

13-0467



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IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

In re: the Marriage of:  
**Tina M. Owen,**

Petitioner,

v.

Civil Action No. **11-D-543-5**  
Chief Judge James A. Matish

**Mark B. Owen,**

Respondent.

**Order Affirming Decree of Divorce in Part and Reversing Decree of Divorce in Part**

Pending before the Court are separate petitions for appeal, filed by Tina M. Owen and Mark B. Owen, from a decision of the Family Court of Harrison County ("Family Court") granting a divorce to the parties and deciding various issues regarding the invalidity of a prenuptial agreement, equitable distribution, alimony, and attorney fees. The Court held a hearing on the petitions for appeal on January 9, 2013. Petitioner appeared at the hearing in person and through counsel Larry W. Chafin. Respondent appeared in person and through counsel Debra Tedeschi Varner and Allison S. McClure.

After conducting the aforementioned hearing on January 9, 2013; reviewing the "Order Pertaining to Enforceability of Antenuptial Agreement," entered January 9, 2012, and the "Decree of Divorce," entered October 23, 2012, the video/discs from the family court proceedings on December 14, 2011, and May 30, 2012, and the court file; and analyzing pertinent legal authority, the Court concludes that the Decree of Divorce should be affirmed in part and reversed in part.

**Factual and Procedural Background**

The Family Court orders provide extensive findings of fact and this matter has a

lengthy and complicated procedural history.<sup>1</sup> The Court will not restate these details in full; however, the critical facts, dates, and filings are summarized below.

The parties signed a prenuptial agreement on December 8, 1981. The parties married four days later on December 12, 1981. It was the second marriage for both parties and both parties had minor children. On August 18, 2011, Ms. Owen filed a petition for divorce in the Family Court. In his response, Mr. Owen requested that the Family Court enter an order enforcing the prenuptial agreement. All of the parties' children are adults.

The Family Court held two separate evidentiary hearings: one regarding the enforceability of the parties' prenuptial agreement and one regarding equitable distribution.<sup>2</sup> On December 14, 2011, the Family Court held a hearing regarding the prenuptial agreement. On January 9, 2012, the Family Court entered an order, ruling that the prenuptial agreement was unenforceable. Specifically, the Family Court ruled that, although the prenuptial agreement was executed voluntarily and under circumstances free from fraud, duress, or misrepresentation, Ms. Owen did not have knowledge of its contents and legal effect at the time it was executed.

On January 30, 2012, Mr. Owen requested a stay in the Family Court; the Family Court denied this request on February 2, 2012, and clearly stated that its January 9, 2012, order regarding the enforceability of the prenuptial agreement was not a final order. On February 6, 2012, Mr. Owen filed a "Petition for Appeal and, in the Alternative,

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<sup>1</sup> Beginning with the last paragraph on page 2 and continuing through page 9 of the memorandum attached to Mr. Owen's petition for appeal, Mr. Owen sets forth the procedural history of this matter in detail.

<sup>2</sup> In the "Order Pertaining to Enforceability of Antenuptial Agreement," the Family Court explained that the reason for holding two separate hearings was because "[c]ounsel previously requested a separate evidentiary hearing on the validity of the Antenuptial Agreement and believed that the Court's ruling upon the matter could potentially facilitate settlement negotiations." p. 1.

Writ of Prohibition from January 9, 2012 Order Pertaining to Enforceability of Antenuptial Agreement” and requested a stay in the circuit court. This Court denied the request by order entered February 9, 2012, finding that the January 9, 2012, Family Court order was not a final order subject to appeal<sup>3</sup> and that the writ of prohibition was not properly filed.

In the February 9, 2012, order, this Court instructed Mr. Owen that the petition for a writ of prohibition should be filed as a separate civil action. On March 6, 2012, Mr. Owen filed State ex rel. Mark B. Owen v. Tina M. Owen and the Hon. Lori B. Jackson, civil action number 12-C-108, requesting that the circuit court enter a writ of prohibition to prohibit the enforcement of the January 9, 2012, Family Court order. Ms. Owen filed an answer on April 4, 2012. On April 23, 2012, the civil action was transferred from Division 1 of the circuit court to this division. On August 14, 2012, this Court entered a final order removing the case from the docket as moot because Mr. Owen had not requested a hearing date before this Court on the petition, a final hearing was held in Family Court on May 30, 2012, and either party could appeal the final order of the Family Court.

On May 30, 2012, the Family Court held a hearing on equitable distribution. On October 23, 2012, the Family Court granted the parties a divorce on the ground of irreconcilable differences and ordered Mr. Owen to pay Ms. Owen \$417,273.00 in two separate payments to effectuate equitable distribution. In the Decree of Divorce, the Family Court incorporated its prior rulings in the “Order Pertaining to Enforceability of Antenuptial Agreement” by reference.

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<sup>3</sup> In his petition for appeal, Mr. Owen again argues that the January 9, 2012, order was final and appealable. This Court stands by its February 9, 2012, ruling that the Family Court’s January 9, 2012, ruling was interlocutory.

## **Standard of Review**

West Virginia Code § 51-2A-14(a) provides that “[t]he 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.” The standard of review of findings of fact made by the family court is clearly erroneous and the standard of review for the application of the law to the facts is an abuse of discretion standard.

## **Conclusions of Law and Analysis**

Mr. Owen argues that the Family Court committed reversible error with regard to its rulings on (1) the invalidity of the prenuptial agreement, (2) equitable distribution and spousal support, and (3) attorney fees. Ms. Owen’s counter-petition for appeal raises issues with equitable distribution and the award of attorney fees.

### **I. Prenuptial Agreement**

Mr. Owen argues that the Family Court committed reversible error in determining that the parties’ prenuptial agreement was invalid based on Ms. Owen not having knowledge of the contents and the legal effects when the agreement was executed in 1981. More specifically, Mr. Owen argues that Ms. Owen had knowledge and, if she did not, it was due to her own neglect and that, under basic contract principles, Ms. Owen should not benefit from her inaction.

The parties signed a prenuptial agreement on December 8, 1981, at the law office of David C. McMunn, counsel for Mr. Owen. The parties signed the agreement in front of Mr. McMunn, who also served as the notary public. Ms. Owen did not consult independent counsel prior to executing the agreement. At the time, Mr. Owen was 38

years old and Ms. Owen was 23 years old. The parties married each other on December 12, 1981, four days after signing the prenuptial agreement. It was the second marriage for both parties.

On January 9, 2012, the Family Court entered an order, ruling that the prenuptial agreement was unenforceable. Specifically, the Family Court ruled that, although the prenuptial agreement was executed voluntarily and under circumstances free from fraud, duress, or misrepresentation, Ms. Owen did not have knowledge of its contents and legal effect at the time it was executed. See generally syl. pt. 2, Ware v. Ware, 224 W. Va. 599, 687 S.E.2d 382 (2009).

The Family Court further found that “[Mr. Owen’s] counsel spoke with [Ms. Owen] about antenuptial agreements in general but did not review the provisions of the specific agreement between the parties” and highlighted that, although the agreement states that Ms. Owen “has had the advice of counsel,” the testimony was undisputed that Ms. Owen did not have the advice of independent counsel. “Order Pertaining to Enforceability of Antenuptial Agreement,” p. 2. Furthermore, the Family Court found “[Ms. Owen] to be truthful in her claims that [Mr. Owen] assured her that Mr. McMunn represented both of their interests.” Id. at p. 3. Although not the basis of its decision, in dicta, the Family Court also noted that it would likely find that the prenuptial agreement was unconscionable because several provisions in the agreement are contrary to West Virginia law and public policy.

This Court notes that Ms. Owen also testified that she was not provided a copy of the prenuptial agreement before signing it, while Mr. Owen had made changes to the

agreement in draft form<sup>4</sup> and testified that he did not recall whether he had provided Ms. Owen a copy of the agreement prior to their meeting with Mr. McMunn. According to Ms. Owen, she did not receive a copy of the prenuptial agreement until 2005, when she first filed for divorce. Ms. Owen further testified that Mr. Owen told her what to say during the meeting with Mr. McMunn and that, when she signed the agreement, she did not know what rights she was forfeiting or the specifics of Mr. Owen's assets.

On appeal, Mr. Owen argues that the Family Court erred by failing to apply basic contract principles and asks this Court to find that, because Ms. Owen signed the prenuptial agreement, she is deemed to have read and understood it and is, therefore, bound by its terms. In response, Ms. Owen asserts that the invalidity of the prenuptial agreement is supported by Gant v. Gant, 174 W. Va. 740, 329 S.E.2d 106 (1985) (overruled) and Ware v. Ware, 224 W. Va. 599, 687 S.E.2d 382 (2009) (holding that both parties must be represented by independent counsel for the presumption of validity to apply to a prenuptial agreement)--pertinent, on-point authority addressing prenuptial agreements--and the evidence presented to the Family Court.

In finding the prenuptial agreement unenforceable, the Family Court order provides a detailed recitation of the facts surrounding the execution of the prenuptial agreement. This summary is supported by the evidence presented to the Family Court on December 14, 2011. Furthermore, the Family Court properly exercised its discretion and applied pertinent West Virginia law pertaining to prenuptial agreements to the facts presented. Accordingly, after carefully reviewing the arguments and evidence presented by both parties, the Court cannot find that the Family Court committed clear error or

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<sup>4</sup> It appears that the prenuptial agreement signed by the parties was modified from an agreement originally prepared by Mr. McMunn in anticipation of Mr. Owen marrying a Ms. Linkous.

abused its discretion. The Family Court's ruling that the prenuptial agreement is unenforceable is **AFFIRMED**.

Furthermore, the Court stands by its February 9, 2012, ruling and **ORDERS** that the Family Court's January 9, 2012, ruling was interlocutory and not subject to appeal. In addition to the reasons cited in its February 9, 2012, order, this Court also highlights Rule 53 of the West Virginia Rules of Practice and Procedure for Family Court, which addresses bifurcation:

The court shall not bifurcate a divorce proceeding unless there is a compelling reason to grant the divorce prior to resolving issues related to spousal support, child support, and distribution of property; no party will be prejudiced by the bifurcation; and a temporary order has been entered granting spousal support, child support, and any other necessary relief. If a case is bifurcated, the final order shall be entered within six months of the entry of the bifurcation order.

## II. Equitable Distribution and Spousal Support

Both parties argue that the Family Court committed reversible error with regard to several of its rulings in the Decree of Divorce. The Court will address each of these assignments of error below. Initially, however, the Court notes that both parties spent the majority of the divorce proceeding addressing the faults of the other party<sup>5</sup> and provided minimal evidence regarding the value of their marital and pre-marital estates. Based upon the dearth of evidence provided by the parties, the Family Court did its best to make an equitable distribution and ultimately ordered Mr. Owen to pay Ms. Owen two payments totaling \$417,273.00.

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<sup>5</sup> Although other grounds were raised by both parties, the Family Court granted the divorce only on the ground of irreconcilable differences.

**a. Mr. Owen's Assignments of Error Raised in Petition for Appeal**

**First, Mr. Owen argues that the Family Court erred by failing to give him credit for the inheritance that he received during the marriage. The Family Court addressed Mr. Owen's inheritance on page 2 ¶ 10 of the Decree of Divorce:**

During the marriage, but prior to 2001, respondent received an inheritance from his family which totaled \$142,912.00. Then, on an unspecified date and for an unspecified amount, respondent used a portion of his inheritance to pay off the mortgage on the marital home. The respondent, who was careful to rarely cause any asset to be titled in both parties' names, no doubt intended in good faith to use his inheritance to enhance what he believed was his separate property based on the provisions of the prenuptial agreement. If the respondent had provided information at trial pertaining to whether or not any proceeds from marital effort had been commingled in the account in which his inheritance was placed; and if no commingling had occurred; and if respondent had provided the amount of his separate property used to pay off the mortgage, the Court would have considered denominating the payoff amount of the mortgage as separate property. However, the burden of proof lies on the party claiming the separate nature of any specific item of property, and respondent failed to provide information about the payoff amount of the mortgage and about whether the funds used were clearly separate funds or had been commingled with marital funds. Accordingly, the home is marital property.

Mr. Owen argues that "undisputed testimony was presented as to the approximate amount of the payoff and that the funds were not commingled." Specifically, Mr. Owen contends that unrefuted testimony was presented that Mr. Owen inherited funds in the amount of \$142,912.06, kept them in a separate account, and used the funds to pay off the mortgage on the home that is in his separate name. Furthermore, Mr. Owen highlights that the Family Court recognized that he did not intend to provide a gift to the marital estate.

In response, Ms. Owen acknowledges that Mr. Owen did not intend to make a gift to the marital estate but argues that Mr. Owen failed to meet his burden of proof to show that such funds were not commingled with funds from the marital estate and also

failed to provide evidence regarding the specific amount of the funds used to pay off the mortgage on the home that the Family Court found to be marital.

“ ‘When an individual during marriage has property which is separate property within the meaning of W. Va. Code [§] 48-2-1(f), and then exchanges that property for other property which is titled in his name alone, and which is not comingled with marital property, then that other property acquired as a result of the exchange is itself separate property.’ Syl. pt. 3, Hamstead v. Hamstead, 184 W. Va. 272, 400 S.E.2d 280 (1990).” Syl. pt. 1, Odle v. Eastman, 192 W. Va. 615, 453 S.E.2d 598 (1994) (per curium).

Mr. Owen testified that he inherited \$142,912.06 in stock, cash, and the sale of real property from his parents in 2001. Mr. Owen further testified that he sold all of the stock and paid off the mortgage to the marital home, which was titled in his name only. However, Mr. and Ms. Owen both testified that around 1990 Mr. Owen used his separate money to purchase a condominium in Canaan Valley that was titled in both parties' names. Eventually, the condo was sold and the proceeds were used to buy the most recent marital home. Finally, Mr. Owen testified that the \$15,000.00 from the sale of the real property was deposited into either his checking or savings account, both of which were titled in his name only.

The Family Court found that the condominium was marital because the separate nature of the property was extinguished by both parties' names being listed on the title. Furthermore, the Family Court determined that the house was marital due to the prenuptial agreement being unenforceable. Accordingly, after reviewing the parties' arguments and the video of the divorce proceeding, the Court affirms the Family Court's

finding that Mr. Owen failed to meet his burden to prove that the inheritance funds remained separate property.

**Second, Mr. Owen argues that the Family Court erred by failing to give him credit for the value of his separate estate prior to marriage.** Mr. Owen argues that the Family Court should have deducted \$94,000.00, his pre-marital worth as reflected in the parties' prenuptial agreement, from the marital estate. Mr. Owen further argues that, because the \$94,000.00 was, to a great extent, not commingled and was used to purchase assets that remain Mr. Owen's separate property, the entire \$94,000.00 pre-marital worth should be deducted from the marital estate.

In response, Ms. Owen argues that Mr. Owen failed to meet his burden to demonstrate that the property he held thirty years' prior to the parties' separation retained its character as separate property. The Court agrees with Ms. Owen and, based upon the evidence presented, cannot find that the Family Court abused its discretion in not deducting the \$94,000.00 from the marital estate. The Court also notes that the \$94,000.00 value was ascertained from the Asset Disclosure attached to the parties' prenuptial agreement, which was determined to be invalid by the Family Court and upheld as invalid by this Court.

**Third, Mr. Owen argues that the Family Court erred by including four ounces of Mr. Owen's gold in the equitable distribution calculation.** In its equitable distribution, the Family Court included the value of \$6,800.00 for four ounces of gold. Ms. Owen testified that Mr. Owen purchased the gold in lieu of replacing the diamond in her ring every couple of years. Based on the testimony presented, the Court cannot find that the Family Court abused its discretion.

**Fourth, Mr. Owen argues that the Family Court erred by failing to address Ms. Owen's IRA when determining the total value of the marital estate.** Both parties testified that Ms. Owen had cashed out her IRA. Ms. Owen testified that she cashed out the IRA before previously filing for divorce from Mr. Owen in 2005; Mr. Owen agreed that Ms. Owen cashed out her IRA around this time. However, the parties disagreed regarding how Ms. Owen spent the money. Ms. Owen asserted that she spent the money on household goods, such as a television, while Mr. Owen testified that he did not recall Ms. Owen purchasing anything for the household with the funds.

On appeal, Mr. Owen cites W. Va. Code § 48-7-206(3) for the proposition that assets with a fair market value greater than or equal to five hundred dollars that have been transferred for inadequate consideration or wasted away by one party within five years before the filing of the divorce must be included in the marital estate. To be clear, Mr. Owen is asking the Court to apply West Virginia Code § 48-7-206's five-year rule to *the date when Ms. Owen filed her first petition for divorce*, which she later withdrew, stating "[t]he precise timing of the depletion of the IRA is unknown; however, it was certainly within five years of the filing of the first divorce petition. Though [Ms. Owen] eventually dismissed the first divorce action, she should not benefit from such dismissal and depletion of the marital assets during the first divorce." "Petition for Appeal from October 23, 2012 Decree of Divorce on Behalf of Appellant, Mark B. Owen," p. 35.

In response, Ms. Owen highlights that Mr. Owen is not alleging that the IRA was not disclosed. Ms. Owen further argues that the IRA was disposed of more than five years before the filing of *this* divorce action.

The Court finds that, under the plain language of West Virginia Code § 48-7-206, the Family Court did not commit error by failing to include the value of Ms. Owen's IRA, which she cashed out sometime around early 2005, because the funds were transferred more than five years prior to August 18, 2011--the date the underlying divorce petition was filed.

**Fifth, Mr. Owen argues that the Family Court erred by failing to give him credit for a \$22,000.00 loan that he made to Ms. Owen.** Before the Family Court, both parties acknowledged that, in June 2005, Mr. Owen gave Ms. Owen \$22,000.00 to pay credit card debt.<sup>6</sup> However, Ms. Owen characterized the money as a gift, while Mr. Owen characterized it as a loan. Mr. Owen presented a copy of the cashed check with the notation "Loan" on the subject line and testified that Ms. Owen had signed a note that disappeared indicating that the \$22,000.00 was a loan.

"Although one spouse can transfer property to the other spouse by irrevocable gift under W. Va. Code [§] 48-3-10 [1984], '[i]n all instances, the burden of proof is upon the spouse who would claim the gift.'" Kapfer v. Kapfer, 187 W. Va. 396, 400, 419 S.E.2d 464, 468 (1992) (per curium) (quoting Roig v. Roig, 178 W. Va. 781, 785, 364 S.E.2d 794, 798 (1987) (upholding circuit court's classification of an automobile as marital where conflicting testimony was presented regarding whether the automobile was a gift from husband to wife)). Based upon Kapfer, Mr. Owen argues that, because Ms. Owen offered no proof that the \$22,000.00 payment was a gift, the Family Court committed reversible error when it did not attribute the value of the loan to Ms. Owen's portion of the marital estate.

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<sup>6</sup> There was conflicting testimony regarding whether the credit card debt was Ms. Owen's or her adult daughter's from a prior marriage.

The Supreme Court of Appeals of West Virginia has "consistently indicated that findings of fact made by a trial court in a divorce proceeding based on conflicting evidence will not be disturbed unless they are clearly wrong or are against the preponderance of the evidence." Sellitti v. Sellitti, 192 W. Va. 546, 551, 453, S.E.2d 380, 385 (1994). Here, the Family Court heard conflicting testimony and determined that the \$22,000.00 should not be included in the marital estate. The Court will not disturb this discretionary determination.

**Sixth, Mr. Owen argues that the Family Court erred by failing to give him credit for the payments he made on the marital estate between the date of separation and the Decree of Divorce.** Mr. Owen highlights that the Family Court ordered him to pay Ms. Owen \$1,400.00 per month in interim spousal support and that he paid for the insurance on the vehicles and the home; the taxes on the personal property, real property, and businesses; and the household utilities since October 28, 2011. Accordingly, Mr. Owen argues that, pursuant to Conrad v. Conrad, 216 W. Va. 696, 612 S.E.2d 772 (2005), he is entitled to an offset of one-half of the payments made in the interim between the filing and finalization of the divorce.

In addressing interim payments of marital debt, the Supreme Court of Appeals of West Virginia stated, "[r]ecoupment of payment of marital debt by one party prior to the ultimate division of marital property has often been permitted upon a final equitable distribution order." Id., 216 W. Va. at 702, 612 S.E.2d at 778; see also Jordan v. Jordan, 192 W. Va. 377, 452 S.E.2d 468 (1994) (final allocation of marital debt permitted husband to recoup his expenses related to the marital home).

The Family Court did not address any type of credits or offsets for the interim payments made by Mr. Owen on marital debt; however, Mr. Owen failed to present evidence of any payments at the divorce proceeding. Because there was no evidence presented to the Family Court regarding these payments, the Court finds that Mr. Owen waived this argument.

**Seventh, Mr. Owen argues that the Family Court erred by awarding Ms. Owen permanent nominal alimony without a showing of financial necessity and without terms for the termination of such alimony.** The Family Court awarded Ms. Owen \$1,400.00 per month in alimony until modification by the Family Court or the equitable distribution payment is paid in full, at which time the alimony will reduce to \$25.00 per month on a permanent basis until she remarries or participates in a de facto marriage. Both parties raise assignments of error with regard to the award of nominal permanent spousal support: Mr. Owen argues that the \$25.00 per month, without any criteria for termination of the same, is an abuse of discretion, while Ms. Owen contends that the amount is insufficient in light of the parties' respective financial positions.

Ms. Owen cites language from Banker v. Banker, which recognizes that, while a party must not be receiving or paying alimony for a court to revise a spousal support order, "it is still preferable for the party who may seek a later modification to have a request for nominal alimony ruled upon at the initial divorce stage." 196 W. Va. 535, 547, 474 S.E.2d 465, 477 (1996). Furthermore, "[q]uestions relating to alimony . . . are within the sound discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused." Syl. pt. 4, Pearson v. Pearson, 200 W. Va. 139, 488 S.E.2d 414 (1997)

(internal citation omitted). Based upon West Virginia law, the Court cannot find that the Family Court abused its discretion. Furthermore, the Family Court stated that the nominal support payments will terminate if Ms. Owen remarries or participates in a de facto marriage.

**b. Ms. Owen's Assignments of Error Raised in Counter-Petition for Appeal**

Ms. Owen's counter-petition for appeal raises issues with the Family Court's equitable distribution determination. **First, Ms. Owen argues that the Family Court committed clear error and abused its discretion in attributing Ms. Owen income in the amount of \$1,560.00 per month.** In the Decree of Divorce, the Family Court found that "Petitioner has an earning ability and several years left to work. Therefore, petitioner should earn at least \$1,560.00 per month, which is full-time employment at \$9.00 per hour." Decree of Divorce, p. 4 ¶ 11.

Ms. Owen highlights her own testimony that she is unemployed but seeking employment and that, at the time of the proceeding before the Family Court, her sole source of income was \$195.00 per week in unemployment compensation. Ms. Owen further testified that her unemployment benefits would cease within three months of the divorce proceeding. Accordingly, Ms. Owen argues that the Family Court should have attributed \$845.00 per month as her income, rather than \$1,560.00. In response, Mr. Owen highlights evidence that Ms. Owen has training and prior employment as an insurance agent and, given her age and health, is capable of earning at least \$9.00 per hour in full-time employment.

The Court finds that the Family Court did not abuse its discretion in attributing \$1,560.00 per month in income to Ms. Owen and that such finding is supported by the evidence presented at the divorce proceeding.

**Second, Ms. Owen argues that the Family Court abused its discretion by failing to include Ms. Owen's automobile debt in the equitable distribution analysis.** Before the Family Court, Ms. Owen testified that, after she and Mr. Owen separated, she incurred debt on her vehicle to finance legal fees for the underlying divorce. The Family Court included this expense in its spousal support analysis but did not include this debt in its equitable distribution analysis. Because Ms. Owen incurred this debt after the parties' separation, as supported by her own testimony, such debt is her separate property under West Virginia Code § 48-1-237(5) and is not subject to equitable distribution. Accordingly, the Family Court did not commit error by excluding this separate property in the equitable distribution analysis.

### III. Attorney Fees

**Mr. Owen also challenges the award of attorney fees for Ms. Owen. Specifically, Mr. Owen challenges the award of \$15,000.00 in attorney fees for an appeal and \$3,000.00 in attorney fees for work associated with Mr. Owen's previously-filed writ of prohibition that was ultimately dismissed by this Court as moot.**

On February 21, 2012, the Family Court ordered Mr. Owen to pay Ms. Owen interim attorney fees in the amount of \$20,000.00 on or before March 1, 2012. In the Decree of Divorce, the Family Court awarded Ms. Owen an additional \$15,000.00 to cover the appeal if it was filed before equitable distribution had been made in full and

\$3,000.00 for attorney fees incurred as a result of the previous writ of prohibition that was filed with this Court.

Mr. Owen acknowledges that an award of attorney fees are permitted under West Virginia law in certain cases but argues that \$15,000.00 to cover the cost of an anticipated appeal and \$3,000.00 to cover Ms. Owen's attorney fees with respect to the writ of prohibition are unfounded and unwarranted.

**i. \$15,000.00 for Anticipated Appeal**

The Decree of Divorce addressed the award of attorney fees for Ms. Owen for the anticipated appeal as follows, in part:

The petitioner also anticipates that this Decree of Divorce will be appealed. Pursuant to West Virginia Code § 48-1-305, this Court has jurisdiction to grant an award of attorney fees for appeals where an intention to appeal has been stated. The Court believes that equity would require that respondent assist with petitioner's attorney fees for this appeal only under certain conditions. If an appeal is filed in the Circuit Court or in the first instance to the West Virginia Supreme Court of Appeals by mutual agreement, and if complete equitable distribution has not been made in full at the time that the appeal is filed, then within 48 hours of the filing of the appeal, respondent shall pay the sum of \$15,000.00 to petitioner for attorney fees related to the appeal. If equitable distribution has been made in full, it is likely the parties will be in similar financial circumstances, and this Court declines to award any attorney fees for appeal purposes.

During the pendency of the action, only respondent had resources to pay attorney fees. Petitioner held very little of the marital assets while respondent held nearly \$1,000,000.00 in assets, some of which were easily converted into cash. The petitioner's attorney obtained beneficial results, particularly in the areas of equitable distribution and obtaining a divorce. In the end, undoubtedly each party's standard of living will be affected by the large amounts of attorney fees expended in this matter. The petitioner's attorney fee[s] incurred was reasonable in the local area for a high-conflict divorce action with underlying contested questions of fact and law.

Decree of Divorce, pp. 6-7 § 13.

As an alternative to ordering Mr. Owen to pay Ms. Owen \$15,000.00 when he filed the appeal, Mr. Owen contends that “[a] more appropriate and logical decision would be an award of fees should [Ms. Owen] be successful on appeal.” “Petition for Appeal from October 23, 2012 Decree of Divorce on Behalf of Appellant, Mark B. Owen,” p. 38. As support for this alternative, Mr. Owen argues that, if he is successful in his appeal, he will have no way to recoup the \$15,000.00 paid to Ms. Owen’s attorney for the appellate proceeding.

West Virginia Code § 48-5-504(b), which addresses attorney fees and court costs in divorce matters, states, “If an appeal is taken or an intention to appeal is stated, the court may further order either party to pay attorney fees and costs on appeal.” Nearly identical language is also included in West Virginia Code § 48-1-305(b) and West Virginia Code § 48-5-611(b). The Supreme Court of Appeals of West Virginia has also acknowledged a family court’s authority to award attorney fees in divorce matters and has set forth factors for a family court to consider when determining whether to award such fees. See syl. pt. 4, Banker v. Banker, 196 W. Va. 535, 474 S.E.2d 465.

Based on the authority cited above, the Family Court had the authority to award attorney fees to cover the costs of appeal and considered the appropriate factors set forth by the Supreme Court of Appeals of West Virginia in deciding to award attorney fees to Ms. Owen.

**ii. \$3,000.00 for Ms. Owen’s Fees Incurred Responding to Mr. Owen’s Petition for Writ of Prohibition**

Mr. Owen also argues that the award of \$3,000.00 to Ms. Owen to cover the work associated with Mr. Owen’s petition for a writ of prohibition is improper and contrary to the West Virginia Rules of Appellate Procedure for the West

Virginia Supreme Court of Appeals.

On February 6, 2012, Mr. Owen filed a "Petition for Appeal and, in the Alternative, Writ of Prohibition from January 9, 2012 Order Pertaining to Enforceability of Antenuptial Agreement" and requested a stay in the circuit court. This Court denied the request by order entered February 9, 2012, finding that the January 9, 2012, Family Court order was not a final order subject to appeal<sup>7</sup> and that the writ of prohibition was not properly filed.

In the February 9, 2012, order, this Court instructed Mr. Owen that the petition for a writ of prohibition should be filed as a separate civil action. On March 6, 2012, Mr. Owen filed State ex rel. Mark B. Owen v. Tina M. Owen and the Hon. Lori B. Jackson, civil action number 12-C-108, requesting that the circuit court enter a writ of prohibition to prohibit the enforcement of the January 9, 2012, Family Court order. Ms. Owen filed an answer on April 4, 2012. On April 23, 2012, the civil action was transferred from Division 1 of the circuit court to this division. On August 14, 2012, this Court entered a final order removing the case from the docket as moot because Mr. Owen had not requested a hearing date before this Court on the petition, a final hearing was held in Family Court on May 30, 2012, and either party could appeal the final order of the Family Court.

In awarding attorney fees, the Family Court focused on Mr. Owen's "failure to move the Writ forward" after Ms. Owen's counsel was compelled to perform "much research and effort" in order to adequately respond to the petition for a writ of

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<sup>7</sup> In his petition for appeal, Mr. Owen again argues that the January 9, 2012, order was final and appealable. This Court stands by its February 9, 2012, ruling that the Family Court's January 9, 2012, ruling was interlocutory.

prohibition. The Family Court provided the following reasoning for awarding the \$3,000.00:

Because the matter never went forward in the Circuit Court, there was no opportunity for the petitioner to seek reimbursement of the fees associated with the Writ of Prohibition from the Circuit Court. Pursuant to West Virginia Code § 48-1-305(c), the attorney fees incurred by petitioner to defend the writ were unnecessary.

Decree of Divorce, p. 6 ¶ 12.

The Family Court lacked jurisdiction to award fees in a civil action that was filed in circuit court. Because the Family Court exceeded its authority, the Court is reversing the award of the attorney fees associated with Mr. Owen's petition for a writ of prohibition. Accordingly, the Court **ORDERS** Ms. Owen to immediately return \$3,000.00 to Mr. Owen.

**Ms. Owen also asserts an error with regard to the Family Court's award of attorney fees. Ms. Owen argues that the Family Court abused its discretion by reducing the amount of the non-attorney fees and costs that were submitted by Ms. Owen as being incurred during the divorce.** As previously stated, the award of attorney fees is within the discretion of the family court. Accordingly, the Family Court was permitted to reduce the rate charged by an attorney or non-attorney staff member, as well as to determine what costs are reasonable. See Decree of Divorce, p. 7 ¶ 13. This Court will not interfere with the Family Court's discretionary judgment.

#### **Orders**

The Court **ORDERS** that the Decree of Divorce is **AFFIRMED IN PART AND REVERSED IN PART**. The Court **FURTHER ORDERS** Ms. Owen to immediately return

\$3,000.00 to Mr. Owen because the Family Court did not have jurisdiction to award attorney fees in a separate civil action filed in circuit court.

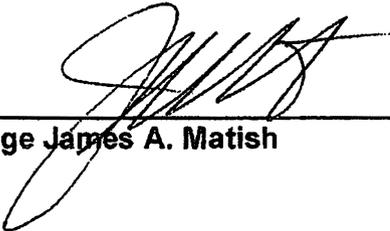
The Court **DIRECTS** the Circuit Clerk to forward certified copies of this order to the following:

**Larry Chafin**  
Counsel for Tina M. Owen  
314 South Second Street  
Clarksburg, WV 26301

**Debra Varner**  
**Allison McClure**  
Counsel for Mark B. Owen  
P.O. Drawer 2040  
Clarksburg, WV 26302

**Lori B. Jackson, Family Court Judge**  
301 W. Main Street  
Clarksburg, WV 26301

ENTER: 03/25/2013

  
\_\_\_\_\_  
Chief Judge James A. Matish

STATE OF WEST VIRGINIA  
COUNTY OF HARRISON, TO-WIT

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18<sup>th</sup>  
Family Court Circuit of Harrison County, West Virginia, hereby certify the  
foregoing to be a true copy of the ORDER entered in the above styled action  
on the 25 day of March, 2013.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix  
the Seal of the Court this 25 day of March, 2013.

Donald L Kopp II *rs*

Fifteenth Judicial Circuit & 18<sup>th</sup> Family Court  
Circuit Clerk  
Harrison County, West Virginia

