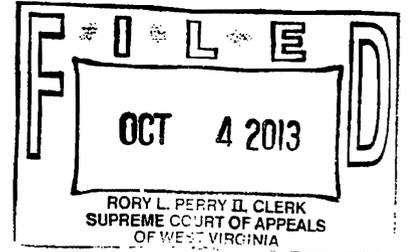


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0708

MARIA MARINO POTTER,
Respondent Below, Petitioner,



vs.

JAY M. POTTER,
Petitioner Below, Respondent.

Hon. Paul Zakaib, Jr., Judge
Circuit Court of Kanawha County
Civil Action No. 05-D-618

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The circuit court committed clear legal error in affirming the denial of procedural and substantive process under the erroneous premise that a family court may conduct the final hearings in a divorce action by conversations and inquiries of the parties and that due process must be requested.
2. The circuit court committed legal error in failing to reverse and remand the Final Order for compliance with Rule 52(a) of the West Virginia Rules of Civil Procedure.
3. The circuit court abused its discretion and exceeded its legitimate jurisdiction when it disregarded the narrowly prescribed parameters of appellate review imposed under West Virginia Code §51-2A-14.
4. The circuit court committed clear legal error when it failed to reverse and remand the final order with directions to achieve equitable distribution within the marital estate as contemplated by West Virginia Code §48-7-105.
5. The circuit court abused its discretion when it substituted its own erroneous factual predicate to reverse the family court's determination of equal value of the marital motor vehicles disregarding each vehicle's hearing date current NADA value and wholly disregarding petitioner's separate funds contribution.
6. The principle of judicial estoppel bars Mr. Potter from "changing the rules" and arguing against the Temporary Order to preclude credit/reimbursements for servicing marital debt and preserving the marital estate solely from Ms. Potter's separate funds.
7. The circuit court committed clear legal error when it determined that under Rule 22(b) of the Rules of Practice and Procedure for Family Court the family court has authorization to mechanically adopt a proposed order from a party.

II. STATEMENT OF THE CASE

This is an appeal by Petitioner herein and Respondent below, Maria Marino Potter (“Ms. Potter”) from the Final Order Regarding Petitions For Appeal entered by the Circuit Court of Kanawha County on June 3, 2013 which denied, upon review, her appeal of the Final Order of the family court in a divorce action entered on December 15, 2010 and which granted, in part, the appeal of that Order by Respondent herein, Petitioner below, Jay M. Potter (“Mr. Potter”). A.R. 006 and 007. The Petitioner has been denied equitable distribution and therefore seeks reversal of the Judgment entered by the Circuit Court which orders her to pay Respondent a lump sum payment of \$134,731.59 from funds outside the marital estate to equalize the distribution of non-retirement account assets of the marital estate while providing she receive a lump sum payment of \$62,045.54 from the marital estate as a transfer from Mr. Potter to one of her retirement accounts. A.R. 0020 and 0016. Petitioner respectfully asserts that having solely serviced marital debt without corresponding reimbursement fair and equitable distribution has not been attained. Petitioner further respectfully asserts that the Judgment Order must be reversed as contrary to West Virginia Code §51-2A-14 because it is predicated on new factual findings and conclusions not contained in the family court Order.

The Parties were married on May 31, 1980 in Monongalia County, West Virginia. The Petition for Divorce was filed by Mr. Potter on March 22, 2005. A.R. 0001. The first hearing in the divorce action was conducted on June 27, 2005. As a result of that hearing the family court entered a Temporary Order granting Mr. Potter’s request for his appraiser to conduct an appraisal of the marital residence to be completed by August 26, 2005. The Temporary Order also required the parties to complete their financial disclosures within twenty-one (21) days after entry of the Temporary Order and set a final hearing in the matter for September 15, 2005.

Because Mr. Potter objected to paying any portion of marital debt, the Temporary Order also required that Ms. Potter make the mortgage payments relative to what had been their marital home while providing that she be credited/reimbursed with the amount of those payments in the Final Order. A.R. 0427. It is clear that the family court, at the Temporary Hearing, could not have properly evaluated Mr. Potter's ability to service marital debt or obligations because he had, in fact, not yet filed a financial disclosure. A.R. 0001. His counsel, at the first hearing, did, however, represent that those financial disclosures had been made and that Mr. Potter requested the appraisal because he had no knowledge of his financial condition. A.R. 1234.

A proper financial disclosure would have revealed that Mr. Potter had, prior to the first hearing, availed himself of the benefit of using the marital residence as an asset on a "Uniform Residential Loan Application" to qualify for a mortgage on a home he purchased and jointly titled in his name, and the name of his extra-marital affair partner. The marital home was listed on this loan application as rental property generating monthly income of \$1,222. A.R. 1256. The September 15, 2005 final hearing was continued to December 16, 2005, because Mr. Potter's appraisal and financial disclosures remained incomplete.

On November 4, 2005, Mr. Potter noticed his appearance as co-counsel to Tim C. Carrico, Esquire, and shortly thereafter noticed the deposition of the law partner of Ms. Potter's then counsel, Arden J. Curry, II, creating a conflict which required Mr. Curry to withdraw. A.R. 0851. The December 16, 2005 final hearing was therefore continued to allow Ms. Potter to obtain new counsel.

On December 12, 2005, Mr. Curry filed Ms. Potter's August 4, 2005 verified Financial Statement, which had previously been provided to Mr. Potter's counsel by letter dated August 5, 2005, as well as the summary appraisal report evidencing the real property appraisal of the

marital residence obtained on October 25, 2005. Mr. Curry also filed the Motion to Compel Full and Complete Financial Disclosures setting the same for hearing on December 16, 2005. A.R. 1231 and 0855. Also, on December 12, 2005, Mr. Carrico filed on behalf of Mr. Potter his first Motion for Bifurcation. This motion was ultimately the subject of four (4) other filings by Mr. Potter. The family court, during a March 10, 2008 hearing, ultimately granted the Renewed Motion for Bifurcation disregarding Rule 53 of the Family Court Rules which expressly prohibited bifurcation in this matter. A.R. 0001.

The Order of Bifurcation entered by the family court judge on May 5, 2008 was the subject of a successful Writ of Prohibition to the Circuit Court. The Writ of Prohibition was granted, in part, because no evidence was presented on behalf of either party as required by Rule 81(a)(2) of the West Virginia Rules of Civil Procedure, no testimony was adduced in support of granting the parties a divorce on the grounds of irreconcilable differences, a fatal defect, and because the entry of the Order of Bifurcation violated Rule 22(b) of the Rules of Practice and Procedure for Family Court by failing to provide for the time period allowable for objections. A.R. 1024-1083. *See* Order Granting Petition for Writ of Prohibition entered on January 20, 2009 by the Honorable H.L. Kirkpatrick, III, Kanawha County Civil Action: 08-MISC-263. A.R. 1083.

At the November 16, 2009 pre-trial status conference, Mr. Potter requested that he be permitted to obtain another appraisal of the marital real property as his appraiser was no longer available to serve as his expert. The family court verbally ordered:

1. That an appraisal of the marital residence be performed by a court appointed appraiser and that parties were required to agree on the appraiser. The appraiser was to determine the fair market value of the property as of the agreed date of separation of August 7, 2003, as well as its current fair market value. The appraiser was ordered to attempt to determine the extent to which any increase in value, if there is any

increase in value, is directly attributable to expenditures and efforts made by Ms. Potter subsequent to August 7, 2003;

2. That on or before December 10, 2009, each party was to exchange a list of marital assets, a list of marital personal property and a list which identifies each party's separate non-marital personal property as of August 7, 2003; and

3. That Ms. Potter provide Mr. Potter a list of credits related to her expenditures on the marital residence subsequent to August 7, 2003. To the extent that Mr. Potter has made expenditures subsequent to August 7, 2003 for which he claims credit, he is to provide a list of those credits to Ms. Potter on or before December 10, 2009. A.R. 0205-0268.

The assets of the marital estate for equitable distribution purposes exceeded one million dollars.

A.R. 0500 and 0205. The Court also ordered a final hearing to begin at 9:30 a.m. on March 23, 2010. The final hearing took place on May 20, 2010 and was completed telephonically on May 26, 2010. The final hearing consisted of forced negotiations, controlled rather supervision of the Petitioner's attempt at the introduction of evidence and involved arguing to present evidence rather than evidence followed by argument. A.R. 0062, 0063, 0269 and 0429.

As of the Temporary Hearing of June 27, 2005 the parties' Chase Bank accounts and Smith Barney stock investment account were constructively frozen. The Smith Barney stock account as of the close of the market on July 29, 2005 had a value of \$191,937.23 plus a cash component separate portion of \$3,068.62. The parties also jointly established in November 2003 Chase Bank accounts with an August 4, 2005 value of \$59,406.78. A.R. 0855. Ms. Potter's documented separate funds expenditures which serviced the marital residence, marital debt and obligations and preserved the marital estate as of the May 20, 2010 final hearing, exceeded \$130,000. A.R. 0501. The Chase account with a value of \$63,000 was split by agreement in 2009 and the Smith Barney/Morgan Stanley account was split by agreement before the May 20, 2010 hearing with a value of \$243,000. A.R. 0062. The marital estate thus profited from Ms. Potter's separate funds expenditures by approximately \$48,000. The mortgage established in August 2003 had been retired in August of 2008. The marital residence was thus unencumbered.

A.R. 0489. Mr. Potter received his claimed credit of separate funds expenditures in full. The same, however, was, with limited exception, summarily denied to Ms. Potter. A.R. 0006 and 0050.

III. SUMMARY OF ARGUMENT

The Appeal raises issues with respect to whether the family court Final Order was prematurely entered without properly affording due process, whether the Final Order demonstrates an independent analysis of the record below setting forth findings of fact and conclusions of law consistent with the dictates of West Virginia Code §48-7-106 and Rule 52(a) of the West Virginia Rules of Civil Procedure, whether the Final Order accords equitable distribution. This appeal also raises the issue of whether the circuit court's Final Order Regarding Petitions For Appeal must be disregarded for appeal purposes under the dictates of West Virginia Code §51-2A-14 and whether the Final Order is void having been mechanically adopted contrary to the mandatory notice and objection provisions of Rule 22(b) of the Rules of Practice and Procedure for Family Court. The family court Final Order does not contain a finding that the parties admitted "irreconcilable differences" although the Final Order concluded that such grounds had been established.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for oral argument under Rule 19 of the Rules of Appellate Procedure as it involves assignments of error in the application of settled law and claims an unsustainable exercise of discretion where the law governing that discretion is settled.

V. ARGUMENT

A. Standard of Review.

The standard of review pertaining to this appeal is embodied in *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004). In the Syllabus of *Carr* this Court explained that “[i]n reviewing a final order entered by a circuit court judge upon review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of desecration standard”. This Court further stated in this Syllabus that questions of law are reviewed *de novo*. *Id.*

B. THE CIRCUIT COURT COMMITTED CLEAR LEGAL ERROR IN AFFIRMING THE DENIAL OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS UNDER THE ERRONEOUS PREMISE THAT A FAMILY COURT MAY CONDUCT THE FINAL HEARINGS IN A DIVORCE ACTION BY CONVERSATIONS AND INQUIRIES OF THE PARTIES AND THAT DUE PROCESS MUST BE REQUESTED.

As noted in *Henry v. Johnson*, 450 S.E.2d 779, (W. Va. 1994), divorce proceedings are subject to traditional notions of procedural and substantive due process. This Court has repeatedly held in the context of divorce proceedings that “[t]he due process of law guaranteed by the State and Federal Constitutions, when applied to proceedings in the Courts of the land, require both notice and the right to be heard.” Syllabus, *Crone v. Crone*, 375 S.E.2d 816 (W. Va. 1998); *Fernandez v. Fernandez*, 624 S.E.2d 777 (W. Va. 2005). [Emphasis added]. This Court in *Simpson v. Stanton*, 119 W.Va. 235, 193 S.E. 64 (1937), noted the essential elements of due process of law are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case explaining the most famous, and perhaps the most often quoted, definition of due process of law being that of Daniel Webster in his argument in the Dartmouth College case, in which he declared that by due process of law was meant ‘a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial’. [Emphasis Added]. The well-established principles of justice also include the right to know the

opposing evidence and oppose it with evidence according to the principles of fair judicial investigation, and to have the final determination grounded on evidence in some reasonable view supporting it. *Id.*

There can be no dispute that the West Virginia Rules of Civil Procedure apply to actions for divorce, as is evidenced by a reading of Rule 81(a)(2), which speaks in terms of such cases being “tried”. This Court explained in *McDougal v. McCammon*, 193 W. Va. 229, 236-37, 455 S.E.2d 788, 795-96 (1995), that “one of the purposes of the discovery process under our Rules of Civil Procedure is to eliminate surprise. Trial by ambush is not contemplated by the Rules of Civil Procedure. Further, the discovery process is the manner in which each party in a dispute learns what evidence the opposing party is planning to present at trial. Each party has a duty to disclose its evidence upon proper inquiry. The discovery rules are based on the belief that each party is more likely to get a fair hearing when it knows beforehand what evidence the other party will present at trial. *Graham v. Wallace*, 214 W. Va. 178, 185 588 S.E.2d 167, 174 (2003). West Virginia Code §48-2-33 [1984], now W. Va. §48-7-201, requires a full disclosure of one spouse’s financial assets to the other spouse at the time of divorce, and contemplates a meaningful hearing on the subject of equitable distribution of property by which the spouse submitting financial data may be cross-examined concerning the nature, origin and amount of assets.” Syllabus Pt. 2, *Rogers v. Rogers*, 182 W. Va. 388, 387 S.E.2d 855 (1989).

Without benefit of recording and without the parties present, the family court at the March 23, 2010 final hearing discussed with counsel potential issues for the case and rendered rulings to control presentation of evidence including, but not limited to, refusing to hear testimony concerning the negative impact that Mr. Potter’s multiple liquidations and transfers of retirement accounts both before and during the litigation may have affected their ultimate value,

and with regard to the issue of financial transactions and marital funds expenditures by Mr. Potter in relation to his extra-marital affair. Additionally, the Court, without the benefit of having allowed presentation of evidence and without hearing such evidence, gave indication of how her potential rulings would impact the marital estate. The central theme of which was, she was just gonna divide it down the middle, which included a directive that the five pension/retirement accounts would each be divided down the middle by five separate qualified domestic relations orders. Having rendered these off the record dictates, the judge forced the parties into a negotiation session with the understanding that if they could not resolve this matter by agreement she would resort to auctioning off and selling property.

The family court's Final Order on Page 6, Paragraphs 6 and 8 addresses the court's disposition of the "jewelry" issue. In this regard, Paragraph 6 states that Ms. Potter "should receive exclusive ownership and possession of her jewelry free and clear of any interest of Mr. Potter". Further, under Paragraph 8, to compensate Ms. Potter "for the difference in values between the marital portion of her jewelry and the marital portion of the Petitioner, [sic] the Petitioner should pay the Respondent \$3,000.00".

In the process of directing a division of the marital household furnishings the judge on the record for the first time reiterated Mr. Carrico's assertions made in the unrecorded proceeding earlier that morning. "And then you've got this argument that you just brought up, Tim, about this jewelry that's worth \$25,000". A.R. 0078. The Court then goes on, for the first time in a divorce pending for five years, as follows:

The Court: Ok. Lets talk about the jewelry for a moment. You said your mom - or attorney said that your mom had purchased gift certificates and you went and purchased jewelry with it. A.R. 0078.

Ms. Potter: Your . . . I don't know what list Mr. Potter is talking about, but he asked questions about my jewelry, so today is the first time it has ever become marital. It exist - -

The Court: It's never been an issue?
Ms. Potter: Never on his list. He asked me questions - -
The Court: Well is it marital?
Ms. Potter: It's non-marital. It's all been - -
The Court: Was it purchased prior to the marriage?
Ms. Potter: It was purchased either from money or - -
The Court: No, the question - - the question is Ms. Potter -
Ms. Potter: - it was gifts - -
The Court: Was it purchased during the course of the marriage?
Mr. Potter: Some was. Some was not.
The Court: Okay. And the sum that was the issue. I don't care whether it was purchased before or whatever. But what was, what's the value of those items that were purchased during the course of the marriage?
Ms. Wilcox: But again, I mean, just as a housekeeping matter, your Honor, I mean your last ruling required both Parties to submit a list of marital, non marital, whatever.
Mr. Potter - - here's Mr. Potter's list.
The Court: I have his list.
Ms. Wilcox: There's no jewelry on it. I mean, we - - we learned today that he has some - - he believes he has some claim to - - to her jewelry, and we don't even know what pieces of her jewelry, because I mean, I don't know about you, but I mean, most of us, as females, have had jewelry since we were kids, I mean, given to us, you know, whatever, on special occasions. - - what jewelry is he making a claim to?
The Court: What jewelry are you making a claim to?
Mr. Potter: The jewelry that we purchased periodically throughout the course of the marriage, almost exclusively at Galperin;s Jewelry.

Mr. Potter did not present any list of jewelry purchased at Galperin's although he acknowledged that there was an account at Galperin's.

Mr. Potter: Yes, ma'ma. And it was impression that that was going to be appraised - -
The Court: How come you didn't put it on your list as marital?
Mr. Potter: if you'll look at my list, it contains a category for awarding something like property that wasn't presented for a - - for an appraisal.
The Court: Ok.
Mr. Potter: Judge Snyder ordered that the - - our personal property be appraised. I submitted what jewelry I had for the appraisal. She did not. A.R. 0086.

The property appraisal was ordered at the hearing which unlawfully bifurcated the divorce the appraisal provisions were part of the Order of Bifurcation voided by Judge

Kirkpatrick. Thus, the appraisal provisions do not exist. There is, thus, no appraisal report in the record. A.R. 1026 and 1083.

The Court: I'm sorry, stop, please. Where? Where is it on the list?

Ms. Potter: It isn't.

Ms. Wilcox: It's never been called marital.

The Court: The burden of proof is on him. Where is it?

Mr. Potter: We're getting out the list.

Mr. Carrico: It's right here. Judge, if you look at category number three, other personal property, "items not produced by wife on 7/22/08 and valued as of "_____ at _____, A. R. 0264. What happened was: he submitted - - Judge, so you understand, Judge ordered that Lisa Lynn do a personal property evaluation of all property in both houses, so she went in, valued all the property and - - in Jay's house and she went in and valued all the property at her house, but she didn't make the jewelry available to Lisa Lynn.

Ms. Potter: That's - -

Mr. Carrico: So in here, he noted that referred to both of those appraisals and the items not produced.

Ms. Potter: He didn't - -

The Court: Ok, stop, stop. Why didn't you say, "jewelry, current Order of Judge Snyder" and put either a figure - - since she purchased it with her - a figure down there to the best of your ability at that point? Why didn't you do that?

This is a vague phrase here. I didn't know what the heck that was. So now today, conveniently, its jewelry, and maybe it will be paintings or something else. I mean, you all understand what I'm talking about here. We are trying to be as specific as we can. But to put something down - - I just discounted that. I didn't even - I said "well, I don't know what that is." And so that's why I'm saying, "well, where is jewelry on here?" but today you're telling me that's that is what supposed to be.

Ms. Potter: Yes, ma'ma and whatever materials she didn't submit for an appraisal.. if you recall - -

The Court: What other material was it that she didn't submit for an appraisal?

Mr. Potter: I'm not aware of any, frankly,.

The Court: So right now we're talking about this jewelry and that basically what you intended this to be and to mean.

...The Court: And again, Mr. Potter, if you put items, marital, 'items not produced by wife on 7/22/08" and you're referring to one of Judge Snyder's Orders and valued as of _____ at da - ta da - ta -da and what you meant was jewelry. I'm asking you why you didn't put "Jewelry" down there.

Mr. Carrico: Judge, I think he initially identified it in his financial statement with the Court didn't you.

Mr. Potter: I - jewelry - -

The Court: But that's not here on this that I ordered. This is just - - that's just a vague line on here, and today during the course of negotiations we plug in jewelry. That's what it looks like. Are you going to help me?

...

Ms. Wilcox: Our understanding, your Honor, was that you asked us to do this so we would know what issues we were trying today.

The Court: that's exactly right.

Ms. Wilcox: So we're not on notice about the jewelry being an issue.

...The Court: Or by him.

The Court: . . . but there is jewelry, and you don't dispute, Ms. Potter, that there was some jewelry purchased during the course of the marriage. Not all of it was purchased during the course of the marriage.

Ms. Wilcox: Or by him.

The Court: Or by him. So let's assume for the moment, though that the jewelry that he and you purchased together during the course of the marriage form Galperins is worth \$25,000 just to throw that out there for a moment. You want to keep the jewelry you don't want to sell it. I'm telling you all, if you put me in the position where you all don't agree I'm ordering it sold.

...

So I'm leaving those to the side

...The jewelry as has been presented here today, has a value of \$25,000, per "fictual" [fictional] sake here. A.R. 0078-0092.

The Family Court resolved the newly raised issue of "jewelry" at the May 20, 2010 hearing. When the issue of the fictitious jewelry is raised again effectively overruling this counsel's objection based upon Judge Kirkpatrick's ruling, the judge moves forward as follows.

A.R. 0288-0297:

...

Ms. Potter: . . . During requests for production of documents were issued by Mr. Potter and Mr. Carrico to me – I think it must have been in 04 or 05 – asking me to itemize any piece of jewelry I had, how I got it over \$250. They had a folder, I guess, for four years five years that has every piece of jewelry including every piece of jewelry bought by - - at Galperin's. Everyone of them was a Christmas gift. In fact, the first one is the 20th Anniversary gift which traded up my engagement ring that Jay bought. There are no appraisal like - - except they're listed on insurance for remake purposes not for current. I think that the stack of what we gave them showed the original engagement ring that Jay bought in 79. He wanted that - - he wanted a larger ring for our 20th anniversary and we had given them the invoices on everything. The other pieces that I and your Honor I'm not sure whether I can talk whether its ok

The Court: Go ahead

Ms. Potter: I never went to Galperin's in all the years that we were married, and personally bought myself jewelry. Bob Shea who owns Galperin's Jewelry knew the both of us from coming in for - - most of the purchases are December, January and May: Christmas, January birthday, May anniversary. Jay and I would sometimes work on a piece of jewelry for six or so months maybe the pearl to come from here or the stone would come from my Mom. Now if there is anything else on the list of accounts, may have bought his secretaries something or a gift for somebody else - - somewhere else.

But the pieces that you're speaking of that would have been purchased at Galperin's were specific, like a garnet stone that's my birthstone. What would be my wedding ring.

But they were all itemized out more than four or five years ago, did not become an issue until the last hearing.

There was at no time an appraisal on jewelry. If the Court - - the Court would have the benefit, I think, of seeing or hearing the tape, Ms. Lynn was present for household furnishings, but any . . . but any debt . . . we did not respond about the jewelry . . . we did respond about jewelry - - about a request for production issue, and apparently it never became an issue until the last hearing.

But I do have - - I can show you every single thing that was bought there I know of, and including pieces my Mom did give me money for that were itemized, and you can see my Mom's hand writing on them.

But the jewel - - for Christmas gift, birthday gift, anniversary and Christmas, and - - that's all been put in - - given to them four or five years ago.

Ms. Potter: It's a request for production. (showing Judge)

The Court: And it has - - Mr. Carrico do you have that?

Ms. Potter: From years ago you have this.

Mr. Carrico: Your Honor, what we - - our response is that the Court a long time ago appointed and authorized us to an appraisal of all of the personal property. Lisa Lynn did that.

Jay made his jewelry available she did not make her jewelry available to Lisa Lynn.

Ms. Potter: That's not true. A.R. 0297

...

Mr. Carrico: essential . . .

Mr. Carrico finally concedes that there is no such appraisal showing jewelry at \$25,000 A.R. 0300-0301.

The Court: Okay this is how I'm going to settle this, and we're going to do it this way: Maria is going to get all her jewelry, plus \$3,000. Jay is going to keep his negatives. Period. I'm not going to separate them and divide them all up. So all of her stuff is not gonna be treated as a marital asset that's a gift. Boom. [Emphasis Added].

I'm gonna treat his railroad negatives essentially as hobby of his and those are his personal things, he keeps them. You just pay her \$3,000. That's the difference between the two. A.R. 0305.¹

¹ West Virginia Code §48-1-237(4) defines separate property as property received during a marriage by gift.

With that, Mr. Potter effectively took back every gift he had given, birthday, anniversary and Christmas gifts to his wife in more than two decades of marriage. All while artificially inflating the value of the marital estate by \$25,000 and diverting the judge's attention from the very valuable marital photograph negative collection. A.R. 0860-0926.

Unfortunately, this would not be the end of such tactics having previously agreed to divide the Chase bank accounts and shortly before the May 20, 2010 hearing where the parties agreed to divide the joint stock account, Mr. Carrico announced to the court that there was an "issue" with the previously divided Chase account and they needed an accounting. Thus, Mr. Carrico resurrected a "Chase Bank issue" that was resolved at the July 18, 2007 hearing. See 7/18/07 CD. A.R. 0062, 0129 and 1298.

Mr. Carrico represented that, beginning in December 12, 2003, "there's joint accounts set up with a value of \$143,003.71 and the two Chase accounts together \$160,109.22" and that "Ms. Potter had removed monies" and that "we never received an explanation on what happened with the \$95,000 noting moneys had gone into the stock account". Ms. Potter was permitted to address the issue explaining the accounting done in 2007 with every dollar accounted for and demonstrating how money had been transitioned for stock purchase and joint expenditures noting that Mr. Potter knew of every transaction – and noted to Mr. Carrico "you accused me of stealing three years ago" – "you have had the records since September 2005". With this the judge determined "Okay, so if she did it, [the accounting] then we ought to be able to pick up a piece of paper and the day became consumed with "let's find the money" ending with less than \$4000 unaccounted for from memory and the court's decision to leave the issue with "we can credit it against her other credits". The hearing tape show Mr. Zak with Mr. Carrico picking up the account showing the Judge what was provided. The Judge then ended with telling Mr. Carrico to

take Ms. Potter's deposition if he did not understand the accounting. That disposition was never notice or requested. The hearing of 7/18/07 was to have been the final hearing but Mr. Carrico had just given Mr. Zak Mr. Potter's first formal financial disclosure. See 7/18/07 and 5/20/13 CDs, A.R. 0062. Mr. Carrico can also be seen at the end of the 5/20/10 CD in a discussion on Ms. Potter's reimbursement due when for the first time he is made aware of the Temporary Order. A.R. 0427. This is where the "Conrad Credit" theory began to evolve. The Order Regarding Petitions for Appeal has "newly created findings" as to the "unaccounted for monies and is the "Conrad Credit" not found in the family court Order. A.R. 0006 and 0050. At the hearing of March 23, 2010 the judge "deferred" cross examination" to the next hearing because the resurrection of the "2007" accounting issue" consumed most of that day. A.R. 0180. A.R. 0427.

This counsel specifically requested cross examination of Mr. Potter on his financial expenditure as to his extra marital affair and was denied this right. A.R. 0470. As to the issue of denial of due process - - this counsel respectfully submits that it is a matter of *res ipsa loquitur*.

C. THE CIRCUIT COURT COMMITTED LEGAL ERROR IN FAILING TO REVERSE AND REMAND THE FINAL ORDER FOR COMPLIANCE WITH RULE 52(a) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE.

This Court has said that to properly review an order of a family court, "[t]he order must be sufficient to indicate the factual and legal basis for the [family court's] ultimate conclusion so as to facilitate a meaningful review of the issues presented." *Province v. Province*, 196 W. Va. 473, 483, 473 S.E.2d 334, 337 (1999). (As an appellate court, this Court's task is to determine whether the circuit court's reasons for its order are supported by the record."). "Where the lower tribunals fail to meet this standard - *i.e.* making only general, conclusory or inexact findings," this Court "must vacate the judgment and remand the case for further findings and

development.” *Province*, 196 W. Va. At 483, 473 S.E.2d at 904. *See also Collosi v. Collosi*, __S.E.2d __, 2013 WL 291992 (W. Va.).

The family court Final Order fails, on its face, to comply with the dictates of Rule 52(a) of the West Virginia Rules of Civil Procedure as it contains inadequate, incomplete and erroneous findings of fact, is devoid of analysis of facts in relation to application of law and provides no legal basis for its conclusions. A.R. 0050.

Rule 52(a) of the West Virginia Rules of Civil Procedure states that “[i]n all actions tried without a jury . . . the court shall find the facts specially and state separately its conclusion of law thereon . . .” In the instant case, it is clear that the family court did not comply with Rule 52(a). Although the Final Order contains findings of fact, not only does it not contain a complete recitation of the necessary findings of fact in order to support the court’s rulings regarding the division of the marital estate, but many of the findings of fact are either incorrect or represent matters or testimony that did not take place during final hearing.

For instance, under purported Finding of Fact Number 3, it appears that the parties testified as to separation date and their last co-habitation. Ms. Potter stipulated to the August 7, 2003 separation date with regard to asset distribution issues. *See Wilson v. Wilson* 227 W. Va. 157, 706 S.E.2d 354 (2010). (divorce action in which parties stipulated to separation date). Neither party testified on their co-habitation or on matters related to their separation. Finding of Fact Number 9 states that an ORDER REGARDING DIVISION OF CERTAIN MARITAL PERSONAL PROPERTY was entered. There is no such Order. This means that the rulings of March 23, 2010 on the division of marital household furnishings and as to certain separate property of the parties remains unaccounted for. Finding of Fact Number 10 references the

fictional “jewelry” as the family court first referred to it when it became an issue for the first time on final hearing. It mysteriously became “marital” under the Final Order.

Finding of Fact Number 11 references testimony allegedly rendered by appraiser Dean E. Dawson, SRA, indicating that Mr. Dawson testified as to the amount of the lien encumbering the marital residence as of the date of separation. Mr. Dawson, an appraiser, did not render any such testimony. Finding of Fact Number 12 states that the parties agreed that Mr. Potter is entitled to reimbursement of \$5139.00 of his separate funds. There was no such agreement. Testimony on the \$5,139 came into evidence under the family court’s inquiries as to claimed credits of the parties. A.R. 0501

Finding of Fact Number 19 states that, at the conclusion of the final hearing, Mr. Potter moved for attorney fees. The transcript and tape of the May 26, 2010 hearing clearly demonstrates otherwise. A.R. 0062 and 0063. Additionally, as to Finding of Fact Number 14, the family court on the record after examination of Ms. Potter as to multiple financial transactions did not make any ruling that she had “failed to account” for any funds inquired about. If, in fact, that had been the outcome of the family court’s determination, the Final Order should have reflected the calculation to have made such a determination derived from specific financial documents in evidence. The inclusion of this finding is further erroneous because the family court refused to allow examination of Mr. Potter as to financial transactions and expenditures related to his extra-marital affair. A.R. 0470. Thus, the family court was not in a position to definitively rule on the issue of whether the parties may have owed each other in relation to marital and separate funds expenditures. Additionally, the Order summarily disposes of claimed reimbursements of Ms. Potter without even stating the basis of the claims or the legal basis for denying the claims.

In order for the family court to have appropriately divided the marital estate, the judge first would have had to delineate what assets were marital. Equitable distribution is a three-step process: “The first step is to classify the parties’ property as marital or non-marital. “The second step is to value the marital assets. The third step is to divide the marital estate between the parties . . .” Syl. Pt. 4, *Evans v. Fry*, 543 S.E.2d 389 (W. Va. 2000), quoting, *Whitting v. Whitting*, 396 S.E.2d 413 (W. Va. 1990); Accord, *Fitzgerald v. Fitzgerald*, 639 S.E.2d 866 (W. Va. 2007). A review of the Final Order makes clear that the family court did not make factual findings about what assets comprised the marital estate. A.R. 0050. Consequently, in addition to the findings of fact being incorrect in many instances, they are also inadequate and incomplete. Probably the most glaring omission is a failure to include a finding that each party admitted to irreconcilable differences. *See* Rule 81(a) of the West Virginia Rules of Civil Procedure.

In addition to the numerous mistakes contained in the findings of fact, it is clear that the family court engaged in no application of the law to those factual findings, however incorrect or incomplete. The Final Order is devoid of any conclusions of law with the exception of the phrase “as a matter of law”. There is no evidence of any analysis of the facts and no application of the law to the facts or citation to any legal justification. The Final Order clearly and unequivocally does not comport with the dictates of Rule 52(a). Under this Rule, the trial court has duty to make its findings of fact and it should not surrender or delegate this function by the mechanical adoption of findings proposed by counsel which is precisely what happened here. *South Side Lumber v. Stone Const. Co.*, 152 S.E.2d 721, (W.Va. 1967).

Evidence that no independent analysis was undertaken is demonstrated by the content of the Final Order’s first paragraph which omits two of the three final hearing dates and contains a purported final hearing date years before the family court judge was on the bench. Additionally,

Ms. Potter's final pleading was an Amended Answer and Counterclaim and the hearings were not all telephonically recorded. A.R. 0062. Significant testimony was obliterated from the record at the May 26, 2010 hearing including evidence on the pension/retirement accounts, cash surrender life insurance value and as to certain credits and reimbursements sought by Ms. Potter because the family court judge forgot to turn on the recording equipment.

This Court has on multiple occasions reaffirmed the ruling set forth in *South Side Lumber, supra*, on the requirement of trial courts to make specific findings of fact and conclusions of law under Rule 52. Syllabus Point 9, *Wyant v. Wyant*, 400 S.E.2d 869 (W. Va. 1990), quoting *Witte v. Witte*, Syllabus Point 3, 315 S.E.2d 246 (W. Va. 1984), and noting that "Rule 52(a) of the West Virginia Rules of Civil Procedure requires a trial court in a divorce proceeding to state on the record findings of fact and conclusions of law which support its decision. A divorce decree which does not comply with this mandatory requirement may be remanded for compliance."

Given that the May 26, 2010 telephonic hearing concluded with the family court judge representing that she would timely contact counsel with rulings on outstanding issues, it is painfully obvious that the family court did not comply with the mandates of Rule 52.² For this reason, the Final Order should have been reversed by the circuit court and remanded for further proceedings. This was also necessary given the family court's refusal to allow proper presentation of evidence and more, importantly, the fundamental denial of due process by refusal to allow cross-examination.

No credible argument can be asserted to support a conclusion that the circuit court took any significant time to independently analyze or verify the adequacy and sufficiency of the Final

² On November 30, 2010, the judge's assistant sent a separate letter to each counsel and requested a proposed order. It was only later that counsel learned that they had both received the letter. The family court judge did not contact either counsel subsequent to the May 26, 2010 telephonic hearing with any of her final rulings.

Order. The parties at oral argument specifically asked the circuit court to enter its own order. However, the matter pended on the docket almost a year before the judge sent a letter requesting proposed orders by April 25, 2012. The Final Order Regarding Petitions For Appeal is, in essence, also nothing more than a “mechanical adoption”. The first paragraph has been slightly amended except for affirming the family court’s denial of the nonexistent “motion for attorney fees”, it is otherwise verbatim including each erroneous date and contains the word “principals” as opposed to “principles”.

D. THE CIRCUIT COURT ABUSED ITS DISCRETION AND EXCEEDED ITS LEGITIMATE JURISDICTION WHEN IT DISREGARDED THE NARROWLY PRESCRIBED PARAMETERS OF APPELLATE REVIEW IMPOSED UNDER WEST VIRGINIA CODE § 51-2A-14.

The statutory constraints on a circuit court’s exercise of appellate review jurisdiction of a family court Final Order are set forth under West Virginia Code §48-5-102, §51-2A-14 and §51-2A-8(d). Although West Virginia Code §48-5-102(b) recognizes that the Legislature has vested circuit courts and family courts with concurrent jurisdiction over the subject matter of divorce. The circuit courts have limited power in divorce action when performing appellate review. These limitations are set forth under West Virginia Code §51-2A-14 which dictates the following with regard to the applicable standard of review:

(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 8 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. [Emphasis added].

West Virginia Code §51-2A-12 4(b), in turn, restricts what a circuit court may consider for purposes of appellate review by restricting the circuit court's to consideration of the recording of the hearing or the transcript of testimony and the exhibits, appellate review together with all documents filed in the proceeding.

The circuit court summarily dealt with Ms. Potter's challenge to the Final Order on the grounds that the Order contained insufficient, inadequate and erroneous facts with great sarcasm. In this instance regarding the initial valuation of the marital residence, the circuit court did not find that any of the factual findings of the family court were erroneous. The authority under West Virginia Code §51-2A-14 limits the circuit court's appellate review to the findings of fact contained in the Final Order. In *Zickefoose v. Zickefoose*, ___ S.E.2d ___, 724 S.E.2d 312, 316 (W. Va.), 2012 W.L 426759 (W. Va.), "a Circuit Court may not substitute its findings of fact for those of a family court judge merely because it disagrees with those findings". See, Syl. Pt. 2, in *re: Robinson*, 212 W. Va. 632, 575 S.E.2d 242 (2002); Syl. Pt. 4, in part, *Stephen L.H. v. Sherry L. H.*, 195 W. Va. 195 W. Va. 384, 465 S.E.2d 841 (1995). As to the decision of the majority in *Zickefoose*, Justice Workman issued a separate opinion concurring, in part and dissenting in part, but specifically addressed the fact that it is not the proper role of the circuit court to make new or revised findings of fact. *Id.* at 319. Having found no findings clearly erroneous and previously determined that the Final Order contained adequate findings, the circuit court simply chose to do the impermissible.

The family court Final Order contains an inadequate predicate to determine the basis of its findings with regard to the valuation of the marital residence. The circuit court's obligation under the statutory standard of review was to reverse that portion of the Order, at a minimum,

directing the family court to make more specific findings and to specify her conclusions of law based on those findings. Inasmuch as the family court Order on the initial valuation of the marital residence contained merely conclusory statements in terms of conclusions of law, the circuit court was in no position to determine that the family court had committed legal error under the principles enunciated in *Mayhew v. Mayhew*, 205 W. Va. 490, 519 S.E.2d 188 (1999). In this regard the circuit court without any basis of a determination for any legal conclusion made by the family court concluded that the judge had improperly applied an active/passage doctrine of *Mayhew* erroneously. In this regard, the circuit court committed clear legal error. The *Mayhew* decision involves an entirely different scenario to this case.

In *Mayhew*, the wife asserted that certain shares of stock should be considered marital property because they were “comingled in a single certificate with ten shares which clearly were purchased during the marriage with marital funds and which were clearly marital property”. 197 W. Va. 298-99, 475 S.E.2d at 390-91. The factual scenario in this particular case deals with the issue of entitlement to reimbursement predicated on the preservation provisions of West Virginia Code §48-5-508. *Mayhew* addresses what occurs within a marriage, not events once a court gets involved during a divorce action. There can be no question that the funds expended by Ms. Potter to preserve and maintain the marital estate are separate funds inasmuch as there is certain irony with regard to the short abuse of discretion in disregarding the appropriate standard of review given that the Court’s Order on Page 5 contains the entire statutory provision of Virginia Code §51-2A-14. The standard of review clearly does not authorize the circuit court to independently enter a judgment order as to equitable distribution by creating “new” facts. The circuit court usurped the power of the family court with regard to entry of an independent judgment order under the circumstances presented. The limited appellate review jurisdiction of

the circuit court does not include the ability to *sua sponta* enter a judgment order on newly created “facts”.

Rule 28(c) of the Rules of Practice and Procedure For Family Court dictates that the “Petition for Appeal shall be prepared in the same or substantially similar form as that set forth in Appendix A of these Rules”. The form promulgated by this Court, consistent with West Virginia Code §51-2A-14, prohibits the presentation of “evidence” for argument on appeal that does not derive from the family court proceedings. Despite the express directive of this Court in that regard, Mr. Potter took the liberty of arguing “evidence that would have been presented in the event he had been permitted to argue his “Motion for Attorney Fees”. Mr. Potter also took the liberty upon responding to Ms. Potter’s Petition for Appeal of including a letter that he had written to this counsel dated the same day as the final hearing, May 26, 2010, where he provides his supplemental responses to Requests for Production of Documents that had previously been filed, but not the subject of any of the final hearings, in which he attempted to address the fact that he had provided an accounting of his expenditures all of which have never been subject to cross-examination which is clearly at issue on appeal. A.R. _____.

Additionally, through Exhibit B to Mr. Potter Response, Ms. Potter learned for the first time that on December 30, 2010, two days after the December 15, 2010 Order was certified to counsel and still in its appeal period, Mr. Potter contacted Morgan Stanley and attempted to transfer retirement funds into Ms. Potter’s IRA despite the fact that the Final Order gave her the choice of where the funds subject to the Qualified Domestic Relations Order would be deposited. Mr. Potter in the e-mails to Morgan Stanley states that he has to know this information to notify the court and Ms. Potter’s attorney that he is prepared to comply with the Order. A.R. _____. It is doubtful given the tax protection of QDRO that “a little piece of paper” would be legally

sufficient. This particular e-mail exchange with Morgan Stanley suddenly became a part of the findings and conclusions of Paragraph 18, page 5 of the Final Order Regarding Petitions for Appeal which, in essence, Mr. Potter prepared. This sentence referring to the exchange of retirement assets includes the phrase “and the only requirement for a transfer of assets between the accounts of the parties was an authorization form signed by both parties. The circuit court’s decision thus, in part, to uphold the family court’s final distribution is based on this new “fact”.

Rule 52(a) of the West Virginia Rules of Civil Procedure is obviously equally applicable to circuit court orders. Rule 52(a) requires that findings of fact and conclusions of law be separately stated and not merged as the circuit court did in the Final Order Regarding Petitions For Appeal. Again, this Order contains the erroneous finding of a separation date for the parties. Under the Combined Finding of fact and Conclusion of law Number IV, the circuit court order erroneously states that the Final Divorce Order was entered on January 24, 2011 as opposed to December 15, 2010. The Order notes that the court requested proposed orders before April 25, 2010 which is true, however, Mr. Potter’s Order was filed five days thereafter.

The circuit court’s Final Order eviscerates the partial reimbursement payments for taxes and insurance which had been included in the Final Order under the basis that Ms. Potter was “exclusively occupying the residence” even though the family court Order contains no explanation of the basis for the ruling. The Final Order also includes a finding that “the wife has exclusively occupied during the eight years and eight months since the parties separated” the marital residence. There is no such finding in the family court Order. Under combined Finding and Conclusion 10, the Order references tangible personal property for distribution, however, the final order references a separate Order that does not exist. The Order also contains under

Paragraph 12, the length of time the divorce was purportedly pending until the Final Order and once again the date of the Final Order is incorrect.

In an attempt to justify the denial of due process on the issue of cross-examination, Paragraph 13 has an erroneous finding that neither party got to cross-examine the other. However, almost the entirety of the May 20, 2010 hearing was a duel simultaneous examination of Ms. Potter on the ambush accounting issue by Mr. Carrico and Judge Mullens. A.R. 0062. Paragraph 14 erroneously states that neither Ms. Potter or her counsel objected to the way the hearing was conducted or to “the lack of cross-examination in particular.” Ironically, the May 26, 2010 letter attached to Mr. Potter’s Response to Ms. Potter’s Petition For Appeal to this counsel specifically challenged the issue of cross-examination that had been requested and denied. Paragraph 16 references a purported hearing in the divorce action occurring on June 23, 2005. However, there were no proceedings in the divorce action on that date. Paragraph 17, also contains an erroneous date with regard to a prior divorce hearing.

The family court’s Final Order does not address in any way the basis for providing proportionate reimbursement to Ms. Potter on the mortgage, property taxes or insurance but these new findings are in the circuit court’s Order at Paragraph 16 and 17. The Final Order denotes the payments received by Ms. Potter as “Conrad Credits”. The Family Court never characterized the credits in any way. The same continues that Ms. Potter is not entitled to any of the reimbursements for property taxes or insurance because “she alone was living in the house”. These are just a few of the “new facts” that form the basis to increase the “Net Estate Equalization Payment by Wife” from \$113,204.09 to \$134,731.59. Given the erroneous dates as to entry of the Final Order in the circuit court Order, there are now two independent judgments against Ms. Potter for each of these respective amounts in the respective Orders.

The Final Order signed by Judge Mullens was mechanically adopted and the Final Order Regarding Petitions for Appeal was likewise mechanically adopted. Mr. Potter had more than a second bite at the apple and Mr. Potter should not have the benefit of the error he alone created. The question is, did he even bother to read the standard of review in the Order that he submitted which clearly dictates that the circuit court's jurisdiction on appellate review was to simply review the findings of fact, not create new ones that personally benefited him? The circuit court Order should, thus, be disregarded for purposes of this Court's analysis. In view of the fact that the circuit court failed to follow the mandatory standard of review the Order should be reversed, in its entirety, as it constitutes both an abuse of discretion and clear legal error.

E. THE CIRCUIT COURT COMMITTED CLEAR LEGAL ERROR WHEN IT FAILED TO REVERSE AND REMAND THE FINAL ORDER WITH DIRECTIONS TO ACHIEVE EQUITABLE DISTRIBUTION WITHIN THE MARITAL ESTATE AS CONTEMPLATED BY WEST VIRGINIA CODE §48-7-105.

West Virginia Code §48-7-105 dictates that ["i]n order to achieve the equitable distribution of marital property, the court shall, unless the parties otherwise agree, order when necessary, transfer of legal titles to any properties of the parties, giving preference to affecting equitable distribution through periodic or lump sum payments". West Virginia Code §48-7-106 requires the family court in any order which divides or transfers the title to any property, determines the ownership 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. The provisions of West Virginia Code §48-7-105 are clear and unambiguous. The Legislature contemplated clearly in enacting this statutory provision that the ultimate determination of equitable distribution is to be based on all marital property. The statute does not condone the

process the family court used to equalize the marital estate. The family court provided no explanation for failure to abide by West Virginia Code §48-7-105. This statute directs a marked preference for effectuating equitable distribution either by a periodic payment or a lump sum payment. It does not contemplate a final order which requires the equalization of a component part of the marital estate by qualified domestic relations order or a letter of transfer and then separately require a party to pay \$113,204.09. If, in fact, the legislative contemplation for equitable distribution had been based on a component by component determination for ultimate distribution then the result here would have been a QDRO from Ms. Potter to Mr. Potter transferring retirement funds in the sum of \$51,158.55 without any lump sum payment. This is clearly not what the statute contemplates.

In *Arneault v. Arneault*, 219 W. Va. 628, 639 S.E.2d 720 (2006), this Court analyzed the provisions of West Virginia Code §48-7-105 in the context of ownership interest in a business entity. The Court in *Arneault* noted that prior to applying this statute to the facts of that case the Court first was required to ascertain its meaning. In its analysis, the Court did not find any ambiguity in the plain meaning of the statute and determined that West Virginia Code §48-7-105 clearly expresses a legislative intent to achieve equitable distribution of marital property and with regard to business ownership noted that it provided detailed instructions for the reviewing court when the marital property is comprised of ownership interests in the business. The statute likewise provides direction on achieving equitable distribution of marital property. The transfer of legal title to property of the parties is at issue.

For purposes of equitable distribution Mr. Potter sought for the pension/retirement accounts to be divided by separate QRDO on each account. Ms. Potter sought equitable

distribution by offset under this Court's decisions in *Cross v. Cross*, 326 S.E.2d 449 (W. Va. 1987), and *Barrett v. Barrett*, 504 S.E.2d 659 (W. Va. 1998).

When the family court forced negotiations of March 23, 2010 did not achieve her desired result of an agreement by the Parties for distribution of assets shortly after her opening remarks, she asked about the "pension" issue and thereafter was on an extended tirade as to why we are even discussing this because essentially it's the province to determine the values in such accounts by "stupid" benefits administrator". She then said, without ever having taken any testimony on the pension/retirement account on Mr. Potter's "pension" that Mr. Potter did not have a pension. And clearly, until Ms. Potter indicated that she was hoping to receive a setoff from the exchange of the house for the difference in the pension/retirement accounts because Mr. Potter's were larger than hers, the court had clearly never considered the possibility of set-off. The Court told the Parties that she wanted hard numbers for the May 20, 2010 hearing when she received a full exhibit with those numbers she an argument ensued with this counsel on allowing Ms. Potter to testify on her own exhibit. The exhibit involved determining the marital and non-marital components of all pension/retirement accounts using Mr. Potter's values. Mr. Potter was permitted to have an independent accountant review the exhibit. At the start of the May 20, 2010 hearing Mr. Carrico represented that the accountant had deemed the methodology in the calculation and the final determination to be correct. Unfortunately, all of the testimony regarding the pension/retirement accounts is missing from the record. Ms. Potter was allowed to testify at that point on the exhibit and on the issue of the fact that due to the different ages of Mr. Potter and Ms. Potter she being under the legal age to withdraw any of her retirement account she would be subject to a ten percent penalty imposed by the IRS which Mr. Potter would not. Thus, the offset calculation was not intended as a determination of equalization other than by

offset. Additionally, no determination had been made at that time of the total value of the marital estate for equitable distribution purposes. The final order provides an explanation for dictating both a QDRO transfer and a separate payment of cash outside the marital estate. This was a marital estate exceeding \$1,000,000,000 in assets.

On interpreting a statute that presents a purely legal question, this Court noted in *Banker v. Banker*, 196 W. Va. 535, 544, 474 S.E.2d 465 (474) (1996).

We previously ‘recognized that generally the words of a statute are to be given their ordinary and familiar significant and meaning’. On a pure question of statutory construction, we must try to determine legislative intent using traditional tools of statutory construction. ‘in ascertaining legislative intent affect must be given to each part of the statute and the statute as a whole so as to accomplish the general purpose of the legislation.’

While our starting point is the language of the statute, we note that in interpreting the terms in our domestic relations statute specifically, we, in the past have taken care not to undermine the statute fundamental goals. Recognizing the statute varied uniqueness, we can consistently have turned back each legal maneuvers attempted by litigant that were not in keeping with over reaching duties, responsibilities, and rights that the West Virginia Legislature intended.
[citations omitted].

While the statute does indeed provide for a lump sum transfer the provision taken as whole refers to a lump sum transfer when the marital estate is insufficient for offset. *Arneault, supra*.

F. THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT SUBSTITUTED ITS OWN ERRONEOUS FACTUAL PREDICATE TO REVERSE THE FAMILY COURT’S DETERMINATION OF EQUAL VALUE OF THE MARITAL MOTOR VEHICLES DISREGARDING EACH VEHICLE’S HEARING DATE CURRENT NADA VALUE AND WHOLLY DISREGARDING PETITIONER’S SEPARATE FUNDS CONTRIBUTION.

On Page 12 of the Final Order regarding Petitions for Appeal, the Circuit Court addressed Mr. Potter's Fourth Ground of Appeal under Paragraph Number Twenty-three which continues on to Page 13. The Circuit Court Order in regard to its ruling on Ground Four sets forth the following in pertinent part:

That the Family Court abused its discretion by excluding the differences in the value of 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 value 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 the difference in values of the vehicles.

Based on the record, the Family Court did not account for the differences in the value 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.

To the extent the Family Court did not provide an explanation for the exclusion in its Final Order, the failure to do so was Mr. Potter's as the Order entered by the Family Court not only demonstrates a legitimate basis for directing the exchange of the vehicle titles which is, in fact, contained in the record below.

At the hearing of November 16, 2009, the Family Court ordered the Parties to file by December 10, 2009 a list of marital assets as of the stipulated separation date of August 7, 2003.

Ms. Potter's marital property list as of that date identifies a 2001 BMW 330ci and a 1999 BMW 325 along with the sentence "replaced by trade for 2004 BMW 325xi and cash from Maria Marino Potter's bonus. Vehicle was ordered in August 2003 by the Parties". Mr. Potter's December 10, 2009 asset list identifies the BMW 2001 330ci claiming the same to be valued by the Husband as of July 2000 at \$14,760 and allegedly valued by the Wife at \$18,600 on August 2005. Mr. Potter's asset listing further identified the BMW 2004 325xi as valued by Husband on July 2005 at \$29,005 and allegedly valued by the Wife on August 2005 at \$27,755.

At the hearing on May 20, 2010, the family court examined assets based on their current value. Mr. Potter provided a listing that determined the BMW 2001 to be worth \$16,680 and the BMW 2004 to be worth \$28,380 but these values were derived by Mr. Potter's averaging of five year old financial statement information and current value. Ms. Potter presented an Exhibit indicating that the vehicle values were roughly equal using their NADA values and noted that her separate funds had also paid a portion of the 325xi. Under direct examination by Mr. Carrico, Mr. Potter testified concerning his valuation of the marital motor vehicles as follows:

- Q. Now, after the next item, you have your BMW 2001. Is that correct?
- A. Correct.
- Q. Now, that is an asset. Do you purchase that during the marriage?
- A. Correct.
- Q. Was it paid off during the marriage?
- A. Yes.
- Q. Alright. I see that we put a value of \$16,680 on that; is that correct?
- A. That's correct, and apparently that's an average of the two values that each Party initially set.
- . . .
- Q. You filed -- in your assets listing, you filed with the Court that's been referenced by the Court today, you identified in that the values that you put on the car in your financial statement and the value that your Wife did; is that right?

- A. Correct.
- Q. . . . [w]hat was the value that you put on the - - your vehicle, the financial statement?
- A. As of July 2005, \$14,760.
- Q. What was the value that she put on it?
- A. As of August of "05", \$18,600.
- Q. How did you come up with your value?
- A. I asked Moses BMW what the value was. They're the ones that service the car.
- Q. Then I averaged the two numbers that you and your wife used and came up with \$16,680; is that correct?
- A. Apparently so.
- . . .
- Q. Now, the next item is your Wife's BMW.
- A. Correct.
- Q. A 2004.
- A. That is correct. And I valued it at \$29,005 as of July 2005 based Moses' representations, and she apparently valued it at \$27,755 as of August '05 and you apparently averaged those two and came out with \$28,380, which I am willing to accept as the value.

The record in this matter demonstrates that there is no verified financial statement of Mr. Potter demonstrating a July 2005 valuation on the motor vehicles. Mr. Potter's first verified financial statement in this matter was not filed until after the July 18, 2007 hearing. The valuation of the motor vehicle in Ms. Potter's originally verified and filed financial statement demonstrates that she used values derived from Kelly Bluebook Private Sale Evaluation not heresay values. Additionally, as shown on her 2005 filed financial statement "the 330ci was purchased in 2000 for approximately \$40,000 and its five year loan was paid in fully in early 2003. The 325xi was purchased in October 2003 by trade of a 1999 BMW 325 and cash from her bonus.

Ms. Potter's testimony as to her request that the Court simply direct the exchange of the titles given the NADA values and the fact that the 2001 BMW 325xi was also purchased from

her separate funds does not exist on the record because the court failed to turn on the recorder at the outset of the hearing. At the May 26, 2010 hearing, the Court disposed of the motor vehicle issue by simply telling the Parties to exchange the car titles. The family court never actually made a specific value determination of the vehicles' values.

Approximately two months before the Final Order of December 15, 2010 was entered, Mr. Potter contacted Ms. Potter advising that he wanted to trade the 2001 BMW 330ci and asked her to agree to the exchange of titles. Mr. Potter made no indication that he intended to challenge, in any way, the vehicle values and the 2001 vehicle was, in fact, thereafter disposed of under an agreement to exchange the titles. This counsel so advised the family court in submission of a proposed Final Order. The simple fact is that the family court did not value the motor vehicles based on Ms. Potter's 2005 financial statement values. Mr. Potter's position in his Cross Petition for appeal to the Circuit Court is simply disingenuous. Given the disposal of the vehicle and his failure to identify the fact that a significant part of the purchase price came from separate funds of Ms. Potter. Ironically, the accounting provided to Mr. Carrico in 2007 provided full financial information on the purchase of the 325xi and those which were the subject of the joint examination by the family court and Mr. Carrico on the accounting issue. Based on the record below the Family Court did not, in fact, abuse its discretion that it was appropriate to direct the exchange of the titles to the motor vehicles when Mr. Potter had not, in fact, followed the Court's directive and provided testimony on the current vehicle values.

G. THE PRINCIPLE OF JUDICIAL ESTOPPEL BARS MR. POTTER FROM "CHANGING THE RULES" AND ARGUING AGAINST THE TEMPORARY ORDER TO PRECLUDE CREDIT/REIMBURSEMENTS FOR SERVICING MARITAL DEBT AND PRESERVING THE MARITAL ESTATE SOLELY FROM MS. POTTER' SEPARATE FUNDS.

The principle of judicial estoppel applies in this case and bars Mr. Potter from attempting to the “change the rules” and argue against the Temporary Order. Judicial estoppel bars a party from re-litigating an issue when: “(1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.” Syl. Pt. 2, *West Virginia Department of Transportation, Division of Highways v. Robertson*, 217 W. Va. 497, 618 S.E.2d 506 (2005).

Here, all the elements are met. Mr. Potter filed a Verified Petition For Divorce in which he averred that he had preserved, maintained and/or contributed to the increase in value of marital assets on March 22, 2005. On April 28, 2005 Mr. Potter entered into a contract to purchase real property located at 2051 Smith Road at a cost of \$207,000 on April 28, 2005. A Uniform Residential Loan Application was completed in relation to this purchase, which bears Mr. Potter’s signature and was dated by him on June 2, 2005. His signature appears below a line which reads “I/We fully understand that it is a federal crime punishable by fine or imprisonment, or both to knowingly make any false statements concerning any of the above facts as applicable under the provisions of Title 18, United States Code § 1001, et seq.” The Uniform Residential Loan Application bearing Mr. Potter’s signature identifies him as “unmarried” and in response to a question as to whether he is a party to a lawsuit, the applicationC was marked “no”. The financial records related to the loan application demonstrate that Mr. Potter provided the funds for the purchase of the property, which he titled in his name and that of his mistress. The

Uniform Residential Loan Application signed by him, however, lists the marital residence as income generating rental property with monthly income of \$1,222.00. Incredible as it may seem, Mr. Potter appeared before the Family Court on June 27, 2005 failing to provide financial information required to be provided and to force the appraisal of the marital home, which had been used to qualify for the loan to purchase property for the benefit of his mistress. Other marital assets were also used without indication of their ownership with Ms. Potter. Mr. Potter paid over \$13,000 at closing of this loan. Mr. Potter, by counsel, appeared at the first hearing before the Family Court on June 27, 2005 and represented that he had made the requisite financial disclosures and moved to force an appraisal of the marital residence feigned no knowledge of his financial condition. He also objected to paying any portion of marital debt but did not object to Ms. Potter receiving credit/reimbursement for what she paid. The Temporary Order imposed on her a requirement to preserve the marital residence. She expended over \$130,000 in this regard.

During the Family Court proceedings there are limited references to Mr. Carrico identifying the mortgage payments, insurance and taxes as “Conrad credits”. See *Conrad v. Conrad*, 612 S.E.2d 772 (W. Va. 2005). Mr. Carrico was reminded at the close of one of the hearings of the Temporary Order which dictated that Ms. Potter was to receive reimbursements for the payments made as directed by the Court and as evidenced by the Court proceeding on June 27, 2005. Mr. Carrico was unaware of the Order as he had not represented Mr. Potter at the first hearing. The “Conrad” argument became the antidote to the Temporary Order.

So, for the first time during the final hearing Mr. Potter and his counsel advocates under *Conrad* that Ms. Potter should receive only fifty percent of the payments made to service marital

debt from her separate funds. Mr. Potter's new "use and occupancy" theory made its way into the circuit court final order.

The Temporary Order which was entered on July 22, 2005 as a result of the June 27, 2005 first hearing in this matter required appraisals of the marital residence to be completed by August 26, 2005. As a result of the Temporary Order's directive there are, in fact, two appraisals valuing the marital residence in 2005. The Temporary Order addresses the issue of "Preservation of Property" under Item No. 3 with a specific reference to West Virginia Code §48-5-508. "Preservation of Property" provision. The marital residence became subject to reappraisal at the November 16, 2009 pre-trial status conference when Mr. Potter requested that he be permitted to obtain another appraisal because his appraiser was no longer available to serve as his expert. The family court ordered *sua sponte* that it was going to court appoint an appraiser the parties would have to agree on and that she intended to proceed with only the court appointed appraiser. She directed that the appraisal be performed by an individual the parties agreed upon, that the appraiser was to determine the fair market value of the property as of August 7, 2003 and its current fair market value. The court also ordered that the appraiser was to attempt to determine the extent to which there was any increase in value is directly attributable to expenditures and efforts made by Ms. Potter subsequent to August 7, 2003. There is no written order reflecting the court's verbal rulings with regard to her directive as to a court appointed appraiser.

At no time prior the November 16, 2009, did Mr. Potter or Mr. Carrico on his behalf communicate anything regarding a need to have the marital residence reappraised. And as the result of the November 16, 2009 hearing the property was ordered to be retrospectively appraised almost two years prior to the date the family court had ordered the first appraisal. It was also at

this hearing that the court ordered the parties to provide a list of claimed credits related to their expenditures with regard to the marital residence.

In this regard the Final Order states that the marital residence was appraised by Dean E. Dawson, SRA., who testified to an August 7, 2003 value of \$339,000.00 and a value of \$349,000.00 as of February 22, 2010. The next sentence in the Final Order that follow in Paragraph 11 begins findings regarding the BB&T mortgage as of August 15, 2003. Further down in the Paragraph the a Finding states that Ms. Potter “introduced evidence concerning improvements she made to the residence after the date of separation”. Under Paragraph 18, the Court finds that Ms. Potter seeks “(29) credits against the marital estate relating to expenditures that she made toward the marital residence after the date of separation.” There are no other findings with regard to valuation of the marital residence, however, under “Conclusions of Law” Paragraph 10, the Court states 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” by Ms. Potter after the date of separation. The Court goes on in Paragraph 10 to note Mr. Potter’s objection and exception to this finding when there is no objection on the record by Mr. Potter to this finding. (check to see if appraiser testimony is on “fair market value”). The only other reference to initial evaluation of the marital residence in regard to the marital residence is the last sentence of Paragraph 15 of the Conclusions of Law which states “[t]hat it is this Court’s finding as a matter of law that the Respondent should be denied all REIMBURSEMENT for any of the other expenses she incurred requested in her Equitable Distribution Credit/Offset Schedule”

In response to a question from Mr. Carrico concerning whether his opinion of the \$339,000 was rendered to a reasonable degree of certainty of experts in his field Mr. Dawson

hesitated and indicated, “yes with some degree of reasonable certainty”. Seeking clarification under a second examination by Mr. Carrico in regard to his opinion of value on the subject property Mr. Dawson testified as follows:

Q. Right. So the only thing you really can say with reasonable certainty in this case is the value that you testified to in August and what it is now, is that right?

A. The only thing with real certainty is what I saw with my own eyes.

The record below is clear in that despite offering an opinion of value at \$339,000 for the subject property as of August 7, 2003 the Court appointed appraiser was unwilling to testify to the requisite standard to substantiate his opinion.

By playing “fast and loose” Mr. Potter has placed himself in a position to, in essence, have included for equitable distribution purpose the 2010 current value of the marital residence of \$349,000. There should never have been an issue of “capping” for reimbursement. The family court exceeded her legitimate authority and abused her discretion when she ordered a simultaneous retrospective and current appraisal.

H. THE CIRCUIT COURT COMMITTED CLEAR LEGAL ERROR WHEN IT DETERMINED THAT UNDER RULE 22(b) OF THE RULES OF PRACTICE AND PROCEDURE FOR FAMILY COURT, THE FAMILY COURT HAS AUTHORIZATION TO MECHANICALLY ADOPT A PROPOSED ORDER REQUESTED FROM A PARTY.

Rule 22(b) dictates the follows:

Preparation of Order and Findings. – in proceedings in which both parties are self-represented, the Court shall prepare all orders and findings of fact. 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. An attorney assigned to prepare an order or proposed findings shall delivery the order or findings to the court no later than ten days after the

conclusion of the hearing giving rise to the order or findings. Within the same time period the attorney shall send all parties copies of the draft order or findings together with a notice which informs the recipients to send written objections within five days to the court and all parties. If objections are received, the court shall enter the order and findings no later than three days following the conclusion of the objection period. If objections are received, the court shall enter an order and findings no later than 10 days after the receipt of the objections.

At no time did the Family Court ever indicate that she intended either Party to prepare the ultimate Order. Quite the contrary, the Court had expressed that she would contact the counsel with rulings and the Court also. The provisions of Rule 22(b) are mandatory, not discretionary. Had the Family Court followed the Rule 22(b) the notice and objection provisions there is some possibility that we might not be in front of this Court today.

Had the circuit court not hurriedly as a result of the pending Writ of Mandamus entered an order that dealt with Ms. Potter's grounds for appeal as being simple whiney or silly, the Court might have noticed a glaring jurisdictional omission in the Final Order. As stated in the Petition for Appeal, the family court Final Order is devoid of appropriate factual predicate on which to apply conclusions of that are insufficient, inadequate for any factual predicate to create legal conclusions. While the Family Court Order finds sufficient grounds for granting a divorce on the basis of irreconcilable differences, the Findings of fact contain no basis for the same. Therefore the Order is devoid of a specific finding of fact that demonstrates that the Parties admitted irreconcilable differences on the record. See Rule 81(a)(2) of the West Virginia Rules of Civil Procedure.

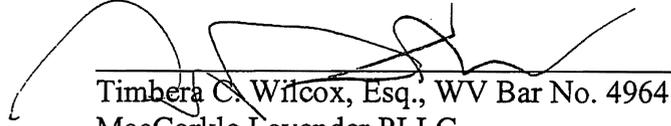
IV. CONCLUSION

WHEREFORE, for the foregoing reasons the Petitioner respectfully prays that this Honorable Court reverse the June 3, 2013 Order Regarding Petitions for Appeal and void the

December 15, 2010 Final Order of the Kanawha County Family Court and assure that a fair and equitable distribution is granted upon divorce.

MARIA MARINO POTTER

By Counsel

A handwritten signature in black ink, appearing to read 'Timbera C. Wilcox', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

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CERTIFICATE OF SERVICE

I, Timbera C. Wilcox, counsel for Petitioner Maria Marino Potter, do hereby certify that on **October 4, 2013**, I served a true and correct copy of the foregoing **Petitioner's Brief** and **Appendix** upon counsel of record, by Hand Delivery addressed as follows:

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