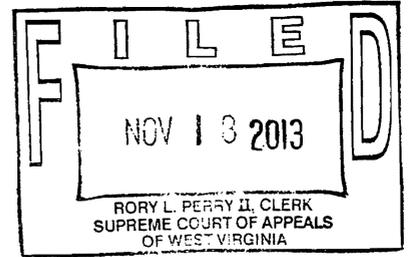


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0708



MARIA MARINO POTTER

Respondent Below, Petitioner

v.

JAY M. POTTER

Petitioner Below, Respondent

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

RESPONDENT'S BRIEF

AND

CROSS-ASSIGNMENT OF ERROR

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I. STATEMENT OF THE CASE

The procedural history of this case is set forth below. It reflects a decade-long effort by Jay Potter to obtain a divorce from Maria Potter without being forced to waive his financial interest in the marital residence (in which she has continued to reside) and a corresponding effort by Ms. Potter to prevent Mr. Potter from obtaining a divorce unless and until (1) he agrees to waive that financial interest; or (2) the amount of credits that she accrues against his financial interest equals the amount of that interest and she is therefore able to obtain complete ownership of the marital residence without paying anything to him.

- August 7, 2003 The parties separated when Mr. Potter moved out of the marital residence.
- March 22, 2005 Mr. Potter, by his counsel Tim Carrico, petitioned for a divorce. The case was assigned to Judge Mark Snyder. It involved no children, no personal property that was complicated to value, and only a single marital residence.
- December 6, 2005 Ms. Potter’s initial counsel moved to withdraw as her counsel; and that motion was subsequently granted.
- July 18, 2007 At a hearing on a motion by Mr. Potter for a bifurcated divorce on the grounds of a marital separation of more than two years, Judge Snyder refused to allow the testimony of Mr. Potter’s witnesses (attorneys Jay Goldman and David Schumacher) or the admission of any other evidence of the date of marital separation, which was an issue to which Ms. Potter refused to agree. Judge Snyder then denied Mr. Potter’s motion and ordered the case to mediation.
- November 16, 2007 The parties participated in an unsuccessful mediation.
- May 5, 2008 Having previously refused to allow Mr. Potter to argue that he was entitled to a

divorce on the grounds of marital separation, Judge Synder granted Mr. Potter a bifurcated divorce on the grounds of irreconcilable differences. However the basis for his ruling was Mrs. Potter's verbal agreement that irreconcilable differences existed; and he neglected to record her agreement. She subsequently denied having made the agreement and petitioned for a writ of prohibition voiding the divorce.

- January 20, 2009 Judge Kirkpatrick of the 10th Circuit, who was appointed to hear Ms. Potter's petition after all of judges in the 13th Circuit declined to hear it, voided the divorce.
- July 16, 2009 Ms. Potter's second counsel moved to withdraw as her counsel. That motion was subsequently granted; and Ms. Potter retained her third – and current – successive counsel.
- July 28, 2009 Judge Snyder recused himself, at Ms. Potter's request, after indicating that he could probably not rule objectively regarding her because of his frustration that she "had not been truthful with the court". The case was reassigned to Judge Sharon Mullens.
- March 23, 2010 Judge Mullens conducted the first day of a three-day final hearing.
- May 20, 2010 Judge Mullens conducted the second day of the final hearing.
- May 26, 2010 Judge Mullens conducted the third day of the final hearing. This segment of the hearing was conducted telephonically.
- December 15, 2010 Judge Mullens entered the Final Order.
- January 24, 2011 Judge Zakaib accepted appeals by both parties.
- June 24, 2011 Judge Zakaib conducted a hearing on the appeals.
- March 16, 2012 Judge Zakaib requested the parties to submit proposed orders based on the hearing; and those orders were subsequently submitted.
- May 24, 2013 Mr. Potter petitioned this Court for a writ of mandamus requiring Judge Zakaib to

enter a final decision order on the appeal that had been pending before him for two years and four months. He cited, as grounds for his request, the fact that he was approaching 67 years of age, which was the age at which his father had died of a heart attack, a year younger than his grandfather had been when he died of a heart attack, and three years younger than his brother was when he underwent coronary bypass surgery. He also mentioned the fact that, during his preceding 96 months in family court, he had paid approximately \$48,000 more in mortgage payments than he would have had to pay if he had been able to obtain – and apply to his mortgage – the amount of his financial interest in the marital residence, from which he had moved almost ten years earlier

June 3, 2013 Judge Zakaib entered the Final Order Regarding Petitions for Appeal.

June 28, 2013 Ms. Potter filed her Notice of Appeal of the Final Order requesting, among other things, that the December 15, 2010 divorce – like the May 5, 2008 divorce – be voided because it had violated her Constitutional rights.

According to Ms. Potter’s Brief, she is requesting this Court to “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.” (Brief pp. 39-40). As discussed below in the Summary of Argument, Mr. Potter has some difficulty making correlations among Ms. Potter’s numerous factual allegations, assignments of error, and requests for relief. However based on the past 10 years, he presumes that her objective is to have this Court order whatever form of relief will produce the most lengthy lower-court proceedings so that she can continue accruing credits to claim against the amount of Mr. Potter’s financial interest in the marital residence in which he has not resided for 10 years and four months. Mr. Potter’s objective is to have this Court dismiss her appeal and order the family court to conduct a hearing on his request for attorney fees.

II. SUMMARY OF ARGUMENT

Ms. Potter has filed a 40-page Brief containing eight argument sections in support of a three-part request that this Court (1) reverse Judge Zakaib's June 3, 2013 appeal order; (2) void Judge Mullens' December 15, 2010 family court order; and (3) "assure that a fair and equitable distribution is granted upon divorce." (Brief pp. 39-40).

Responding to Ms. Potter's 40 pages is difficult because of the way in which she relates factual allegations (i.e. that Mr. Potter did, or did not, do certain things) and procedural allegations (i.e. that Judge Mullens or Judge Zakaib did, or did not, do certain things) to her requests for relief. Basically Ms. Potter scatters innumerable factual and procedural allegations among her eight argument sections and is often less than clear – at least to Mr. Potter – about what the Court should do if it agrees with a given argument.

Mr. Potter will deal with the preceding situation by dividing his response among four argument sections. Section A (which consists of eight subsections, including a summary) responds to each allegation that Ms. Potter seems to categorize as a violation of her due process rights. Sections B and C each responds to an allegation that Ms. Potter does not appear to categorize as a Constitutional violation and that can be addressed separately from other allegations. Section D responds to four of Ms. Potter's arguments regarding allegations that she does not appear to categorize as Constitutional violations. These four arguments each involve multiple allegations based on multiple factual situations; however there is a commonality among the first three of them. They relate to the credits that Ms. Potter is claiming against Mr. Potter's financial interest in the marital residence. Because of this, there is a relationship between Mr. Potter's section A arguments and his section D arguments. His section A arguments address the due process issues that Ms. Potter hopes will induce this Court to grant her an opportunity to argue her case to the family court for a second time. His section D arguments address

the credit-related issues that Ms. Potter will argue, for the second time, if the due process issues provide her with that opportunity.

Before proceeding with his arguments, Mr. Potter needs to discuss a threshold procedural issue that applies to many of his arguments, particularly those related to due process. This relates to page 23 of Ms. Potter's Brief, in which she asserts that Mr. Potter violated an evidentiary rule by including, in his response to her circuit court appeal of the family court hearing, a 2006 discovery response that he submitted to the family court immediately after the 2010 final hearing. Mr. Potter needs to discuss this issue now because he has included that same discovery response, as well as other extraneous material, in the Appendix to this brief in order to counteract incorrect factual allegations by Ms. Potter.

The situation that Ms. Potter references on page 23 began at the end of the last day of the 2010 final hearing. Ms. Potter contended that Mr. Potter violated a court order to provide Ms. Potter with certain discovery information. That allegation was absolutely incorrect because Mr. Potter had served that discovery response during 2006. Immediately after the final hearing, Mr. Potter provided a copy of the discovery response to Ms. Potter's counsel and to Judge Mullens in order to prove that he had done what Ms. Potter asserted that he had not done. (Appendix 1347). Ms. Potter is now asserting that the 2006 discovery response should not have been submitted to Judge Zakaib because it had not been considered by Judge Mullens until after the 2010 hearing. In other words, she is advocating the theory that if an attorney makes incorrect representations during a given proceedings and those misrepresentations are not challenged during the proceedings, they become credible evidence in any subsequent proceedings. The scariest aspect of this situation is that Ms. Potter is continuing to take the position that there was nothing improper about the representations that she made to the family court. In support of her arguments to this Court, she is making exactly the same incorrect representation that she made to the family court three years ago. According to page 470 of the Appendix to Ms. Potter's Brief, Mr. Potter violated the court order to provide Ms. Potter with discovery information. (Appendix

1346). So regardless of how many times Mr. Potter provides Ms. Potter with a copy of the discovery response that he made in 2006, she will not cease asserting the incorrect allegation that she is still waiting for it and being deprived of her Constitutional rights in the process.

The preceding scenario illustrates the point that Mr. Potter has been trying to make – without much success – to multiple judges for more than eight years. These proceedings are going to continue indefinitely unless the judicial system puts an end to Ms. Potter’s practice of resurrecting and recycling the same incorrect allegations over and over again. To the best of Mr. Potter’s recollection, throughout the entire course of these proceedings there has been only one issue that Ms. Potter stopped recycling. That was a claim for alimony that she asserted but ceased pursuing after she realized that the record reflected that during the first year of the marital separation she had earned \$284,060 and Mr. Potter had earned \$89,577.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Mr. Potter believes that an oral argument is necessary because it is not possible to respond adequately in written form to the multiple intertwined arguments that Ms. Potter has made – which is not to say that it will necessarily be possible to respond adequately orally either. Mr. Potter also believes it would be inappropriate to try to conduct the argument under Rule 19 because it would be impossible for either side to address Ms. Potter’s 40 pages of issues in only 10 or slightly more minutes. Although this is a basic divorce case that involves no children and no particularly unusual assets to be valued and distributed, it has remained in the family court system for over eight years without a single significant issue – other than Ms. Potter’s request for alimony – having been ultimately resolved.

IV. ARGUMENTS

A. MS. POTTER WAS NOT DENIED DUE PROCESS DURING, OR IN CONJUNCTION WITH, THE THREE-DAY FINAL HEARING; AND THE DECEMBER 15, 2010 ORDER GRANTING MR. POTTER A DIVORCE SHOULD NOT BE VOIDED.

Due Process in Relation to Retirement Plan Accounts

Ms. Potter seems to contend that the final hearing constituted “trial by ambush” because she had not been provided with “a full disclosure” regarding the assets in Mr. Potter’s retirement plan accounts. (Brief p. 8). Also she contends that Judge Mullens refused 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.” (Brief p. 8).

This is a resurrection of an issue that was only disputed between 2005 and 2007. Basically Mr. Potter transferred some of his retirement accounts from Citigroup Global Markets to A&F Financial Advisors, which is the investment management subsidiary of the accounting firm of Arnett Foster Toothman. The transfer-related dispute is summarized in four correspondences between August 12, 2005 and March 8, 2007 (Appendix 1329). As those correspondences indicate, Mr. Potter gave Ms. Potter full access to all information regarding those accounts; however for years afterwards, Ms. Potter continued to represent to the court that she was being denied access to that information. That dispute ended long before the final hearing, after it became apparent that the investment returns that AFFA was achieving in Mr. Potter’s accounts exceeded those that were being achieved in Ms. Potter’s own accounts. Consequently Mr. Potter is unaware of what Ms. Potter means by her reference to “negative impact”; and he is confused by her mention that his transfer of the accounts “may have affected their ultimate value.” (Brief p. 8). Ms. Potter is fully aware that the transfers actually did affect their “ultimate value”. Their values were increased, which was what the transfers were intended to accomplish.

The issues that Ms. Potter has raised have nothing to do with the final hearing because discussions during the hearing did not relate to the issue of investment returns. They dealt with the issue of how the account values would be calculated for distribution purposes; and the parties came to an agreement on that issue. The discussions also dealt with the issue of the process via which the account values would be equalized; and that issue is discussed below in argument section B.

Due Process in Relation to “Financial transactions and marital funds expenditures by Mr. Potter in relation to his extra-marital affair”

Ms. Potter contends that the final hearing constituted “trial by ambush” because she had not been provided with “a full disclosure” regarding “financial transactions and marital funds expenditures by Mr. Potter in relation to his extra-marital affair.” (Brief p. 9). Her Brief goes on to state: “This counsel specifically requested cross examination of Mr. Potter on his financial expenditures as to his extra marital affair and was denied this right. A. R. 0470.” (Brief p. 15).

For purposes of clarification, the discussion that follows relates to the discussion of factual inaccuracies that are located above at the end of the Summary of Argument section.

The preceding representations, which relate to a woman named Zen Hall whom Mr. Potter has married, were inaccurate in two respects. First, the final hearing testimony contained on page 470 of the Appendix to Ms. Potter’s Brief was not a request to cross examine Mr. Potter. It was a dramatic announcement, made by Ms. Potter’s counsel at the conclusion of her presentation on the last day of the final hearing, that Mr. Potter had violated an order to provide discovery information regarding Ms. Hall. Second, Mr. Potter had not violated the discovery order. He had served a response almost four years earlier, on June 19, 2006. Immediately after the hearing, he provided a second copy of the response to Ms. Potter’s counsel and a copy to Judge Mullens. (Appendix 1347).

The representations in Ms. Potter’s Brief regarding her supposed lack of financial information about Ms. Hall exemplify the lack of basis for her “due process” claim. Having provided the information on June 19, 2006, on February 15, 2007 Mr. Potter offered to make himself and Ms. Hall available to be

deposed by Ms. Potter's counsel. (Appendix 1331). Neither Mr. Potter nor his counsel ever received a response to that request.

There was no basis for Ms. Potter to argue during the 2010 final hearing that she had been prejudiced in any way by a lack of information regarding Ms. Hall; and there is no basis for her to be making the same argument now. All of which probably explains why Ms. Potter based both arguments on factual inaccuracies.

Due Process in Relation to Mr. Potter's Purchase of a Residence

Ms. Potter contends that she did not receive – and apparently was deprived of due process by the lack of – a “proper financial disclosure” regarding Mr. Potter's purchase of a residence. (Brief p. 3). This is a resurrected-from-2005 issue that was not addressed at the final hearing. If it had been, Mr. Potter would have provided Ms. Potter and the court with a copy of a December 8, 2005 letter to the residential loan officer via which he gave Ms. Potter's counsel full access to the documentation of that loan. (Appendix 1338). Ms. Potter's counsel never contacted the loan officer. This is because if he had contacted the loan officer in 2005 to obtain information regarding the loan, Ms. Potter would not be able to argue now – and would not have been able to argue on multiple occasions between 2005 and now – that her Constitutional rights were being violated by the lack of information regarding the loan.

Due Process in Relation to the Cash Value of Life Insurance

Ms. Potter references “significant testimony” regarding “cash surrender life insurance value” having been “obliterated from the record”. (Brief p. 19). Mr. Potter has no recollection of any final hearing testimony regarding life insurance cash value; and if that testimony did occur, it was apparently not “significant” enough for Ms. Potter to describe to this Court. The only dispute regarding life insurance cash value arose during 2006, after Ms. Potter incorrectly represented to her counsel that Mr. Potter was concealing a life insurance policy that had cash value. Mr. Potter informed Ms. Potter's counsel, via a May 26, 2006 letter, that the policy in question had no cash value. (Appendix 1340).

Neither Mr. Potter nor his counsel ever received a response to that letter; and the cash-value issue did not arise again until it appeared seven years later in Ms. Potter's Brief.

Mr. Potter does have two life insurance policies that actually have cash values; he provided Ms. Potter with the same information that he received from the insurance carrier regarding those values; and he has never had any reason to believe that this information was inaccurate.

Due Process in Relation to Inquiries Regarding Bank Accounts

Ms. Potter's discussion of the extent to which she was deprived of her due process rights includes criticism of Mr. Potter's counsel for having "announced to the court that there was an 'issue' with the previously divided Chase account". (Brief p. 14). Mr. Potter is unclear as to how that announcement could have deprived Ms. Potter of any due process right; and he asserts that it was entirely justified. The "issue" to which Mr. Potter's counsel referred began on May 24, 2004 when, unbeknownst to Mr. Potter, Ms. Potter withdrew the \$113,490.88 balance in her and Mr. Potter's joint savings account and transferred that amount to an account that she had established in her own name. The "issue" continued through April 14, 2005, when she signed Mr. Potter's signature on their joint income tax returns without his consent and autonomously filed the returns in order to, in his opinion, reduce the chances that he would notice that interest was being paid to a new account. (Appendix 1328). Previously, while the returns were being prepared, Ms. Potter had requested that Mr. Potter not contact the CPA who was preparing them because the CPA also did accounting work for Ms. Potter's law firm and, according to Ms. Potter, the CPA would charge that firm for time spent consulting with Mr. Potter. Mr. Potter complied with that request; however after Ms. Potter executed his signature and filed the returns without affording him an opportunity to review them, he began asking Ms. Potter about financial transactions that she had been making. He received only evasive answers. Consequently on September 9, 2005, Mr. Potter's counsel issued subpoenas for her bank records; and those records revealed that Ms. Potter had been appropriating marital funds for her own use.

In view of the preceding scenario, Mr. Potter has difficulty equating his counsel's inquiries about those transactions to violations of Ms. Potter's due process rights.

Due Process in Relation to the "Jewelry Issue"

Ms. Potter contends that Judge Mullens "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." (Brief p. 9). That is partially accurate. Judge Mullens did force the parties into a negotiation session; however Mr. Potter has no recollection of her threatening to auction or sell their property. She indicated that, in the absence of a division agreement, she would divide some personal property in ways that neither of the parties might like. Ms. Potter has offered a five-page argument as to why this was a denial of her due process rights. (Brief pp. 9-14).

The weakness in Ms. Potter's argument is that she agreed to a division of the property at issue. She views the situation as follows: "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." (Brief p. 14). That is not an accurate characterization of what happened. Mr. Potter did not take back anything. He agreed to assign certain values to certain items of property; and Ms. Potter did exactly the same thing. Furthermore – and this is why Ms. Potter's attempt to abrogate her agreement seems strange – the values that Judge Mullens assigned to the property being divided were Ms. Potter's values, not the values that Mr. Potter would have assigned if Judge Mullens had afforded him that opportunity.

The 2010 jewelry situation and the 2008 irreconcilable differences situation both illustrate the same point. The only agreements that Ms. Potter can be relied upon to keep are those that get her something that she wants. Likewise, when she is deprived of something that she wants, she elevates that deprivation to a denial of a fundamental right.

Due Process in Relation to Final Hearing Procedures

Ms. Potter seems to relate each of the preceding six supposed violations of her due process rights to a violation of a broader right, which was to have the final hearing conducted in a more formal way than Judge Mullens chose to conduct it. According to Ms. Potter, Judge Mullens conducted the hearing by means of “conversations and inquiries of the parties” instead of by the legally required “orderly proceeding adapted to the nature of the case.” (Brief p. 7).

Mr. Potter agrees with Ms. Potter’s characterization of the hearing as being judicial “conversations and inquiries of the parties”. He viewed that approach as being unusual; and he would have considered it to be inappropriate in a jury trial. However it seemed appropriate under the circumstances of this case. This was because, notwithstanding the implications of Ms. Potter’s Brief, Judge Mullens gave Ms. Potter extensive leeway in how she presented her case. Mr. Potter’s counsel did likewise; and the participation of Ms. Potter’s own counsel was very limited. The presentation of Ms. Potter’s case consisted primarily of her lecturing to the court. Mr. Potter’s counsel did not make any objections because he and Mr. Potter were certain that Ms. Potter would continue to prolong these proceedings – at the mortgage-related cost to Mr. Potter of about \$500 per month – by appealing any ruling that was the least bit adverse to her; and they wanted to minimize her grounds for an appeal.

If Ms. Potter or her counsel had objected to Judge Mullens’ “conversations and inquiries” approach and if the judge had overruled that objection and continued with that approach, Ms. Potter might have an appealable issue. However neither Ms. Potter nor her counsel made any such objection. Ms. Potter’s counsel never requested to ask questions either to Ms. Potter or to Mr. Potter; and Judge Mullens never informed the parties that counsel would be prohibited from making opening statements, closing statements, or their own interrogations.

Summary of the Due Process Issue

Ms. Potter’s allegations that Mr. Potter withheld information regarding his retirement accounts, regarding Ms. Hall, regarding his purchase of a residence, and regarding the cash value of his life

insurance are all incorrect. Ms. Potter and her three successive counsel had either that information or direct access to that information for years prior to the 2010 final hearing.

The inquiries that Mr. Potter's counsel made about the contents of joint bank accounts were appropriate and did not violate Ms. Potter's right to due process.

The forced negotiation session that resulted in Ms. Potter making an agreement regarding the value of her jewelry did not violate her right to due process.

The "conversations and inquiries" approach that Judge Mullens took to the final hearing did not violate Ms. Potter's right to due process.

**B. NEITHER THE FAMILY COURT NOR THE CIRCUIT COURT ERRED
IN ORDERING THAT THE PARTIES' RETIREMENT ACCOUNTS
BE EQUALIZED BY A TRANSFER OF ASSETS BETWEEN ACCOUNTS.**

This argument is in response to argument "E" in Ms. Potter's Brief. (Brief pp. 26-29). It is a simplified version of the argument that was made to Judge Mullens during the family court final hearing and to Judge Zakaib in the circuit court appeal. (Appendix 1365).

Mr. and Ms. Potter each participate in "defined contribution" retirement plans, to which contributions in certain amounts are made and invested. These are different from "pension" or "defined benefit" plans – such as those in which judges participate – in which the amount of the retirement benefit depends on factors, external to the plan, such as annual salary and years of service. Explained another way, a participant in a defined contribution plan has an account with a value that varies, over time, because of the addition of contributions, earnings, and appreciation or depreciation in the assets of the account. However a participant in a pension plan does not have an account, he or she has a right to future benefit payments. So the value of a participant's interest in a defined contribution plan is determined by valuing the assets in his or her account; but the value of a participant's interest in a pension plan has to be determined by actuarially computing the present value of the participant's future benefits. The point of all this is that, notwithstanding Ms. Potter's arguments to the contrary,

distributions from pension plans have to be performed differently than distributions from defined contribution plans.

The value of Mr. Potter's retirement accounts exceeded the value of Ms. Potter's retirement accounts. Judges Mullens and Zakaib both ruled that the accounts should be equalized by transferring a certain amount from one of Mr. Potter's accounts to one of Ms. Potter's accounts. This is routine standard procedure that takes place when plan participants are divorced or when a participant dies and has a beneficiary who is also a plan participant.

Ms. Potter does not want to follow this standard procedure, which is consistent with the law favoring lump sum transfers. As previously discussed at some length, Ms. Potter's primary objective during the past decade has been to reduce or, if possible, eliminate Mr. Potter's financial interest in the marital residence. She asked Judge Mullens and then Judge Zakaib, and now she is asking this Court, to incorporate Mr. Potter's defined-contribution retirement accounts into her plan by reducing the amount of Mr. Potter's interest in the marital residence by the amount of the difference between her retirement accounts and his retirement accounts. That might seem like a simple process – it would be an on-paper transaction without an actual transfer of assets – however it is complicated by the fact that Mr. Potter's retirement accounts – like Ms. Potter's accounts – were funded by pre-tax contributions. So in the future, when they begin taking distributions from those accounts, the distributed funds will be taxable as income. Because of this, the use of a certain value of retirement account assets to offset an equal amount of marital-residence credit would not constitute an equitable distribution. That is why Judge Mullens and Judge Zakaib both ruled – correctly – that the retirement accounts will have to be equalized in the most direct way, by making a transfer from one account to another account.

Phrasing the preceding argument in another way, offsets – instead of account-to-account transfers – are used with defined benefit "pension" plans, but not because offsets are less complicated than account-to-account transfers. Offsets are used because participants in pension plans do not have

accounts containing assets that can be valued; they have expectations of future payments in amounts that must be ascertained by calculations.

Ms. Potter's efforts to convince a succession of courts to modify retirement account practices to suit her marital residence credit needs have had – and are continuing to have – a significant financial affect on Mr. Potter. It was apparent before this litigation even began that Mr. Potter had a greater amount of retirement assets than Ms. Potter had and that those amounts would have to be equalized. Consequently Mr. Potter set aside an amount of retirement funds that he believed would be sufficient to fund that equalization. In order to ensure not only that fluctuations in the financial markets did not reduce that amount, but also that those funds would be available when needed, he has maintained those funds in cash-equivalent investments and not incorporated them in the retirement planning that he has needed to do, considering that he was 59 years old when he filed for divorce more than eight years ago. Eventually, during the 2010 final hearing, the equalization amount was determined to be slightly over \$62,000. During the eight years that the family court system has been faced with Ms. Potter's resurrection of the same issues over and over again, Mr. Potter has derived no benefit whatsoever from those "retirement" funds. That situation will continue until the judicial system gets around to enforcing a final order.

**C. THE CIRCUIT COURT DID NOT ERR BY ORDERING THAT THE
PARTIES' RESPECTIVE AUTOMOBILES BE VALUED FOR
EQUITABLE DISTRIBUTION PURPOSES.**

This argument is in response to argument "F" in Ms. Potter's Brief (Brief pp. 29-33). It basically repeats the argument that Mr. Potter made unsuccessfully to Judge Mullens during the family court final hearing and successfully to Judge Zakaib in the circuit court appeal. (Appendix 1365).

Mr. and Ms. Potter owned two automobiles; and for distribution purposes, they each assigned a certain value to each auto. The values that Mr. Potter assigned to each auto were different than the values that Ms. Potter assigned to each auto; however because the auto that Ms. Potter drove was

newer than the auto that Mr. Potter drove, they both assigned higher values to the former than they did to the latter.

The difference between the parties' respective values is not an issue because Mr. Potter agreed to apply Ms. Potter's values to both autos. However Judge Mullens ruled that the auto that each party had been driving would become the property of that party. Under the principle of equitable distribution, this equated to a ruling that both autos were of equal value. This was an abuse of her discretion, as Judge Zakaib determined, because the parties themselves had agreed that the value of the auto that Judge Mullens distributed to Ms. Potter exceeded the value of the auto that she distributed to Mr. Potter.

D. MS. POTTER IS NOT ENTITLED TO ANOTHER FAMILY COURT HEARING ON THE ISSUE OF THE AMOUNT AND NATURE OF HER CREDITS AGAINST THE AMOUNT OF MR. POTTER'S FINANCIAL INTEREST IN THE MARITAL RESIDENCE.

This argument is in response to arguments "C", "D", "G", and "H" in Ms. Potter's Brief (Brief pp. 15-26, and 33-39). As Mr. Potter previously explained in the Summary of Argument section, these arguments relate to Ms. Potter's claims for credits against the amount of Mr. Potter's financial interest in the marital residence. They encompass other issues; but those issues are secondary to the credit issue. And the credit issues are important to Ms. Potter because at the 2010 final hearing Judge Mullens awarded her only a small portion of the credits that she had begun trying to accrue as soon as Mr. Potter moved out of the marital residence seven years earlier.

In order to understand the credit issue, one must first understand that the "accounting" that is being referenced so frequently was not actually an accounting. Mr. Potter believed – and actually still believes – that he was entitled to a genuine accounting of the joint funds that Ms. Potter transferred into her own name. The \$113,490.88 referenced previously was the most significant – but not the only – transfer. As of November 2003, their joint accounts totaled \$160,109.22; and by July 2005, after the 2004 tax returns alerted Mr. Potter to the fact that something financially unusual had been happening,

Ms. Potter had reduced that amount to \$331.50. So Mr. Potter basically wanted to know where the \$159,777.72 difference between those amounts ended up before Ms. Potter spent it and to what extent, if any, that difference consisted of Ms. Potter's own funds. That was the "accounting" that Mr. Potter wanted but never received. The "accounting" being referenced in these proceedings was something entirely different.

The final hearing accounting consisted of Ms. Potter spreading financial records all across the top of a counsel table and referring to them while she lectured to Judge Mullens about various expenditures that she had made regarding the marital residence. Judge Mullens kept a tally of the amounts of the expenditures; and the accounting ended when the total amount of the residence-related expenses that Ms. Potter documented approached the total amount of the joint funds. In other words, Judge Mullen's objective was merely to make an on-paper calculation of the amount of joint funds that Ms. Potter had not spent on residence-related costs so that it could be distributed to Mr. Potter. Judge Mullens was not particularly concerned with the issue of whether a given cost item should have been paid by Ms. Potter's funds instead of having been paid, at least according to Ms. Potter, from Mr. Potter's share of the joint funds. However Judge Mullens was concerned with the who-should-have-paid issue later, during Ms. Potter's presentation about the cost items that she was seeking to take as a credit against the amount of Mr. Potter's financial interest in the residence.

To explain the preceding situation in the most basic terms, Ms. Potter spent a great deal of money on the house after Mr. Potter moved out. Some of that money was joint funds; and some of it was Ms. Potter's own money. Judge Mullens did not treat Mr. Potter equitably with regard to his 50% share of those joint funds; however she did treat him equitably with regard to the 50% share of Ms. Potter's own funds that she claimed as credits against his financial interest in the residence.

The crux of Ms. Potter's credit-related arguments is that Judge Mullens' Final Order should be voided because it did not contain enough financial specifics to allow either Judge Zakaib or this court to

perform a meaningful analysis of the financial transactions that were the subject of the order. The assertion about the lack of specifics is entirely accurate. However – and this is the crux of Mr. Potter’s credit-related argument – it will never be possible to perform a significantly meaningful analysis of those transactions, regardless of how many final hearings are held regarding them; and the person responsible for this situation is Ms. Potter herself.

If, as Ms. Potter alleges, the credit-related portions of Judge Mullens’ Final Order are “inadequate, incomplete and erroneous findings of fact, (and) is devoid of analysis of facts in relation to application of law”, the reason for those inadequacies is the approach that Ms. Potter took to incurring the costs that she later claimed as credits. (Brief p. 16). She incurred most, if not all, of those costs autonomously without any involvement by Mr. Potter. She paid some of those costs with joint funds that she had comingled with her own funds and some entirely with her own funds. When expending her own funds, she acted as though Mr. Potter’s financial interest in the marital residence was nothing more than an expense account that had been established for her sole benefit; and she waited years before disclosing the “expense account” items that she had been secretly incurring and secretly paying. Later when she attempted to reconstruct verbally the years of transactions in extended monologues to Judge Mullens, she never addressed the most fundamental issue regarding those transactions: Why, if she genuinely believed that she was entitled to initiate those transactions and either pay for them with joint funds or claim them as credits against Mr. Potter’s interest in the marital residence, did she not involve Mr. Potter in the transactions when they occurred and obviate the need to try to reconstruct them six years later in a courtroom?

As may be apparent, Mr. Potter is not pleased to have spent the past decade in an arrangement in which he has an ownership interest that only benefits someone else; and he is also not pleased to have had what amounts to a \$500 “family court user fee” added to his monthly mortgage payment for the last eight and a half years. However what frustrates him the most is a television advertisement that

appears regularly for the United Services Automobile Association, which issues insurance policies to current or former military personnel and their families. The advertisement features various people who explain where, in the military, a family member “earned” the right to be a USAA policyholder; and one of the people states: “Vietnam in 1972”. The reason this frustrates Mr. Potter is that he became a member of USAA in 1970, when he purchased a policy while en route to Vietnam; and like the person referenced in the commercial, he actually was in “Vietnam in 1972”. However in spite of the fact that Mr. Potter is a 43-year USAA member, he cannot insure his house or his automobiles with USAA because he needs an umbrella policy. USAA cannot issue him an umbrella policy as long as he has an ownership interest in the marital residence; and he will have that ownership interest until the family court system orders a distribution to Ms. Potter. If Mr. Potter does live long enough to be released from the family court system, he will eventually forget most of the financial specifics of this litigation; however he will not forget the extent and length of the government’s interference in his relationship with USAA.

Ms. Potter’s final argument, section H, does not relate directly to the credit issue; but it does relate to a perceived inadequacy in the Final Order. Ms. Potter characterizes this inadequacy as a “glaring jurisdictional omission”. (Brief p. 39). According to her, the 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.” (Brief p. 39). Mr. Potter is not sure what that phrase means; but in the context of the argument in which it appears, he interprets it to mean that, because the Final Order does not adequately explain why irreconcilable differences exist between Mr. Potter and Ms. Potter, neither Judge Zakaib nor this Court is in a position to rule out the possibility that Mr. and Ms. Potter will eventually get back together again.

If Mr. Potter is interpreting that argument correctly, he believes that it underestimates the perceptiveness of Judge Zakaib and this Court.

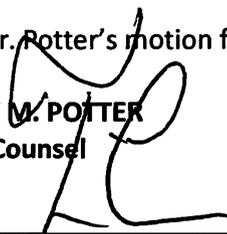
E. MR. POTTER IS ENTITLED TO A HEARING FOR ATTORNEY FEES

That at the conclusion of the final hearing, Mr. Potter moved for reimbursement of attorney fees. The court without conducting any analysis ordered that the parties would be responsible for their own attorney fees. See, Final Order entered on December 15, 2010. The standard procedure for family courts in Kanawha County is to conduct a separate hearing on a motion for attorney fees after the entry of the final order for a proper hearing concerning the *Banker* factors set forth in this Court's decision in *Banker v. Banker*, 196 W. Va. 535, 474 S.E.2d 465 (1996). Importantly, at the time Mr. Potter made his motion for attorney fees, the Court had not determined its rulings as to equitable distribution. Rather, the court directed the parties to submit proposed findings of fact and conclusions of law. Hence, a decision as to equitable distribution would be rendered by the court in the future.

Consequently, when Mr. Potter made his motion it was his expectation that the court would conduct a hearing after the entry of the Final Order, so that the proper analysis would be performed after due consideration of the *Banker* factors. Accordingly, the court should have conducted the hearing relating to attorney fees after the entry of the final order. The family court abused its discretion by not conducting any hearing prior to making its decision. Mr. Potter simply requests that the family court's decision denying him his reasonable attorney fees be reversed and remanded for a proper hearing.

V. CONCLUSION

Mr. Potter believes that he is entitled to (1) a dismissal of Ms. Potter's appeal and (2) an order remanding this case to family court for a hearing on Mr. Potter's motion for attorney fees.


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By Counsel

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STATE OF WEST VIRGINIA

**Maria Marino Potter, Respondent Below,
Petitioner,**

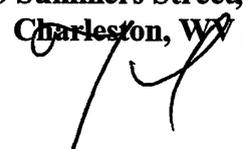
vs.) No. 13-0708

**Jay M. Potter, Petitioner Below,
Respondent.**

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing
"RESPONDENT'S BRIEF AND CROSS-ASSIGNMENT OF ERROR" was served on the
18th day of November, 2013 via United States Mail, postage pre-paid, upon the following:

**Timbera C. Wilcox, Esq.
300 Summers Street, Suite 800
Charleston, WV 25301**



Tim C. Caprico, Esq. (WVSB #6771)