issue.

Mr. Dawson testified that inflation also played a positive role as to the increase in value of the residence. However, he could not testify to any degree of certainty to the specific amount that the kitchen renovations and inflation positively affected the increase in value. Therefore, based on the evidence presented the trial court cannot determine whether the kitchen renovations directly increased the value by \$500, \$9,500, or somewhere in between. For these reasons, the trial court's determination that the kitchen renovations are directly attributable to any amount of the increase in value is clearly erroneous.

Based on the foregoing, the Family Court's decision that the \$10,000 increase in the former marital residence is the Wife's separate property should be reversed.

Consequently, the marital portion of the equity in the former marital residence is \$296,438 (\$349,000 less \$52,562²) rather than \$286,438 (\$339,000 less \$52,562). As a result, as a matter of law the value of each party's marital interest in the house is \$148,219 (\$286,438/2) rather than \$143,219 (\$286,438/2) to account for Family Court's error.

Husband's Ground Three

22. That the Family Court erred by awarding the Wife a \$12,455 credit relating to insurance premiums and property tax payments made while she was the sole

² The basis used by the Family Court to determine the marital portion of the equity in the former residence was \$52,562.

occupant of the marital residence. The Family Court abused its discretion when it awarded the Wife a Conrad credit of \$12,455, which is one half of the amount the Wife paid after the date of separation for home owner's insurance (2005-2010), umbrella insurance (2006-2009), and real and personal property taxes (2005-2009).

Reimbursement to a spouse for payment of the other spouse's 50% share of marital debt paid after the date of separation and prior to the ultimate division of marital property has often been authorized by the West Virginia Supreme Court of Appeals. See Conrad v. Conrad, 216 W. Va. 696 (2005).

Based on this holding, the Wife was appropriately given a Conrad credit for paying off the Husband's 50% share of the debt against the former marital residence that existed after the date separation. Indeed, this was a joint debt that existed at the time of separation.

However, the Husband contends that the trial court abused its discretion by giving the Wife a Conrad credit for the real and personal property taxes, umbrella insurance, and home owners insurance paid by Wife commencing in 2005 (more than a year after the parties' separation) and continuing for more (4) years during this protracted litigation.

In granting these credits, the trial court failed to recognize that during the period that the Wife paid these expenses, she alone was living in the house. Accordingly, these expenses were incurred as a direct result of and incident to her exclusive use and enjoyment of the former marital residence after the date of separation. These debts did not exist at the time of separation. During this period, the Husband, who earned significantly less than the Wife, had to maintain his own residence.

It is further important to note that at the temporary hearing, the Family Court directed that the Wife maintain the mortgage during the pendency of the divorce, and that she would receive a credit in accordance with the final decree, which she did. However, the temporary order makes no reference to the payment of home owner's insurance, umbrella insurance, and real and personal property taxes. These expenses were directly relating to her use and enjoyment of the house, and she could afford them based on her income. No temporary alimony order was requested by either party or necessary.

Such a credit would have been appropriate if the Husband had been living in the house rather than the Wife, and the Wife had been paying for these expenses. But this was not the case. Therefore, the Family Court abused its discretion by giving the Wife the \$12,455 Conrad credit. For these reasons, the decision of the Family Court to award this credit to the Wife was an abuse of discretion and should be reversed. The final equitable distribution should be adjusted so that the Wife does not receive the Conrad Credit of \$12,455 relating to home owner's insurance, property taxes, and umbrella insurance.

Husband's Ground Four

23. That the Family Court abused its discretion by excluding the differences in values as to the parties' vehicles from equitable distribution. The Family Court committed this error by refusing to recognize under equitable distribution that the vehicle the Wife received pursuant to equitable distribution was worth \$9,155 more than the vehicle the Husband received. This amount was determined based on the values set forth in the Wife's financial disclosure. The Husband specifically requested that the final

distribution make an adjustment for this difference, which would have increased his equitable share of the marital estate by \$4,072.50 ($\$9,155/2$).

The Family Court provided no explanation for the exclusion. The Family Court abused its discretion by not making an adjustment to the final equitable distribution for difference in values of the vehicles. Importantly, under W. Va. Code § 48-7-101, “[e]xcept as otherwise provided in this section, upon every judgment of annulment, divorce or separation, the court shall divide the marital property of the parties equally between the parties.”

Based on the record, the Family Court did not account for the differences in the values of the vehicles under its final distribution. Consequently, the Family Court abused its discretion. For these reasons, the decision of the Family Court should be reversed, and the Husband’s equitable share of the marital estate should be increased by \$4,072.50.

Wife’s Grounds One and Three

24. In Grounds One and Three of her petition for appeal, the Wife expresses a variety of criticisms of the Final Order. Her threshold criticism seems to be that the Family Court entered the proposed order presented by the Husband’s counsel and that this constituted a prohibited “mechanical adoption of findings proposed by counsel.” Wife’s counsel presented her own proposed order.

There was nothing improper about the Family Court entering a proposed order that had been drafted by counsel for one of the parties. That action is specifically contemplated by the Rules of Practice and Procedure for Family Court. Rule 22(b) requires that “the court shall prepare all orders and findings of fact” only in proceedings “in which both parties are self-represented”. In proceedings in which “one or both parties

are represented by attorneys, the court may assign one or more attorneys to prepare an order or proposed findings of fact.”

The Wife’s more specific criticisms relate to the content of the Order. Basically, according to her, it does not say enough; and much of what it does say is incorrect. Her most graphic comment, which is expressed in her supporting Memorandum of Law, is that the “effort” of the Family Court to determine the net value of the marital estate was “nonsensical” and the “purported” determination “bears little resemblance to the actual record.”

The applicable standard for this Court to apply in its review of the Order is abuse of discretion and as discussed below, the Family Court’s entry of the Order did not violate that standard.

In addition to other arguments asserted in support of her basis for appeal under Grounds One and Three, the Wife takes issue with the distribution/valuation of her jewelry. She contends there was no testimony regarding “the value of the same except for Mr. Potter’s reference to his account at Galperin Jewelry.” Consequently, the Wife contends that this Court should send that issue (along with every other issue that arose during the three days of hearing) back to Family Court for a more detailed analysis. However, during the final hearing, the Husband and Wife both agreed that the Wife would retain the jewelry and that in exchange, the Husband would retain other marital property and pay the Wife \$3,000. This agreement is specifically accounted for in the Family Court’s final distribution.

The Family Court did not commit error as alleged by the Wife under Grounds One and Three of her petition for appeal. Therefore, her appeal on these grounds should be denied.

Wife's Ground Two

25. That the Family Court denied her the right to present evidence, cross examine witnesses, or otherwise denied her due process. The record shows unequivocally that neither party was denied the right to call witnesses, present witnesses, or argue their respective cases to the Family Court. Accordingly, this Court finds no error regarding this alleged ground for appeal asserted by the Wife in her petition for appeal. Therefore, the Wife's petition for appeal on this ground should be denied.

Wife's Ground Four

26. That the Family Court abused its discretion by ordering the parties to equalize their retirement-account assets by transferring assets from the Husband's defined-contribution retirement account at Morgan Stanley Smith Barney to the Wife's defined-contribution retirement account at Morgan Stanley Smith Barney. This decision was made by the Family Court at the behest of the Husband. He contended that if the Family Court had – as the Wife requested – allowed her to equalize the retirement-account assets by deducting from the Husband's interest in the marital residence an amount equal to his excess of retirement-account assets, that would not have constituted equitable distribution because the funds in the Husband's retirement account are pre-tax dollars.

This Court cannot find that the Family Court abused its discretion by separating the retirement assets from the non-retirement assets for equitable distribution purposes.

This allowed for a more equitable division of the assets because the retirement accounts contain pre-tax dollars. Moreover, the Family Court's Order allows for an equalization of the retirement account assets with one simple lump sum payment from one of the Husband's retirement accounts to a retirement account of the Wife in the amount of \$62,045.54. This equalization lump sum payment is consistent with the equitable distribution principals set forth by the legislature.

Under § 48-7-105, "In order to achieve the equitable distribution of marital property, the court shall, unless the parties otherwise agreed, order, when necessary, the transfer of legal title to any property of the parties, giving preference to effecting equitable distribution through periodic or lump sum payments."

It is further noted that both of the authorities cited in the Wife's Petition (i.e. *Cross v. Cross* and *Barrett v. Barrett*) were cited by her to the Family Court during the final hearing and were considered by the Family Court prior to its ruling on the retirement-account issue. Neither case involved a situation such as we have here in which the equalization can be accomplished by nothing more than a single transfer of an already determined dollar amount from one account to another. Again, the Family Court did not abuse its discretion. Therefore, the Wife's petition for appeal as to Ground Four should be denied.

Wife's Ground Five

27. That the Family Court abused its discretion by denying the Wife's motion to require the Husband to be responsible for all of the mortgage payments on the marital residence during the seven years and five months during which she had been the sole occupant of that residence prior to the Final Hearing. The Wife failed to present to this

Court any factual, legal or equitable basis as to why the Husband should have been responsible for 100% of all of the debt that existed against the former marital residence (rather than only 50%) as of the date of legal separation on August 7, 2003.

The Family Court properly determined that in August of 2003 there existed a mortgage against the former marital residence in the amount of \$59,400; and that the Wife completely satisfied this debt after separation by making (60) payments of \$1,142.65 each for a total of \$68,559.23. However, the Court also determined that the Wife satisfied a portion of this balance by paying \$15,997 from a joint account. Therefore, the Family Court determined that the basis to determine the marital portion of the equity in the former marital residence was \$52,562 (\$68,559.23 less \$15,997).

The Court then subtracted the basis from the fair market value, which the Family Court determined to be \$339,000, to determine the portion of the equity that was marital. This method prevented the Husband from benefiting in any regard from the post separation payments made by the Wife to extinguish the marital debt. Based on the foregoing, the Wife's petition for appeal on Ground Five should be denied.

Adjustment to Family Court's Equalization of Net Marital Estate

28. The final divorce order provides that the Wife pay the Husband \$113,204.09 to equalize the net marital estate as to the non-retirement type assets/debts. This figure was determined as follows by the Family Court:

| | |
|--|---------------|
| The value of Husband's marital interest in former marital residence: | \$143,219.00 |
| Reimbursement to Husband for unaccounted Chase Bank monies: | \$2,000.00 |
| Reimbursement to Husband as to \$5,139 check: | \$2,569.50 |
| Wife's share of Husband's NW Mutual Aid Association Ins.: | (\$19,129.41) |

| | |
|---|---------------------|
| Reimbursement by Husband to Wife for post separation expenditures relating to home owner's insurance, umbrella insurance, real estate taxes, personal property taxes: | (\$12,455) |
| Equalize difference in railroad related property and jewelry by Husband: | (\$3,000) |
| Net Marital Estate Equalization payment by Wife: | \$113,204.09 |

Based on this Court's findings of fact and conclusions of law, the Wife's equalization payment to the Husband as to the non-retirement assets should be increased from \$113,204.09 to \$134,731.59. This increase is determined as follows:

| | |
|---|---------------------|
| The value of Husband's marital interest in former marital residence: | \$148,219.00 |
| Reimbursement to Husband for unaccounted Chase Bank monies: | \$2,000.00 |
| Reimbursement to Husband as to \$5,139 check: | \$2,569.50 |
| Wife's share of Husband's NW Mutual Aid Association Ins.: | (\$19,129.41) |
| Reimbursement by Husband to Wife for post separation expenditures relating to home owner's insurance, umbrella insurance, real estate taxes, personal property taxes: | (\$0) |
| Equalize difference in railroad related property and jewelry by Husband: | (\$3,000) |
| Equalize discrepancy in vehicle values: | \$4,072.50 |
| Net Marital Estate Equalization payment by Wife: | \$134,731.59 |

28. The Wife's petition for appeal should be refused on all grounds.

29. Ground One of The Husband's petition for appeal should be denied. The Family Court did not abuse its discretion by refusing to grant the Husband a hearing on his request for attorney fees and costs under West Virginia Code § 48-5-611(c) and further ordering each party to be responsible for his/her own attorney fees and costs.

30. Ground Two of the Husband's petition for appeal should be granted. The final distribution set forth in the final divorce order regarding the non-retirement assets

and debts should be adjusted to reflect that the value of the Husband's interest in the former marital residence is \$148,219.00, rather than \$143,219.00

31. Ground Three of the Husband's petition for appeal should be granted. The final distribution set forth in the final divorce order regarding the non-retirement assets/debts should be adjusted to reflect that the Wife does not receive a Conrad Credit of \$12,455 relating to payments she made toward home owner's insurance, property taxes, and umbrella insurance coverage relating to the former marital residence after the date of separation on August 7, 2003.

32. Ground Four of the Husband's petition for appeal should be granted. The final distribution set forth in the final divorce order regarding the non-retirement assets/debts should be adjusted to reflect that the Husband receives a Conrad Credit of \$4,072.50 relating to the difference in value of the vehicles.

33. That the remaining portion of the final divorce order should be affirmed.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS

FOLLOWS:

1. The foregoing findings of fact and conclusions of law shall be incorporated, adopted, and ratified, into the Order of this Court as if set forth herein verbatim.

2. The Husband's Appeal based on Husband's Ground One is denied. The Family Court's decision to refuse to grant the Husband a hearing as to his request for attorney fees and costs under West Virginia Code § 48-5-611(c) is affirmed.

3. The Husband's Appeal based on his Ground Two is granted. The Family Court's decision determining that the \$10,000 increase in the value of the former marital

residence after the date of legal separation is reversed. The final distribution set forth in the final divorce order regarding the non-retirement assets and debts shall be adjusted to reflect that the value of the Husband's interest in the former marital residence is \$148,219.00, rather than \$143,219.00.

4. The Husband's Appeal based on Husband's Ground Three is granted. The Court's decision awarding the Wife a \$12,455 Conrad Credit for payments she made toward home owner's insurance, property taxes, and umbrella insurance after the date of legal separation is reversed. The final distribution set forth in the final divorce order regarding the non-retirement assets/debts shall be adjusted to reflect that the Wife does not receive a Conrad Credit of \$12,455 relating to these payments made after the date of separation.

5. That the Husband's Appeal based on Husband's Ground Four is granted. The Family Court's failure to consider the difference in value of the vehicles in the final distribution of non-retirement assets is reversed. The final distribution set forth in the final divorce order regarding the non-retirement assets/debts shall be adjusted to reflect that the Husband receives a Conrad Credit of \$4,072.50 relating to the difference in value of the vehicles.

6. It is the **JUDGMENT** of this Court that the Wife shall pay the Husband a lump sum payment of \$134,731.59 along with post judgment interest as provided by Chapter 48 of the West Virginia Code to equalize the distribution of the non-retirement account assets. The Clerk is directed to record said judgment as required by the law.

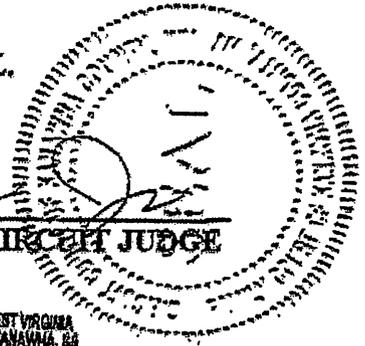
7. It is the **JUDGMENT** of this Court that the Wife's petition for appeal is **DENIED** on all grounds.

8. It is the **JUDGMENT** of this Court that all other portions of the final divorce order are **Affirmed** except as otherwise provided herein.

THE CLERK IS DIRECTED TO PROVIDE A CERTIFIED COPY OF THIS ORDER TO THE ATTORNEYS OF RECORD AND TO FAMILY COURT JUDGE SHARON MULLENS.

THIS IS A FINAL ORDER DISPOSING OF THE APPEAL.


THE HONORABLE PAUL ZAKAIR, JR., CIRCUIT JUDGE



ENTER: June 3, 2013

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY E. BAYSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 3
DAY OF June 2013
Cathy E. Bayson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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KANAWHA CO. CIRCUIT COURT
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IN THE FAMILY COURT OF KANAWHA, WEST VIRGINIA

IN RE THE MARRIAGE OF:

JAY M. POTTER,

Petitioner, _____

v.

Civil Action No. 05-D-618

MARIA MARINO POTTER,

Respondent.

FINAL ORDER

This matter came on for hearing on March 24, 2008, and May 26, 2010, before Judge Sharon Mullens upon the Petitioner's Summons and Complaint, properly filed and duly served upon the Respondent and matured for hearing, upon the Answer of the Respondent, regularly filed and duly served upon counsel for the Petitioner, upon the sworn testimony adduced at hearings before the Court, which testimony was electronically recorded and is hereby **ORDERED** filed and made a part of the record in this action; and upon all pleadings and ordered heretofore entered this action.

The Respondent appeared in person and by counsel, Timbera C. Wilcox, Esq., and the Petitioner appeared in person and by counsel, Tim C. Carrico, Esq.

UPON CONSIDERATION OF ALL OF WHICH, the Court is of the opinion to, and does make the following Findings of Fact and Conclusions of Law:

Findings Of Fact

1. That the parties are both actual and bona fide citizens and residents of Kanawha County, West Virginia, and have been so for more than one year prior to the institution of this action.

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2. That the parties were duly and legally married in Monongalia County, West Virginia, on May 31, 1980.

3. That the parties last lived and co-habitated together as husband and wife in Kanawha County, West Virginia, on or about August 7, 2003, and they have not since that time co-habitated as husband and wife, and that said period of living separate and apart will continue uninterrupted and without any cohabitation by the parties hereto as husband and wife.

4. That no children were born of the marriage. The Respondent is not pregnant.

5. That neither party is now nor was at the time of the institution of this action, a member of the armed forces of the United States or any Nation that is allied with the United States.

6. That neither of the parties are minors, incompetent, or insane.

7. That each party waived alimony.

8. That the parties did not enter into a property settlement agreement.

9. That the Court entered its *ORDER REGARDING DIVISION OF CERTAIN MARITAL PERSONAL PROPERTY*. This is a separate Order, which divides certain marital assets specifically identified therein.

10. The following is a list of the assets and debts at issue at the final hearing that were not resolved by the Court's Order Regarding Division of Certain Marital Assets:

- a. 2001 BMW 330ci currently in the Petitioner's possession.
- b. 2004 BMW 325xi currently in the Respondent's possession.
- c. Respondent's jewelry.
- d. Petitioner's photographs (photography and railroad related property) of

CSX.

- e. Respondent's Pension Retirement accounts:
 - i. Respondent's MLS 401k.
 - ii. Respondent's Self-directed IRA at MS/SB.
 - iii. Respondent's PERS (vested unmatured pension with disability benefit component contributions plus interest).
- f. Petitioner's Retirement Accounts:
 - i. Petitioner's Simple IRA (MS/SB).
 - ii. Petitioner's two rollover IRAs (AFFA).
- g. Former marital residence located at One Crosscreek Road, Charleston, W. Va., and first mortgage.
- h. Check from Petitioner's separate funds in the amount of \$5,139 to Respondent after the date of separation.
 - i. The Joint JP Morgan/Chase Bank Accounts ending in nos. 1473 and 7207.
 - j. Petitioner's Navy Mutual Aid Association Insurance policy ending in nos. 9005.
 - k. Petitioner's Navy Mutual Aid Association Insurance policy ending in nos. 8179.
 - l. The Joint Smith Barney non-qualified investment account.

11. That the former marital residence was appraised by Dean E. Dawson, SRA. He testified that the former marital residence had a value of \$339,000.00 as of the date of the parties' separation on August 7, 2003. He testified that the former marital residence has a value of \$349,000.00 as of February 22, 2010. That on or about the date of separation, this asset had a mortgage through BB&T with a principle balance of \$59,400.00 as of August 15, 2003. The

note is dated August 15, 2003. The repayment terms of the note required a total of (60) payments in the amount of \$1,142.65 each. The Respondent contends that she made all but 14 of these payments from her own separate funds. She contends that from May 2004 to June of 2005 she paid a total of \$15,997 (14 payments of \$1,142.65) toward the outstanding balance of this loan from joint checking accounts at BB&T, and at Chase Bank. The Respondent introduced evidence concerning improvements she made to the residence after the date of separation. The Respondent seeks full ownership of the former marital residence. The Petitioner does not seek ownership of the former marital residence. However, he seeks compensation for the value of his marital interest in this asset.

12. The parties agreed that the Petitioner was entitled to reimbursement from the Respondent relating to a check the Petitioner issued to the Respondent in the amount of \$5,139.00 payable from his own separate funds. This check was deposited by the Respondent into the parties' joint Smith Barney non-qualified investment account.

13. That the parties agreed that their Joint Smith Barney non-qualified investment accounts should be split equally.

14. That the parties' retirement accounts have the following values:

| | | |
|----|--|--------------------|
| a. | Respondent's MLS 401(k): | \$165,478.83 |
| b. | Respondent's IRA at MS/SB: | \$33,610.88 |
| c. | Respondent's PERS: | \$31,884.79 |
| d. | Petitioner's rollover IRA AFFA: | \$334,853.66 |
| e. | Petitioner's rollover IRA AFFA and Simple-IRA MS/SB: | <u>\$20,211.92</u> |
| | Total Agreed Marital Value: | \$586,040.08 |

15. As to the Petitioner's two Navy Mutual Aid Association Insurance Policies, the

Respondent contends that their entire cash value is marital. The Petitioner contends that he is entitled to a credit of \$3,002.76 per pre-marriage and post-stipulation premiums that he had paid. The Respondent requested the Court to divide these two accounts equally.

16. The parties agreed that the Petitioner shall receive the 2001 BMW 330ci, and that the Respondent shall receive the 2004 BMW 325xi. The Petitioner contended that according to the Respondent's financial disclosure, the Respondent's 2004 BMW 325 xi, was worth \$9,155.00 more than his 2001 BMW 330ci. Based, on the foregoing, the Petition sought an offset/credit against the marital estate to account for the difference in values between these two vehicles.

17. That the value of the Petitioner's Navy Mutual Aid Association insurance policy no. 8179 is \$20,651.31, and the value of his Navy Mutual Aid Association insurance policy no. 9005 is \$17,607.50. That the Petitioner paid \$1,564.56 pre-marriage premiums in policy no. 8179 and \$1,438.20 post-separation premiums on policy no. 9005. The Petitioner seeks a credit of \$3,002.76 for those premiums.

18. The Respondent seeks (29) credits against the marital estate, relating to expenditures that she made toward the marital residence after the date of separation.

19. That at the completion of the hearing, the Petitioner moved for a hearing regarding his request for attorney fees and costs.

20. That at the completion of the hearing the Petitioner requested the Court to Order the return of the audio cassette tape that was the subject of Petitioner's Motion for Disposition of Exhibit served October 10, 2008.

Conclusions of Law

1. That the parties have established as grounds for divorce irreconcilable differences

within the meaning of that term as defined in the *West Virginia Code*, §48-5-201 and are entitled to a divorce from the bonds of matrimony.

2. That the parties' joint non-qualified Smith Barney investment account is a marital asset that should be split equally between the parties.

3. That the Petitioner should receive exclusive possession and ownership of the 2001 BMW 330ci free and clear of any interest of the Respondent. The Petitioner should be liable for all debts and obligations relating thereto, and forever save, hold harmless, and indemnify the Respondent thereon.

4. That Respondent should receive exclusive possession of the 2004 BMW 325xi free and clear of any interest of the Petitioner. Respondent should be liable for all debts and obligations relating thereto, and forever save, hold harmless, and indemnify the Petitioner thereon.

5. The Petitioner's request for an offset against the marital estate for the difference in values of the aforementioned vehicles should be DENIED.

6. The Respondent should receive exclusive ownership and possession of her jewelry free and clear of any interest of the Petitioner.

7. The Petitioner should receive exclusive ownership and possession of his railroad and photography related property.

8. That to compensate the Respondent for the difference in values between the marital portion of her jewelry and the marital portion of the Petitioner, the Petitioner should pay the Respondent \$3,000.00.

9. That the Respondent should receive exclusive ownership and possession of the former marital residence free and clear of any interest of the Petitioner. The Respondent should

be responsible for all debts and obligations relating thereto. The Respondent should forever save, hold harmless, and indemnify, the Petitioner as to any debts and obligations relating to this asset.

10. This Court finds as a matter of law that the increase in value of the former marital residence from \$339,000 to \$349,000 is attributable to renovations in the kitchen which were made by the Respondent after the date of separation. The Petitioner's objection and exception to this finding is duly noted. Therefore, it is this Court's finding as a matter of law that the fair market value of the former marital residence for equitable distribution purposes is \$339,000. It is this Court's finding as a matter of law that this asset had a loan against it through BB&T. The amount of the loan as of August 15, 2003, was \$59,400.00. The loan repayment schedule required (60) monthly payments of \$1,142.65 each, for a total amount of \$68,559.23. The Respondent paid all (60) monthly payments. That (14) of these payments were paid from a joint marital account totaling \$15,997. Therefore, the basis used to determine the marital portion of the equity in the former marital residence is \$52,562 (\$68,559.23 less \$15,997). Based on the foregoing this Court finds as a matter of law the marital portion of the equity in the former marital residence is \$286,438 (\$339,000 less \$52,562). This Court finds as a matter of law that the value of each party's marital interest in the house is \$143,219 (\$286,438/2).

11. The Petitioner's request for a credit for his pre-marriage and post-separation Navy Mutual Aid Association premiums should be DENIED. The Court finds as a matter of law that the entire balance of each of the Petitioner's Navy Mutual Aid Association insurance policies are marital property. The total value of these two policies together is \$38,258.81. That this Court finds as a matter of law that the value of each party's marital interest in these two insurance policies is \$19,129.41 (\$38,258.81/2). This Court finds as a matter of law that the Petitioner

should receive exclusive ownership and possession both of these assets, and the Respondent should be compensated for the value of her marital interest in them.

12. The total value of the marital portions of each party's retirement account together is \$586,040.08. It is the Court's finding as a matter of law that each party should receive exclusive ownership and possession of their respective retirement accounts identified above. This Court finds as a matter of law that the value of each party's marital interest in all of the retirement accounts is \$293,020.04. It is this Court's finding as a matter of law that to equalize the retirement accounts the Respondent should receive \$62,045.54 from the Petitioner. It is this Court's further finding as a matter of law that the Petitioner should be entitled to equalize the difference in value of the retirement accounts by transferring to the Respondent from one of his retirement accounts \$62,045.54 pursuant to a qualified domestic relations order, or a letter of instruction, to prevent any tax consequence.

13. That it is the Court's finding as a matter of law that the Respondent should reimburse the Petitioner \$2,569.50 (\$5,139/2) regarding the check written by the Petitioner to the Respondent in the amount of \$5,139, which was subsequently deposited by the Respondent into the parties' joint non-qualified Smith Barney investment account.

14. That it is this Court's finding as a matter of law the Respondent failed to account for \$4,000 of the monies that had been in the parties' joint Chase bank accounts identified above and that she subsequently transferred into her own name and partially expended for various purposes. Therefore, it is this Court's finding as a matter of law that the Respondent shall reimburse the Petitioner \$2,000 (\$2000/2) for these monies that were not accounted for.

15. That after the date of separation, the Respondent paid real and personal property taxes in the amount of \$15,832.00 relating to the former marital residence, and the parties'

vehicles during the period of 2005 to 2009 from her own separate funds. In addition, the Respondent paid \$8,045 toward the home owner's insurance from her own separate funds for the former marital residence for the period of 2005 through May of 2010. Further, the Respondent paid a total of \$1,034 for Umbrella Insurance Coverage for the period of 2005 through 2009 from her own separate funds. It is this Court's finding as a matter of law that the Respondent is entitled to reimbursement from the Petitioner for his share of these payments. Therefore, it is this Court's finding as a matter of law the Petitioner should reimburse the Respondent in the amount of \$12,455 (\$24,911/2). That it is this Court's finding as a matter of law that the Respondent should be DENIED reimbursement for any of the other expenses she incurred requested in her Equitable Distribution Credit/Offset Schedule.

16. It is this Court's finding as a matter of law that to equalize the net marital estate as to the non-retirement type assets/debts, based on the above distribution the Respondent should pay the Petitioner \$113,204.09 as an equitable distribution payment. This figure is determined as follows:

| | |
|--|---------------------|
| The value of Petitioner's marital interest in former marital residence: | \$143,219.00 |
| Reimbursement to Petitioner for unaccounted Chase Bank monies: | \$2,000.00 |
| Reimbursement to Petitioner as to \$5,139 check: | \$2,569.50 |
| Respondent's share of Petitioner's NW Mutual Aid Association Ins.: | (\$19,129.41) |
| Reimbursement by Petitioner to Respondent for post separation Expenditures relating to home owner's insurance, umbrella insurance, real estate taxes, Personal Property Taxes: | (\$12,455) |
| Equalize difference in railroad related property and jewelry by Petitioner: | (\$3,000) |
| Net Marital Estate Equalization payment by Respondent: | \$113,204.09 |

21. That it is this Court's finding as a matter of law that to equalize the net marital

estate as to the retirement type assets \$62,045.54 should be transferred by qualified domestic relations order or a letter of transfer from a retirement account of the Petitioner's to a retirement account of the Respondent's designation.

22. That the Petitioner's request for a hearing on the issue of attorney fees and costs should be DENIED. It is this Court's finding as a matter of law that each party should be responsible for their own attorney fees and costs.

23. That the distribution of assets and debts set forth above is fair and equitable and should be **RATIFIED, APPROVED and CONFIRMED** and incorporated herein by reference.

24. The Respondent and Petitioner agreed to waive any and all claims to alimony, support and/or maintenance from each other now or in the future and understand in so doing are forever barred from requesting the same. The parties having so agreed, it is further understood and agreed by the parties that neither the Family Court of Kanawha County, West Virginia, nor any other Court of the competent jurisdiction, shall have authority to award any alimony, support and/or maintenance payments unto either party, under any circumstances, and the parties do, hereby, revoke jurisdiction for any such award of alimony, support and/or maintenance from any Court that may be deemed to have competent jurisdiction.

It is, accordingly, **ORDERED, ADJUDGED AND DECREED** as follows:

1. That the foregoing findings of fact and conclusions of law shall be incorporated, ratified, and adopted, into the Agreed Final Order of this Court as if set forth herein verbatim.

2. That the marriage heretofore celebrated and existing between Petitioner and Respondent be, and the same is hereby dissolved, and said Petitioner and Respondent be, and they are hereby and forever divorced from each other from the bonds of matrimony.

4. That the division of the net marital estate as set forth above is fair and equitable

and is **RATIFIED, APPROVED, and CONFIRMED** by the Court and is merged herein as though fully set forth herein.

- 5. That the Petitioner's request for attorney fees and costs is **DENIED**.
- 6. That the Court will not address the Petitioner's request for return of the audio cassette tape that was the subject of Petitioner's Motion for Disposition of Exhibit.
- 7. That neither party shall be entitled to an award of alimony/spousal support.
- 8. That each party shall execute any and all documents and take such other action as necessary in order to carry out the intent of this Order.
- 9. To the extent that his Order adversely affects the rights of either party, their objections and exceptions are noted.
- 10. That the Clerk shall mail certified copies of this Order counsel of record.

NOTICE

This is a Final Order. Any party aggrieved by this Final Order may take an appeal either to the Circuit Court or to the West Virginia Supreme Court of Appeals. A Petition for Appeal to the Circuit Court may be filed by either party within thirty (30) days after the date of the entry of this Final Order. In order to appeal directly to the West Virginia Supreme Court of Appeals, both parties must file within fourteen (14) days of the entry of this Final Order, a joint notice of intent to appeal and waiver of the right to appeal this matter to the Circuit Court. If only one party timely files a notice of waiver and appeal to the Supreme Court that appeal will be treated as a Petition for Appeal to the Circuit Court.

ENTER: Sharon M. Mullens
JUDGE SHARON MULLENS

DATED: 12 | 15 | 10

RECORDED

Prepared By,



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