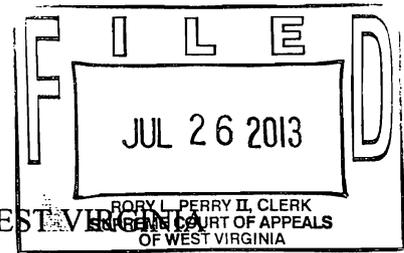


No. 13-0467



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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MARK B. OWEN,

Respondent below, Petitioner herein,

v.

(Civil Action No. 11-D-543-5)

TINA M. OWEN,

Petitioner below, Respondent herein.

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FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA  
THE HONORABLE JAMES A. MATISH

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**BRIEF IN SUPPORT OF PETITION FOR APPEAL  
ON BEHALF OF PETITIONER, MARK B. OWEN**

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF  
APPEALS OF WEST VIRGINIA

**ASSIGNMENTS OF ERROR**

(a) The Family Court of Harrison County, West Virginia, committed reversible error when it invalidated the parties' 1981 prenuptial agreement upon a finding that Tina Owen did not have the requisite knowledge of its contents and legal effect.

(b) Assuming *arguendo* that the Family Court of Harrison County, West Virginia, did not commit reversible error when it invalidated the parties' prenuptial agreement, the Family Court of Harrison County, West Virginia, committed reversible error when it failed to give Mark Owen credit for the inheritance he received during the marriage.

(c) Assuming *arguendo* that the Family Court of Harrison County, West Virginia, did not commit reversible error when it invalidated the parties' prenuptial agreement, the Family Court of Harrison County, West Virginia, committed reversible error when it failed to give Mark Owen credit for his pre-marital worth.

**STATEMENT OF THE CASE**

The central issue in this case surrounds the validity of a prenuptial agreement entered into by Mark B. Owen and Tina Owen on December 8, 1981. A.R. 1-6. The prenuptial agreement provides that the parties intended to marry in the near future following execution of the agreement, that they had disclosed their property interests and sources of income to each other, that they desired to release all rights each of them may have by reason of marriage in the property or estate of the other, and that they waived and released all rights either may have to alimony or other financial benefits from the other in the event of divorce or marital discord. A.R. 1-6.

Mr. Owen was born on May 19, 1943 and was thirty-eight (38) years old at the time of the marriage at issue in this action. Ms. Owen was born on November 9, 1958 and was twenty-three

(23) years old at the time of the marriage.<sup>1</sup> The parties were married in Harrison County, West Virginia, on December 12, 1981. A.R. 12.

Importantly, this was not the first marriage for either party. Both parties had been previously married and had minor children at the time of the 1981 marriage. A.R. 1-6, 38:10-12. Having dated extensively prior to the 1981 marriage, the parties moved in together in Mr. Owen's home in approximately November 1981. A.R. 226:7-13. In addition to having been through the "trial" of a previous divorce, Ms. Owen was employed at the time of the execution of the agreement as a floor secretary for United Hospital Center and had training as a nursing assistant.<sup>2</sup> A.R. 172:22-24.

At the time of the 1981 marriage, Ms. Owen had knowledge of Mr. Owen's financial condition. As stated above, prior to signing the December 8, 1981 prenuptial agreement, Ms. Owen lived in Mr. Owen's home, which was in the same development as his two rental houses, and she knew of his job, car, boat, and motorcycle. A.R. 157:10-159:1 (time stamps 05:36:13-37:51). Moreover, in the December 8, 1981 prenuptial agreement, Mr. Owen disclosed that he had a net worth of \$94,000.00. A.R. 4. Further, Ms. Owen knew a prenuptial agreement had to do with distribution and that Mr. Owen wanted a prenuptial agreement because the divorce from his first wife cost him so much money. A.R. 117:2-3, 209:20-210:1.

Finally, Ms. Owen had the opportunity to consult with an attorney of her choosing prior to signing the December 8, 1981 prenuptial agreement. Multiple people, including her father and sister, did not want her to sign the prenuptial agreement. A.R. 197:21-198:1, 221:9-14. Despite this, through her own choice and four days prior to the wedding, Ms. Owen chose not to retain or consult with an attorney of her choosing and signed the agreement, without bothering to extensively read it.

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<sup>1</sup> There was some discrepancy between the testimony of Ms. Owen concerning her age at the time of the execution of the document and the actual documentation of her age. However, the agreement was executed on December 8, 1981, and, by verified documents, Ms. Owen was born on November 9, 1958, making her slightly older than twenty-three (23).

<sup>2</sup> Though the transcript states that Ms. Owen had training as a "nurse anesthetist," her training is actually as a "nursing assistant."

A.R. 102:18-20 (time stamps 12:48:30-38). Just prior to signing the agreement, Ms. Owen stated to C. David McMunn, Esquire, who drafted the prenuptial agreement, that she did not have anything and did not want anything from Mr. Owen, and Mr. McMunn generally reviewed what a prenuptial agreement was and what was in the agreement she was signing, with Ms. Owen acknowledging she understood. A.R. 81:13-24, 119:23-121:10, 138:3-7 (time stamps 12:17:30-18:01, 01:09:20-11:37, 01:35:16-37).

A civil action for divorce was commenced on or about August 18, 2011, in the Family Court of Harrison County, West Virginia, by Ms. Owen against Mr. Owen. A.R. 7-12. The Petition alleges three (3) causes of action for divorce:

1. Irreconcilable Differences;
2. Voluntary Separation; and,
3. Cruel and Inhuman Treatment.

A.R. 7-12. The Petition, in Count XIII, further alleges the parties entered into a prenuptial agreement “under the conditions of fraud, duress, and coercion, to wit the parties were both represented by the same counsel in the formation and execution of the document.” A.R. 7-12. Finally, the Petition requests in (2.) of the Prayer “[t]hat the pre-nuptial agreement of the parties be set aside as it was entered into under fraud, duress and coercion and continues to be based upon fraud.” A.R. 7-12.

On or about August 30, 2011, the Family Court of Harrison County, West Virginia, entered an Order Setting Temporary Hearing And/Or Final Divorce Hearing. Said Temporary Hearing was scheduled for September 26, 2011. On September 12, 2011, Mr. Owen served his Answer to Petition and Counterclaim in which he admitted the grounds for divorce of irreconcilable differences and voluntary separation and denied the allegation of cruel and inhuman treatment, denied that the prenuptial agreement was entered into under the conditions of fraud, duress, and coercion and denied that the parties were represented by the same counsel in the formation and execution of the document. A.R. 258-263. In his Counterclaim, Mr. Owen requested a divorce on the grounds of adultery and cruel and inhuman treatment. A.R. 258-263. In his prayers for relief in both the Answer

and Counterclaim, Mr. Owen requested that the Family Court of Harrison County, West Virginia, enter an order enforcing the prenuptial agreement. A.R. 258-263.

At the Temporary Hearing on September 26, 2011, the Family Court of Harrison County, West Virginia, heard argument and proffer from the parties' counsel related to the prenuptial agreement and decided that the issue of the validity of the prenuptial agreement needed to be resolved before the court could proceed to granting a divorce and any such relief permitted by the West Virginia Code, including an equitable distribution of property and spousal support. In fact, in Paragraph 5 of the Temporary Order Following Hearing On Petitioner's Motion for Emergency Expedited Relief, entered on October 28, 2011 and drafted by Ms. Owen's counsel, the court stated, "[p]rior to their marriage the parties entered into an Antenuptial Agreement, the validity of which is at issue in this matter, and which needs to be resolved prior to the Court addressing other issues raised by the parties." A.R. 264-268. Thereafter, the Family Court of Harrison County, West Virginia, ordered that the parties conduct such discovery as would be necessary for the court to consider and rule on the issue of the validity of the prenuptial agreement at a hearing on December 14, 2011. A.R. 264-268. During the period of time between the Temporary Hearing and December 14, 2011 prenuptial agreement hearing, the parties conducted discovery, including limited written discovery and depositions of Ms. Owen, Mr. Owen, and C. David McMunn, Esquire.

At the December 14, 2011 prenuptial agreement hearing, the Family Court of Harrison County, West Virginia, heard testimony from the parties, C. David McMunn, Esquire, and Pamela Trippett, Ms. Owen's sister. Following this testimony, the family court heard argument from the parties' counsel. Further, after Ms. Owen's counsel requested that the parties submit written arguments on the issue, Mr. Owen, through counsel, filed and served "Respondent's Bench Brief on the Validity of the December 8, 1981 Prenuptial Agreement" in support of his argument that the prenuptial agreement should be enforced, which he had prepared in anticipation of the hearing. A.R. 269-400. The family court ordered that Ms. Owen's counsel could file a response to the bench brief on or

before January 4, 2012, after which point the court would rule on the validity of the prenuptial agreement.

Following Ms. Owen's December 22, 2011 filing of her Response to the Respondent's Bench Brief the Family Court of Harrison County, West Virginia, entered its Order Pertaining to Enforceability of Antenuptial Agreement on January 9, 2012, ruling that the parties' prenuptial agreement is unenforceable. A.R. 401-413, 414-419. Specifically, the family court ruled that the agreement was executed voluntarily and under circumstances free from fraud, duress, or misrepresentation but was not executed by Ms. Owen with knowledge of its contents and legal effect. A.R. 414-419. In support of this, the family court stated in its Order that:

[a]lthough it is arguable that petitioner had the opportunity to consult with independent counsel prior to the signing of the agreement, the Court finds petitioner to be truthful in her claims that respondent assured her that Mr. McMunn represented both of their interests. *When petitioner was informed otherwise by Mr. McMunn during the meeting at which the document was signed, for whatever reason, petitioner did not question this very important discrepancy.*

Petitioner was not provided any specific explanation of the rights she was potentially waiving with regard to the assets acquired during the marriage, spousal support and child support.

Mr. McMunn testified that he did not go over the provisions of the agreement in detail with petitioner but that he discussed the general concepts of a prenuptial agreement with petitioner. Therefore, this Court concludes that petitioner did not have adequate knowledge of the contents of the Agreement and the legal consequences thereof.

A.R. 416-417 (emphasis added).

Following the invalidation of the parties' prenuptial agreement, Ms. Owen requested that she be awarded attorney's fees, both for litigating the issue of the validity of the prenuptial agreement and for pursuit of the divorce, court costs, and expert witness fees. A.R. 420-426. On January 30, 2012, in anticipation of the filing of his "Petition for Appeal and, in the Alternative, Writ of Prohibition," Mr. Owen filed a Motion for Stay with the family court. A.R. 555-558. On February 1, 2012, the Petitioner filed her Motion to Dismiss and Reply to Motion for Stay, requesting that the

court deny the stay. A.R. 559-565. On February 2, 2012, Mr. Owen filed his Response to Motion to Dismiss and Reply to Motion for Stay seemingly at or near the same time as the family court entered its Order Denying Stay of Execution. A.R. 566-570, 571-574. The family court based its denial of the request for a stay on the assertion that the January 9, 2012 order was not a final order subject to appeal and on the assertion that, because a writ of prohibition had not yet been filed and was not proper in the family court's opinion, a stay was not available to Mr. Owen. A.R. 571-574.

On February 6, 2012, Mr. Owen, believing the January 9, 2012 Order was a final order pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, filed a "Petition for Appeal and, in the Alternative, Writ of Prohibition from January 9, 2012 Order Pertaining to Enforceability of Antenuptial Agreement." A.R. 575-629. Mr. Owen also filed an Emergency Motion for Stay with the circuit court on February 6, 2012. A.R. 630-665. The Circuit Court of Harrison County, West Virginia, denied this request for relief by Order entered on February 9, 2012, finding that the January 9, 2012 Order was not a final order subject to appeal and that the writ of prohibition was not properly filed because it needed to be filed as a separate civil action with a separate complaint. A.R. 666-670.

On February 7, 2012, Mr. Owen filed his Response to Petitioner's Motion for Fees, opposing Ms. Owen's request for attorney's fees, court costs, and expert witness fees. A.R. 427-438. On or about February 21, 2012, the Family Court of Harrison County, West Virginia, entered an order requiring Mr. Owen to pay Ms. Owen Twenty Thousand Dollars (\$20,000.00) on or before March 1, 2012, which would later be characterized as attorney's fees, spousal support, equitable distribution, and/or expert witness fees. A.R. 439-441. Mr. Owen provided this payment to Ms. Owen's counsel on March 1, 2012 via hand delivery by the undersigned counsel.

Ms. Owen also filed a Motion to Compel discovery on February 8, 2012, which was set for hearing on March 12, 2012. A.R. 442-497. This motion sought the production of information requested in Ms. Owen's written discovery directed to Mr. Owen regarding all of his assets, including those protected by the December 8, 1981 prenuptial agreement. Specifically, Mr. Owen

would have to answer interrogatories, more than forty in number, regarding those assets and would have to disclose a wealth of documents pertaining to them. Mr. Owen responded in opposition to the Motion to Compel on March 8, 2012, arguing that the motion should not be resolved until the circuit court ruled on his writ of prohibition. A.R. 671-675. Not only was the discovery ordered, though the interrogatories were limited to forty, but Mr. Owen was forced to preserve his discovery rights and conduct discovery concerning Ms. Owen's assets. Given the ruling on the discovery issue, the parties also had to conduct appraisals of the real and personal property, further compounding the discovery costs.

On March 6, 2012, with firm conviction that the family court's January 9, 2012 Order Pertaining to Enforceability of Antenuptial Agreement was improper and would greatly harm him should he not receive relief from it immediately, Mr. Owen filed a "Complaint for Writ of Prohibition" with accompanying "Petition for Writ of Prohibition From January 9, 2012 Order Pertaining to Enforceability of Antenuptial Agreement with Incorporated Memorandum of Law." A.R. 676-717. On March 7, 2012, Mr. Owen filed his second Motion for Stay with the Family Court of Harrison County, West Virginia, following the filing of his Complaint for Writ of Prohibition the previous day. A.R. 718-722. Within the Motion for Stay, Mr. Owen requested that the family court stay any further discovery or court proceedings pending the resolution of the request for the Writ of Prohibition, as both parties would incur additional litigation time and expenses regarding the equitable distribution and spousal support issues that may be for naught should the request for the Writ of Prohibition be granted. A.R. 718-722.

On March 8, 2012, Ms. Owen filed her Response to Respondent's Motion for Stay, providing a proposed order denying the stay for the family court's entry. A.R. 723-734. On or about March 9, 2012, the Honorable Lori B. Jackson filed her Answer to the Writ of Prohibition. A.R. 735-738. On March 23, 2012, the Family Court of Harrison County, West Virginia, entered its Order Denying Respondent's Motion for Stay, necessitating the filing of a motion for stay with the circuit court.

A.R. 739-741. On March 30, 2012, Mr. Owen filed his second Motion for Stay with the Circuit Court of Harrison County, West Virginia. A.R. 742-766.

On or about April 4, 2012, Ms. Owen filed her “Answer to Complaint for Writ of Prohibition” with an accompanying memorandum of law in response to the writ. A.R. 767-800. On April 9, 2012, Ms. Owen filed her Response to Plaintiff’s Motion for Stay. A.R. 801-810. On April 23, 2012, the writ of prohibition action was transferred from Division 1 of the circuit court to Division 3; however, despite both parties stating in their briefs that they did not believe oral argument was necessary for the resolution of the writ of prohibition, no further action was taken on the writ until August 14, 2012, when the circuit court entered an order removing the writ action from the docket as it was deemed moot. A.R. 811-812, 813-815.

At the May 30, 2012 final hearing, the family court heard testimony from Ms. Owen; Jack Owen, the parties’ son; Melissa Womeldorff, Ms. Owen’s daughter; Loretta Jean Greathouse, Ms. Owen’s mother; Pamela Trippett, Ms. Owen’s sister; Mr. Owen; David M. Owen, Mr. Owen’s son; and, Mark F. Owen, the parties’ son. A.R. 994:13-1121:22, 917:18-938:16, 986:10-993:6, 967:3-985:16, 939:13-965:11, 1122:14-1188:23, 1189:24-1198:8, and 1199:20-1206:9. Ms. Owen also presented her second Motion for Fees to the family court at the final hearing. A.R. 889-907. Following the conclusion of testimony at the final hearing, the family court deferred ruling until post-trial briefs could be submitted and set a deadline of June 15, 2012 for such submissions. The parties were also given permission to respond to each other’s post-trial briefs by June 22, 2012.

On June 15, 2012, Mr. Owen filed and served the “Brief of Respondent, Mark B. Owen, Regarding Separate Property Issues” and Ms. Owen filed and served “Petitioner’s Post Trial Submission Regarding Issues From the Final Divorce Hearing.” A.R. 816-820, 821-849. On June 22, 2012, both parties filed and served their responses in opposition to the other’s post-trial submission. A.R. 850-858, 859-877.

On October 23, 2012, one hundred forty-six (146) days after the May 30, 2012 final hearing, the Family Court of Harrison County, West Virginia, entered its Decree of Divorce in this matter. A.R. 878-888. The family court found that irreconcilable differences had arisen between the parties and granted the divorce based upon that ground alone. A.R. 878-888 at ¶ 7. As discussed more fully below, the family court ordered an equitable distribution payment of \$417,273.00 from Mr. Owen to Ms. Owen, failing to take into account and give credit for Mr. Owen's pre-marital worth and an inheritance received by Mr. Owen during the marriage. A.R. 878-888 at ¶ 10. Further, the family court ordered that Mr. Owen continue to pay spousal support to Ms. Owen in the amount of \$1,400.00 per month<sup>3</sup> until the equitable distribution is paid in full, at which time the spousal support payment would reduce to \$25.00 permanently, with no provision for termination thereof. A.R. 878-888 at ¶ 11. Finally, the family court ordered that Mr. Owen pay Ms. Owen \$3,000.00 in attorney's fees because his previously-filed Writ of Prohibition was not set for hearing and \$15,000.00 in attorney's fees should he file an appeal regarding the decree. A.R. 878-888 at ¶¶ 12-13.

On or about November 21, 2012, Mr. Owen filed a "Petition for Appeal from October 23, 2012 Decree of Divorce" and a Memorandum of Law in support thereof with the Circuit Court of Harrison County, West Virginia. A.R. 1255-1257, 1258-1303. First and foremost, Mr. Owen argued that the family court erred when it invalidated the parties' prenuptial agreement upon a finding that Ms. Owen did not have knowledge of the agreement's contents and legal effects and upon the family court's refusal to recognize general contract law, despite authority from this Court that general contract law applies to prenuptial agreements. *See*, A.R. 1267, 1275-1277, 1279-1280, 1283-1284, and 1286. Second, and relevant to this appeal, Mr. Owen argued that the family court erred when it failed to give Mr. Owen a credit towards the equitable distribution for the inheritance he received during the marriage and his pre-marital worth. A.R. 1271, 1293, and 1295.

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<sup>3</sup> Mr. Owen's monthly spousal support obligation was increased to \$1,800.00 per month by the Circuit Court of Harrison County, West Virginia, when it ruled on Mr. Owen's April 18, 2013 Motion for Stay.

On November 17, 2012, Ms. Owen filed her Response to Petition for Appeal from October 23, 2012 Decree of Divorce on Behalf of Appellant Mark B. Owen and her Counter Petition for Appeal from October 23, 2012 Decree of Divorce. A.R. 1310-1351, 1352-1358. Clearly, Ms. Owen disputed Mr. Owen's contentions contained within his Petition for Appeal; however, she also asserted in her Counter Petition that the family court's finding of fact regarding her budget and income for the purposes of determining spousal support was clearly erroneous and that the family court abused its discretion in attributing Ms. Owen income in its decision concerning spousal support, in failing to include Ms. Owen's vehicle debt in the equitable distribution analysis, by reducing the amount of attorney's fees and costs submitted by Ms. Owen and failing to award Ms. Owen the entire amount of her attorney's fees and costs incurred during the divorce litigation, and by failing to award Ms. Owen permanent alimony higher than \$25.00 per month. A.R. 1310-1351, 1352-1358.

The Circuit Court of Harrison County, West Virginia, held a hearing on the parties' appeals on January 9, 2013, during which it heard extensive argument from both sides on the various appellate issues. A.R. 1367-1428. On March 25, 2013, the Circuit Court of Harrison County, West Virginia, issued its Order Affirming Decree of Divorce in Part and Reversing Decree of Divorce in Part, wherein it affirmed the family court's rulings invalidating the prenuptial agreement and not giving Mr. Owen credit for his pre-marital worth and inheritance and reversed the family court's ruling awarding Ms. Owen \$3,000.00 in attorney's fees for Mr. Owen's writ of prohibition. A.R. 1429-1450. Specifically, the circuit court found that the family court did not commit clear error or abuse its discretion in finding that Ms. Owen executed the agreement without knowledge of its contents and legal effects. A.R. 1434-1435. Further, the circuit court found that the family court did not abuse its discretion in failing to give Mr. Owen credit for the inheritance and his pre-marital worth, largely because the prenuptial agreement governing his pre-marital worth and his use of separate funds during the marriage was invalidated by the family court. A.R. 1436-1438.

## SUMMARY OF ARGUMENT

Mr. Owen appeals the March 25, 2013 decision of the Circuit Court of Harrison County, West Virginia, which affirmed the Family Court of Harrison County's October 23, 2012 Decree of Divorce and January 9, 2013 Order Pertaining to Enforceability of Antenuptial Agreement. The family court committed reversible error when it found that the parties' 1981 prenuptial agreement was not enforceable. The family court based this determination on a finding that Ms. Owen did not have knowledge of the contents and legal effects of the agreement. Importantly, and as discussed more fully below, Ms. Owen knew generally what the prenuptial agreement was and the effect of it — it had to do with distribution upon divorce, would prevent her from getting anything from Mr. Owen, and would avoid another divorce costing Mr. Owen a lot of money. Further, Mr. Owen's attorney, C. David McMunn, reviewed the prenuptial agreement with Ms. Owen prior to her execution of it.

The family court based its decision on the fact that Mr. McMunn generally reviewed the document with Ms. Owen, instead of providing a specific explanation of the rights she was potentially waiving, and the belief that without such a specific explanation, Ms. Owen could not develop the requisite knowledge for the document to be enforceable. The basis of the family court's decision shows a clear misapplication of the common law and ethical rules in West Virginia. Mr. McMunn could not have provided a specific explanation of Ms. Owen's rights because then he would have created a reasonable belief in Ms. Owen that he represented her, thereby violating the prohibition against dual representation and divesting her of the right to seek independent counsel. Further, Ms. Owen, a reasonably-intelligent adult, was capable of understanding what she was signing, and in fact did understand what she was signing, and was duty bound to read the document before affixing her name to it and agreeing to be bound by it. Thus, because Mr. McMunn did not commit dual representation and generally explained the document to Ms. Owen and because Ms. Owen was a reasonably-intelligent adult with an understanding of the document she was signing, Ms. Owen had the requisite knowledge of the contents and effects of the agreement. The agreement

should be enforced and the family court's decisions regarding equitable distribution and spousal support should be reversed.

Assuming that the family court's decision, and thus, the circuit court's decision, regarding the invalidity of the prenuptial agreement is correct, the family court still committed reversible error in its determination of the parties' equitable distribution. Mr. Owen came into the marriage with separate property worth approximately \$94,000.00, as evidenced by the parties' prenuptial agreement. Nothing was presented to the contrary to dispute that figure. Mr. Owen also inherited \$142,912.00 in real and personal property during the marriage. Both Mr. Owen's pre-marital worth and his inheritance are separate property pursuant to the West Virginia Code. The great weight of the evidence shows that Mr. Owen abided by the parties' 1981 prenuptial agreement in maintaining the separate nature of this property and never intended to give all or any portion of the separate property to the marital estate. Therefore, because Mr. Owen came into the marriage with and inherited separate property, those figures should be deducted from the marital estate in determining the equitable distribution figure.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rules 10(c)(6) and 18 of the West Virginia Rules of Appellate Procedure, Mr. Owen requests that this Court grant him the opportunity to present oral argument on the issues herein. Oral argument is necessary, pursuant to the requirements listed in Rule 18(a) of the West Virginia Rules of Appellate Procedure. The parties have not waived oral argument. W. Va. R. App. P. 18(a)(1). The issues presented in this appeal are not frivolous, and are of critical importance in the area of domestic relations, particularly with respect to prenuptial agreements and their effect on future equitable distribution determinations. W. Va. R. App. P. 18(a)(2). Though authoritative decisions exist relative to prenuptial agreements, an analysis of the requisite knowledge of the contents and effects of those agreements and on a parties' reliance upon such agreements when determining later equitable distribution decisions is warranted. W. Va. R. App. P. 18(a)(3). Though

the issues and documentary evidence are fully presented in the brief, the decisional process will necessarily be aided by oral argument, as it is anticipated the Court may have specific questions concerning the factual development. W. Va. R. App. P. 18(a)(4).

As such, Mr. Owen respectfully requests the opportunity to present a Rule 19 oral argument as this case involves assignments of error in the application of settled law, the unsustainable exercise of discretion where the law governing the discretion is settled, and a result against the great weight of the evidence presented to the family court. W. Va. R. App. P. 19(a)(1)-(3).

### **STANDARD OF REVIEW**

This appeal is before this Court upon the March 25, 2013 Order Affirming Decree of Divorce in Part and Reversing Decree of Divorce in Part issued by the Circuit Court of Harrison County, West Virginia, which upheld the family court's invalidation of the prenuptial agreement and refusal to give credits to Mr. Owen for his pre-marital worth and inheritance. In reviewing a final order entered by a circuit court judge upon a review of a final order of a family court judge, the family court's findings of fact are reviewed under a clearly erroneous standard, the application of the law to the facts is reviewed under an abuse of discretion standard, and questions of law are reviewed *de novo*. Syl. Pt. 1, Ware v. Ware, 224 W. Va. 599, 687 S.E.2d 382 (2009). The meaning of contractual provisions is a question of law and is reviewed *de novo*. Id. at 603-604, 386-387.

### **ARGUMENT**

#### **I. The Order Affirming the Invalidation of the Parties' Prenuptial Agreement Should Be Reversed.**

When one party to a prenuptial agreement was represented by counsel during the drafting and signing process and the other was not, the party seeking the agreement's enforcement bears the burden of establishing its validity. Syl. Pt. 5, Ware v. Ware, 224 W. Va. 599, 687 S.E.2d 382 (2009). A prenuptial agreement is valid when it has been executed voluntarily, with knowledge of its content and legal effect, under circumstances free of fraud, duress, or misrepresentation; however, though independent advice is a requirement for the presumption of validity, *independent advice of counsel*

*is not a requirement for a determination of validity when the agreement is understandable to a reasonably intelligent adult and both parties have had the opportunity to consult with counsel. Id.* at Syl. Pt. 2 (emphasis added).

In Ware, the parties married after two years of cohabitation when the wife was twenty-three and the husband twenty-eight. Id. at 601. Mrs. Ware was working as an x-ray technologist at the time of the marriage, while her husband worked at “The Pizza Place of Bridgeport, Inc.” at the Meadowbrook Mall. Id. at 601-602. At the time of the execution of the prenuptial agreement, Mr. Ware owned a forty-nine percent (49%) share of the business. Id. at 602.

A few months before the Wares’ wedding, Mr. Ware asked a local attorney to draft a prenuptial agreement to protect his interest in the business. Id. Approximately ten days before the wedding, the attorney presented a draft of the agreement to the parties, who read the agreement that day for the first time. Id. Mrs. Ware objected to the waiver of spousal support in the draft agreement, and the attorney then removed the provision upon Mr. Ware’s agreement. Id. The next day, the parties signed the prenuptial agreement, along with a Certification of Attorney, at the attorney’s office. Id. The Certification of Attorney, one for each party, provided that the attorney had consulted with each party and advised them of their legal rights. Id.

In the years following the execution of the prenuptial agreement and the parties’ marriage, Mr. Ware acquired interests in several other business ventures and eventually bought his business partner’s share in The Pizza Place, becoming the sole owner of the corporation. Id. Twelve years after signing the prenuptial agreement and marrying, Mrs. Ware filed for divorce. Id. During the divorce, a dispute arose over The Pizza Place, with Mr. Ware arguing it was separate property pursuant to the prenuptial agreement and Mrs. Ware arguing that the prenuptial agreement was invalid and the business should be marital. Id.

During the prenuptial agreement hearing, Mr. Ware testified that he had obtained the prenuptial agreement to protect his interest in The Pizza Place. Id. at 602-603. Mrs. Ware testified that she

signed the agreement because Mr. Ware would not marry her without it and that she did not know anything about the agreement until ten days before the wedding, after she had already bought her wedding dress and tickets for a cruise to the destination of the wedding. Id. at 603. She also testified that Mr. Ware had told her she did not need to obtain her own attorney because his attorney would represent both of them. Id. The attorney who drafted the agreement testified at the hearing that his typical practice was to advise individuals of their right to seek independent counsel but that he believed he could properly counsel both parties because they did not have conflicted interests at the time of the execution. Id.

The family court then invalidated the prenuptial agreement because the attorney had represented both parties and Mrs. Ware had not had an opportunity to seek independent counsel. Id. After the hearing on the equitable distribution, which, essentially, divided the value of The Pizza Place, Mr. Ware appealed to the circuit court, arguing that the invalidation was improper. Id. The circuit court reversed and remanded for further consideration of the issue by the family court. Id. On remand, the family court found that The Pizza Place was protected by the agreement, and, thus, the agreement was valid. Id.

Mrs. Ware then appealed to the circuit court, which again reversed the family court, finding that it had abused its discretion in ruling, as a matter of law, that the agreement controlled the interest Mr. Ware had acquired in the business. Id. The circuit court remanded the case back to family court to determine the value of the interest in the business. Id. After the family court awarded Mrs. Ware another value for the business, Mr. Ware appealed to the circuit court, which affirmed the decision. Mr. Ware then appealed to this Court. Id.

This Court first considered the validity of the agreement, stating initially that, where both parties are of the age of majority, they can enter into a prenuptial agreement regarding the distribution of property in a divorce. Id. at 604. The Court then looked to Gant v. Gant, 329 S.E.2d 106 (1985), which sets forth the requirements for the validity of a prenuptial agreement. Id. at 604-

605. In considering the issue of a party having the opportunity to consult independent counsel, the Ware court found it problematic that the Certification of Attorney signed by each party indicated that the attorney had “‘fully advised’ each of their ‘property rights and of the legal significance of the foregoing Agreement.’” Id. at 605. The Certification did not indicate that each had a right to independent counsel or that he advised Mrs. Ware that he was representing Mr. Ware’s interests rather than hers. Id. The court found that it appeared the attorney led the parties to believe he could represent each of their interests. Id. This dual representation violated the Rules of Professional Conduct relating to conflicts of interest, particularly an example in the comments to Rule 1.7 that an attorney cannot represent multiple parties to a negotiation when those parties have conflicting interests, and the court’s previous decisions that it is never appropriate for a lawyer to represent both parties to a divorce or separation. Id. at 605-606.

This Court further discussed the representation of parties to a prenuptial agreement, citing a Minnesota opinion that concluded that the parties to a prenuptial agreement have “fundamentally antagonistic” interests. Id. at 606. Thus, the Ware court held that one attorney may not represent, or hold himself out as representing, both parties. Id. In so holding that Mrs. Ware had been divested of her right to seek independent counsel, the Court honed in on the language of the Certification, finding that the statements that the attorney had fully advised her of her legal rights and the consequences of entering into the agreement would reasonably lead Mrs. Ware to believe that the attorney was representing her interests and that independent counsel was not necessary. Id. The Ware court invalidated the parties’ prenuptial agreement after finding that Mrs. Ware could have reasonably believed that the attorney represented her interests and that dual representation of parties to a prenuptial agreement, even insofar as just advising the non-retaining party of the rights and consequences inherently involved, is improper. Id.

Here, as discussed more fully below, the parties’ prenuptial agreement was executed voluntarily, without fraud, duress or misrepresentation. Further, C. David McMunn, Esquire, did

not represent both parties, Ms. Owen had the opportunity to consult with independent legal counsel, and Ms. Owen could not have formed a reasonable belief that Mr. McMunn represented her interests. Finally, and most importantly, the parties' prenuptial agreement was executed by two reasonably intelligent adults, with knowledge of its contents and legal effect.

**A. The Family Court Committed Reversible Error in Finding That Ms. Owen Executed the Agreement Without Knowledge of its Contents and Legal Effect.**

The finding of fact that Ms. Owen did not have knowledge of the contents and legal effect of the prenuptial agreement is clearly erroneous. Despite Ms. Owen's repeated contentions that she did not know of the contents (meaning, she did not bother to read the five-page document) or understand what a prenuptial agreement was, the great weight of the evidence and testimony does not support her contention.

During Ms. Owen's testimony, Mr. Gaydos asked,

Q: Ms. Owen, is it your position today that you did not read this agreement?

A: No, I did not. I did not see the agreement.

A.R. 102:18-20 (time stamps 12:48:30-38). Mr. Gaydos inquired of any impediments Ms. Owen may have had at the time of the execution of the agreement:

Q: At the time you signed this prenup, were you under the influence of anything that would cause you not to be able to understand what was in it?

A: Other than love, no.

A.R. 103:4-7 (time stamps 12:49:06-20).

Further, during the meeting to sign the prenuptial agreement, while the actual verbiage is unknown at this time, Ms. Owen made a statement to Mr. McMunn to the effect of "I have nothing and I want nothing from Mark," which was such an odd statement that Mr. McMunn still remembers it over thirty years later. Specifically, Mr. McMunn testified that,

A: She said she didn't have anything — I remember — it's just so unusual — she didn't have anything. She worked at the

hospital, I remember that, and we had gone over the fact that she had children and the business of who was going to be providing support for whose children and the provisions that went into the agreement. But, she said that she didn't have anything, and she didn't want anything from Mark...

A.R. 81:13-24 (time stamps 12:17:30-18:01). He remembered this impression distinctly because:

A: ...I've always said that whatever you have is 100 percent of whatever you have and people generally, particularly if you look at it from the estate viewpoint, you can have basically not much at all dying — people die with not a whole lot and you will get a big fight over it. So it is 100 percent of whatever it is. And it is unusual for somebody to say, "I have nothing." I — it's just kind of a strange thing and it just stuck in my mind. There was the issue that she had to pay — had supporting her children and she had the job to do that and then saying, "I have nothing." It was just unusual. It stuck in my mind.

A.R. 83:10-23 (time stamps 12:20:00-20:50).

Ms. Owen does not deny making that statement to Mr. McMunn; instead, she says she was rehearsed. A.R. 105:11-13 (time stamps 12:52:00-52:09). Whether this was a statement of her own thoughts or one that she allegedly rehearsed in order to be able to sign the prenuptial agreement, the statement alone indicates that Ms. Owen had knowledge of the contents and legal effects of the prenuptial agreement — she would not receive anything from Mr. Owen because she wanted nothing from him.

She was signing the agreement so that she could enter into a marriage with Mr. Owen; she knew he would not marry her without it. A.R. 109:13-16 (time stamps 12:56:38-47). She knew he had previously gone through a divorce and did not want to be as vulnerable in this new marriage as he was coming out of his previous marriage:

Q: And you — and why did Mark want this prenup?

A: He had voluntarily given his first wife a third of his pay, and it was to be used as alimony or — and we got custody of the kids a year — not quite a year after we got married, and she still got to keep the money until they were eighteen.

Q: Okay, that's what he did with his first wife.

A: Right.

Q: What was the reason he told you he wanted a prenup?

A: For legality.

Q: Okay. Do you remember, in your deposition, saying he had to have one because his first wife cost him way too much money?

A: Right.

Q: And you did say that?

A: Yeah. He volunteered it.

Q: Okay. So, you understood that a prenup had something to do with the fact that he wasn't paying out any money?

A: I wasn't sure — I just know that he — whatever it was he wanted me to sign, I would sign for him.

Q: And you understood, though, that a prenup had to do with the distribution of property?

A: I wasn't sure what was in a prenup. He just told me he wanted me to sign this because his first wife had gotten — he had to pay her.

Q: And you didn't —

A: I didn't —

Q: — draw that connection?

A: No, I did not.

Q: During your deposition on November 30th, do you recall saying that — where was that — to the question, “So you had an understanding that a prenup had to do with this distribution?” Your answer, “Yes”?

A: *I knew a prenup had to do something with the distribution,* but I wasn't sure of what a prenup was. I really — I'd never seen one or read one.

...

- Q: So, is it your testimony that, as far as you were concerned, a prenup could deal with whether the carpeting in your house had to be blue?
- A: I wasn't sure what a prenup was — had no idea, no legal training, no legal terms, no nothing.
- Q: But on the 30th of November, you said you understood it had to do with property distribution?
- A: Just from what Mark had told me.
- Q: And you understood he wanted one because his first wife cost him so much money?
- A: He did not tell me for sure that his first wife had cost him a lot of money. I really did not find out how much his first wife had cost him until we went to court for custody of his two kids.
- Q: Page 23 of your deposition, "Did he say anything else?" "Because his first wife cost him a lot of money."
- A: That's the only thing he said to me. I didn't know how much until we went to court.
- Q: Question: "Did you have an understanding as to why Mark wanted a prenup?" "He said it was his own benefit." "Anything else?" "Because his wife cost him a lot of money."

A.R. 114:19-117:15 (time stamps 01:03:05-06:46) (emphasis added); *see also*, A.R. 209:20-210:1.

Thus, Ms. Owen knew the prenuptial agreement was for the parties' benefit, to protect their separate assets; she knew it had to do with property distribution; she knew he wanted one because his first wife cost him a lot of money. She told Mr. McMunn, whether impromptu or rehearsed, she did not want anything from Mr. Owen — meaning she understood the prenuptial agreement would prohibit her from obtaining certain rights should the parties divorce. She just did not care about any of that. She had the knowledge of the contents and effects — protecting Mr. Owen, really both of the parties, from future property distributions and support — but did not care about them. She did not care about them until she filed for divorce from Mr. Owen. At that point, she wanted

distribution, she wanted support, and she wanted freed from the terms of a contract she knowingly and voluntarily, without fraud, duress, or coercion, entered into.

Ms. Owen expects others to abide by their contracts. A.R. 117:21-119:4 (time stamps 01:07:04-08:23). In fact, as an insurance agent, she assisted Mr. Owen in obtaining the parties' automobile liability insurance policy. She has never read the policy. She does not know the specific terms and conditions, but she understands that her vehicle has enough insurance that she could get a new vehicle if she was in an accident. She would expect her insurance company to abide by that insurance policy — that contract with the company — if the policy pertained to a loss incurred. She knows you get coverage from an insurance company if you pay for it — if you abide by the terms of the contract and fulfill your contractual obligations. *See* A.R. 117:21-119:4.

Ms. Owen wants to pick and choose which contracts must be enforced. If she is receiving the benefit of the contract, like one for car insurance, it had better be followed, it had better be enforced, even if she has only general knowledge of its terms and conditions. If it appears she is not receiving the benefit of a contract, like the prenuptial agreement (though, it must be pointed out, it is mutually-beneficial with the same effects on Mr. Owen as on Ms. Owen), it should not be enforced or followed because she has general knowledge of its contents and effects but chose to stick her head in the sand and not inquire further, not seek out independent counsel, and not read the contract.

Further, this was not Ms. Owen's first time at the proverbial rodeo — she had been married and divorced before. A.R. 105:24-106:2 (time stamps 12:52:36-45). While there was allegedly no property to divide coming out of that marriage, they did carry out some type of distribution because her ex-husband kept a vehicle coming out of the divorce, and Ms. Owen and her ex-husband also made a determination of child support coming out of the divorce. A.R. 116:3-8 (time stamps 12:52:45-12:53:05). All of this shows Ms. Owen had knowledge of the rights — property division and support — one could have upon the dissolution of marriage and that she knew she was waiving them by saying she wanted nothing from Mr. Owen.

Despite knowing what effect the prenuptial agreement would have, Ms. Owen signed it. It did not matter to her what it said, she was in love with him, she would have died for him, and, as the saying goes, if he told her to jump off a bridge, it appears she would have done it:

Q: With regard to this agreement, you were in love with him, and you wanted to get married. And frankly, is it true it didn't matter what that contract said, you were going to sign it?

A: I would have died for my husband.

Q: Answer my question.

A: Yes, I was in love with him. I would have died for him. If it was – if I had a choice between him and I, it would have been I.

Q: And no matter what that contract said, you would have signed it?

A: If he told me to, yes.

Q: So, you had no free will at that time?

A: I did whatever he told me to do.

Q: Did he tell you to marry him, or did he ask you to marry him?

A: If I remember right, we were laying on the couch one day and he said, "Let's get married."

Q: Did you say "No"?

A: No.

Q: You said "Yes"?

A: Yes.

Q: So you had an option?

A: Yes.

A.R. 112:12-113:11 (time stamps 01:00:26-01:27). Ms. Owen was not denied the opportunity to read the prenuptial agreement during the approximately 15-minute meeting with Mr. McMunn, she just chose not to read it in detail. A.R. 119:13-20 (time stamps 01:08:50-09:15). She signed her name

to it — agreeing to be bound by its terms and conditions — and gave it back to Mr. McMunn.

A.R.119:21-22 (time stamps 01:09:15-20).

She does not deny that Mr. McMunn reviewed the prenuptial agreement with her:

Q: Do you deny that you — that Dave McMunn went over generally what a prenup was?

A: He asked me if I knew what was in a prenup.

Q: And what did you say?

A: He went over what was in the prenup, and I was rehearsed as to what to say.

Q: So, at that point in time, right before signing, Mr. McMunn did go over what was in the prenup with you?

A: It's been thirty years, but I cannot tell you word for word what he said.

Q: I didn't ask you word for word, but he went over generally the terms of the prenup?

A: He asked me if I understood it, and I understood what my husband had told me to say.

Q: Did you or did you not agree with me earlier that he went over the terms of that agreement with you?

A: Not complete terms. I didn't know the words — the wording that was in that prenup.

Q: Did you ask?

A: No, I did not. I was told not to ask questions.

Q: But he went over them with you?

A: He — he went over just general what was in the prenup.

Q: And generally, at that time — correct me if I'm wrong — is there anything about the language... “Mark B. Owen and Tina Womeldorff, and each of them, waive and release any and all rights which either of them may have to alimony.” That's on page four, under the “Release or Marital Rights.”

A: I did not read the prenup, so I did not know that was in there.

Q: But Dave McMunn went over, you said, the basic terms of the prenup.

A: When I was meeting with Dave McMunn, I was kind of turned off so that I didn't ask questions.

A.R. 119:22-121:10 (time stamps 01:09:20-11:37). But, she acknowledged to Mr. McMunn that she understood the terms of the prenuptial agreement. A.R. 138:3-7 (time stamps 01:35:16-37).

Ms. Owen, a twenty-three year old adult, who had children and had previously been married and divorced, who had nursing training and worked as a receptionist at the hospital, was a reasonably intelligent adult capable of understanding the terms of the prenuptial agreement. Even if she did not receive a copy of the prenuptial agreement until the meeting at which she signed it, she was not denied the chance to read it; she chose not to. She was not under the influence of anything but love at the time of the signing. She understood the contents and effects of the agreement — she knew it had to do with distribution, that Mr. Owen wanted a prenuptial agreement because his ex-wife had cost him a lot of money, and that she would not get anything from Mr. Owen if the marriage dissolved — she just did not care. She did not care about the terms and effects because she loved him and wanted to marry him. She did not care to listen to Mr. McMunn generally explain the prenuptial agreement to her — she “turned off” — because she did not want to do anything to stand in the way of her trip to the altar.

Ms. Owen stuck her head in the sand and signed the contract because she wanted to get married, much like she has apparently stuck her head in the sand on her policy of automobile liability insurance, which she helped her husband obtain from her place of employment. Now that she wants to be divorced, she has decided to pull her head back out of the sand and claim lack of knowledge of the prenuptial agreement. Now that she wants to be divorced, she wants to be released from this contract she signed. Now that she has decided she wants something from Mr. Owen, the contract should not be enforced because she did not bother to read it. Such a position goes against the very nature of contract law — if you sign your name to an agreement, whether you have read it or fully

understand all of its terms, you are bound by it, no matter if you end up receiving the benefits of the agreement. She certainly expects others to abide by the terms of contracts from which she would benefit, contracts that she has not even bothered to read, but the same expectation does not flow to the other contracting party when she believes she is not reaping the benefits of the bargain. Because she knew the agreement was to protect Mr. Owen, had to do with distribution, and was to make sure a dissolution of her marriage with him did not cost him as much as the divorce from his first wife, Ms. Owen had knowledge of the contents and effects of the parties' prenuptial agreement. The family court's finding to the contrary, which the circuit court affirmed, is clearly erroneous.

**B. The Family Court Committed Reversible Error in Finding That the Prenuptial Agreement is Invalid Because Ms. Owen Lacked Knowledge of its Contents and Legal Effect.**

As discussed fully above in Section A, Ms. Owen had knowledge of the contents and effects of the prenuptial agreement. She knew it benefitted Mr. Owen, dealt with distribution, and was to make sure it would not be so costly for him to dissolve a future marriage with her as it was for him to dissolve his first marriage. Even without reading the agreement, she had this knowledge. Further, it does not matter that she did not read the agreement or may not have fully understood the terms of the agreement because general contract law governs prenuptial agreements. *See Gant v. Gant*, 329 S.E.2d 106 (1985). Thus, because the body of prenuptial agreement law in West Virginia concerning the requirement of "knowledge of its contents and legal effect" does not further elaborate on what is meant by that phrase, general contract law must be considered. It is a firmly-established rule that a party who has signed a contract will be bound by its terms and the knowledge thereof, irrespective of whether the terms thereof were read and fully understood. *See Reddy v. Community Health Found.*, 171 W. Va. 368, 298 S.E.2d 906 (1982); *Southern v. Sine*, 95 W. Va. 634, 123 S.E. 436 (1924). *See also Campbell v. Campbell*, 2007 Conn. Super. LEXIS 1038 (Apr. 24, 2007); *Simeone v. Simeone*, 525 Pa. 392, 581 A.2d 162 (1990).

Further, and most important to the family court's holding that Ms. Owen did not have the requisite knowledge of the contents and effects of the agreement to uphold it, Mr. McMunn was under no duty to, and, in fact, could not have, fully advised Ms. Owen of the contents and effects of the agreement. The basis of the family court's holding that Ms. Owen did not have the knowledge required is that Mr. McMunn did not review the provisions of the agreement in detail with Ms. Owen and did not provide specific explanation of the rights she was waiving. Such an application of the facts to the law is not only clearly erroneous but is also an abuse of discretion.

Dual representation is never appropriate in the context of the preparation and execution of a prenuptial agreement. See Ware, 224 W. Va. at 606. In Ware, this Court held that Mrs. Ware was reasonably led to believe that the attorney represented her interests because the attorney in that case fully advised Mrs. Ware of her legal rights and of the consequences associated with entering into the agreement. Id. Here, unlike Ware, the family court found that Ms. Owen had the opportunity to consult with independent legal counsel and that she was informed by Mr. McMunn that he did not represent her. A.R. 414-419. However, should Mr. McMunn have specifically explained the rights Ms. Owen was waiving and reviewed the provisions of the agreement in detail, Ms. Owen could have reasonably believed Mr. McMunn actually did represent her interests, thereby divesting her of the opportunity to seek independent counsel. Therefore, Mr. Owen and, consequently, Mr. McMunn, now find themselves in a legal "Catch 22" — Mr. McMunn advised Ms. Owen that he did not represent her, thereby preserving her opportunity to seek independent counsel, but did not explain in great detail the rights Ms. Owen was waiving, which avoided Ms. Owen forming a reasonable belief he represented her but also, according to the family court, prevents her from having adequate knowledge of the contents and effects of the agreement. Either route Mr. McMunn could have taken would have invalidated the prenuptial agreement according to the family court's reasoning.

If Mr. McMunn had fully advised Ms. Owen of the rights she was waiving, he would have divested her of the right to seek independent legal counsel, but because he did not do that, she

apparently cannot be held to have knowledge of the agreement's contents and legal effects — apparently reasonably intelligent adults are incapable of understanding contracts without being handheld by an attorney. Thus, in a broader perspective, it seems that according to the family court's reasoning, no one could be represented by an attorney in the formation and execution of a prenuptial agreement. If a person is represented and the attorney acts ethically under the Rules of Professional Conduct by avoiding either explicit or implicit dual representation, the prenuptial agreement would be invalidated based upon a lack of knowledge. If a person is represented and the attorney fully advises and explains to the other party of the rights and waivers in the prenuptial agreement, in derogation of the requirements of the Rules of Professional Conduct, the prenuptial agreement would be invalidated based upon the lack of opportunity to seek independent counsel.

Thus, in the face of Ware and the Rules of Professional Conduct, the family court abused its discretion in ruling that the prenuptial agreement was invalid when it found that Ms. Owen, a reasonably-intelligent adult who was advised that Mr. McMunn did not represent her, could not understand the contents and effects of the prenuptial agreement without Mr. McMunn explicitly explaining the rights and waivers therein. Mr. McMunn acted appropriately in advising Ms. Owen that he did not represent her and in avoiding the implications of dual representation inherent in the provision of full explanation of rights at issue in and consequences of the agreement. Mr. McMunn complied with the representation requirements of Ware twenty-eight years before its time and, thus, Ms. Owen had the opportunity to seek independent counsel. Further, because Mr. McMunn did not create a reasonable belief of representation in Ms. Owen, and because she generally understood the contents and effects of the agreement — whether she read it or not — she had the requisite knowledge, pursuant to both general contract law and West Virginia's law on prenuptial agreements to uphold the agreement. The family court's holding to the contrary, and the circuit court's order affirming the same, is reversible error.

**C. The Family Court Committed Reversible Error in Denouncing, and Thereafter Failing to Abide by, General Contract Law.**

It appears that the family court not only ignored the abundant testimony during the December 14, 2011 hearing to support the argument that Ms. Owen had knowledge of the contents and effects of the agreement but also wholly disregarded West Virginia's general contract law applicable to prenuptial agreements. It is not just the court's ruling that indicates this disregard but also the court's statements concerning general contract law that prove the family court committed reversible error in making its decision.

The family court made it abundantly clear at the prenuptial agreement hearing on December 14, 2011 that it did not believe it was required to follow any common law except that relating specifically to prenuptial agreements. At one point in the hearing, Ms. Owen's counsel asked Mr. McMunn on cross-examination, "[w]ould you agree with me that in order to knowingly waive rights that a person has that they would acquire by operation of law absent the operation of a prenuptial agreement that they would have to know what those rights are?" A.R. 96:3-7 (time stamps 12:39:46-40:05). Mr. Owen, through counsel, objected to the question as it called for a legal conclusion. A.R. 96:8 (time stamps 12:40:05-09). Ms. Owen's counsel responded that Mr. McMunn is a lawyer and "has done divorce work." A.R. 96:10-11 (time stamps 12:40:10-11). The family court overruled the objection, stating that Mr. McMunn could provide a legal conclusion. A.R. 96:12-13 (time stamps 12:40:10-13). This question goes to a legal conclusion, concerning a general contract principle, and the court voiced agreement with the question.

Later, during Mr. McMunn's redirect, the following exchange took place:

Q: Mr. McMunn, in the realm of contract law, what is the purpose of reducing an agreement to writing, generally?

A: Evidence.

Q: Of the agreement?

A: Evidence of the terms, yes. What the parties — to which the parties agree.

Q: And it is true, is it not, that the act of the conception of contract law you — as a party to that contract — you are indeed told by law that you are responsible for what you are signing?

Mr. Chafin: I've got to object, Your Honor. This is not — he has not been called as an expert in contract law. He has been asked some questions that are based upon his knowledge as a lawyer —

Mr. Gaydos: He opened the door and as a lawyer I am going into it.

The Court: Well, you think I am really going to make my decision based on what his interpretation of contract law is? Really? When there is other West Virginia law on point?

Mr. Gaydos: Yes.

The Court: Yes you do, you think I am going to base it on his —

Mr. Gaydos: No. Yes, I just want to — I understand what you are saying, Judge, and I just want to get to one point.

The Court: Okay. Go ahead. I'll allow it, but I don't know how meaningful it is. No offense intended, but there is a body of law on this issue in family court. Go ahead.

Mr. Gaydos: And there is a body of law in contract court with contract law on this issue that is very compelling.

Q: If a person fails to read a contract then later comes in and says, "I can't be bound by that contract. I did not read it." What happens in contract law?

Mr. Chafin: Objection, Your Honor. Again, this is irrelevant. It does not relate to the body of law to which you referred and it has no bearing whatsoever on this particular agreement.

Mr. Gaydos: It does, Your Honor. Reddy v. Community Health says that a person who fails to read a document to which they place their signature does so at their own peril. West Virginia 1982. And there is a line of cases going back to 1924 that says — here's another one. Southern v. Sine — "a defendant will not be heard to say later he did not know what the deed contained. It is his duty to know. The law says that he shall know. If he did not read the deeds at the time before acceptance, it was clearly his fault and negligence. Such failure to read a contract before signing it does not excuse that person from being bound by its terms."

The Court: **But we are not under general contract law here. We're just not. There is a body of family law that addresses prenuptial**

agreements, and I am not going to dissuade you from arguing the contract points. However, the family law precedents would certainly override any general contract law precedents as they do in other areas of the law.

A.R. 98:20-101:11 (time stamps 12:43:27-46:50) (emphasis added).

Not only does this exchange show that the family court did not believe, would not consider, and did not consider general contract law principles that were not addressed by the prenuptial agreement case law, but it also indicates the family court had formed an opinion on the prenuptial agreement before hearing all of the evidence — the family court indicated it would entertain testimony concerning legal conclusions on the subject of knowledgeable waiver of rights but that it would not entertain legal conclusions on other areas of general contract law, including those pertaining to an individual’s knowledge of the contents of a contract to which the individual has placed his or her name.

Later, during closing arguments from counsel, the following discussion ensued:

Mr. Gaydos: ...The one thing I would point out, in light of the Court’s earlier comment, a specific syllabus point in Gant v. Gant, which as we know was overruled on the issue of presumption of validity with one party unrepresented — in Gant v. Gant, it specifically says that standard contract principles — contract — standard contract law does apply to all prenuptial agreements, and again, I would — that’s in there, along with a string of cites that cite a variety of —

The Court: This really does not comport with the fact that they’ve stepped outside of it and made other law, but go ahead. They’ve stepped outside of standard contract law and made a body of law specific to prenuptial agreements that does not comport with standard contract law.

Mr. Gaydos: On certain issues, Your Honor, but with —

The Court: Right. So, which — which issues can we take exception with, is the issue. I mean, if they’re not willing to follow standard contract law on some issues, but others, which ones are going to be eventually included in the ones that they’re willing to take issue with?

Mr. Gaydos: Well, we go by the body of law that says now, when you look at the one main issue here is, “I didn’t read it, therefore, I’m

not responsible for it.” And the body of law is very clear that you are responsible for what you sign.

A.R. 175:5-176:7 (time stamps 05:57:34-59:05).

Here, the family court is clearly misinformed in its belief that general contract law does not apply to prenuptial agreements. Certainly, general contract law does apply — there must be an offer, acceptance, consideration, and mutuality. While this Court has set forth specific presumptions of validity and invalidity and the specific requirements one must meet to prove or disprove the same, we still must look to the general contract principles of formation and also to the ancillary considerations — such as the consideration that one who signs an agreement is said to have knowledge and understanding of the agreement by affixing one’s name to the document. While the consideration of knowledge can be supported by evidence that the person has read the agreement, it can also be supported by the extrinsic evidence of the formation and execution process, along with the person’s willingness to sign on the dotted line.

Further, the requirement of understanding is not a requirement that a person be informed of legal principles; it is a requirement that the language be such that a reasonably intelligent adult could understand it. *See Gant*, 329 S.E.2d 106. And the language, including the technical terms in a contract, is controlled by the intent of the parties when it is apparent and not repugnant to any rule of law, because the intent of an agreement, not the words, controls the contract. *See Toothman v. Courtney*, 62 W. Va. 167, 172-173, 58 S.E. 915, 917 (1907). Thus, whether Ms. Owen, Mr. Owen, or both did not understand certain legal terms in the document, the technical terms are controlled by the parties’ intent, which is indicated in the “whereas” clauses in the contract. *See* A.R. 85:7-9 (time stamps 12:22:57-23:06).

The intent of this contract was, and is, clear. The parties intended to be married within the near future. *See* A.R. 1. They desired the release of all rights that either of them might or could have by reason of the marriage in the property or estate of the other. *See* A.R. 1. Further, not only is the intent of the document contained in the whereas clauses understandable and clear, the waiver

language contained in the body of the document is understandable to a reasonably intelligent adult, even with some reference to technical terms. In Paragraph 4, "Release of Marital Rights," the agreement clearly states that "in release and in full satisfaction of all rights which, by reason of the marriage, each may acquire in the property or estate of the other, and in consideration thereof each does hereby waive and relinquish all rights...said party would otherwise acquire in the property or estate..." A.R. 4. Finally, that same paragraph states that the parties waived and released "any and all rights which either of them may have to alimony, support or other financial benefit from the other in the event discord and divorce should befall the said impending marriage." A.R. 4. The agreement, even with some use of technical terms, contains enough explanatory verbiage in plain English that the agreement is understandable to a reasonably intelligent adult.

Although the family court had apparently previously read Gant<sup>4</sup>, it persistently disregarded the directive to refer to general contract law, both in the family court's discussion of the contract principles on the record, its statements that it did not have to look to general contract law, and in its failure to abide by or even consider general contract law in its order. Thus, the family court clearly erred in refusing to apply general contract law principles to the facts presented at the December 14, 2011 hearing. Should the family court have done so, then the prenuptial agreement should have been upheld because Ms. Owen is bound by the agreement to which she fixed her name, had knowledge of the agreement, and the agreement was understandable to a reasonably intelligent adult. Therefore, because the family court refused to apply the general contract law principles to the decision and ignored the evidence and law that would have supported an order validating the agreement, the family court's order, and the circuit court's order affirming it, should be reversed, and the December 8, 1981 agreement should be upheld.

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<sup>4</sup> "So, I've read the case law, except for I'll confess I have not read the case law from November, last month. Was it Lee or something? I've not read that one." A.R. 174:15-18 (time stamps 05:56:48-57:00).

**II. Assuming *Arguendo* That the Family Court’s January 9, 2012 Order Invalidating the Parties’ Prenuptial Agreement is Appropriate, the Family Court Committed Reversible Error in the October 22, 2012 Final Divorce Decree.**

Assuming the family court’s January 9, 2012 Order invalidating the parties’ prenuptial agreement is upheld, the family court still committed reversible error and abused its discretion, as discussed more fully below, when it failed to give Mr. Owen credit for his (1) inheritance received during the marriage and (2) pre-marital worth.

**A. The Family Court Committed Reversible Error When It Failed to Give Mr. Owen Credit for the Inheritance He Received During the Marriage.**

The family court stated in its Decree of Divorce that,

[d]uring 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.

A.R. 878-888 (emphasis added). The family court’s ruling on the issue of the inheritance is erroneous because undisputed testimony was presented as to the approximate amount of the payoff and that the funds were not commingled. In fact, the family court acknowledged that it heard no rebuttal testimony to refute that Mr. Owen inherited the funds, kept them in a separate account and used the funds to pay off the mortgage on the home that is in his separate name to pay. A.R. 1218:6-14. Further, as recognized by the family court’s ruling, Mr. Owen did not have an intent to provide a gift to the marital estate.

West Virginia Code § 48-1-237(4) defines as separate that “[p]roperty acquired by a party during marriage by gift, bequest, devise, descent or distribution.” W. Va. Code § 48-1-237(4). Mr. Owen testified at the final hearing that he inherited stock and cash from his parents in a total amount

of \$127,912.06 and real property, bringing the total amount of his inheritance to \$142,912.06 after Mr. Owen received \$15,000.00 from the sale of the real property in 2001. A.R. 1145:10-22, 1146:4-9. Mr. Owen further testified that he sold all of the stock and paid off the mortgage on his home, which was titled only in his name. A.R. 1146:18-24. The \$15,000.00 proceeds from the sale of the real property was deposited into either his checking or savings account, both of which were titled only in his name. A.R. 1147:1-6.

In order for this property to be included in the equitable distribution calculation, it would have had to have been a gift to the marital estate or commingled with marital property, though Mr. Owen, of course, denies that any such marital estate existed according to the terms of the prenuptial agreement. “Where, during the course of the marriage, one spouse transfers title to his or her separate property into the joint names of both spouses, a presumption that the transferring spouse intended to make a gift of the property to the marital estate is consistent with the principles underlying our equitable distribution statute.” Syl. Pt. 4, Whiting v. Whiting, 183 W. Va. 451, 396 S.E.2d 413 (1990). However, the joint titling gives rise only to a rebuttable presumption, which can be overcome by a showing that the transferring spouse did not intend to transfer the property to joint ownership. Id. at 459.

First and foremost, the portion of the inheritance used to pay off the house was not used for a piece of property that was jointly titled, and the proceeds from the inherited real property were put in an account that was not jointly titled. Therefore, the presumption of a gift to the marital estate does not arise and the funds were not commingled. Second, the value of each portion is clear — the inheritance totaled \$142,912.06, of which \$15,000.00 came from the sale of the real property and the net represented to value of the liquid assets. Third, as the family court recognized, there was no intent to make a transfer to the marital estate — Mr. Owen, based upon the plain language of the parties’ prenuptial agreement, was transferring separate assets to separate assets. He intended, in good faith, to enhance the value of what he believed were separate assets. Therefore, because the inheritance was not a gift to the marital estate and was not commingled, the entire portion of the

inheritance — \$142,912.00 — should be deducted from the total value of the marital estate. The family court’s failure to do so, and the circuit court’s order affirming this decision, is reversible error.

**B. The Family Court Committed Reversible Error When it Failed to Give Mr. Owen Credit for the Value of His Separate Estate Prior to Marriage.**

The family court, in valuing the marital estate, failed to deduct Mr. Owen’s pre-marital worth of approximately \$94,000.00.<sup>5</sup> Property acquired before marriage or that acquired during marriage in exchange for property acquired before marriage is separate property not subject to equitable distribution. W. Va. Code §§ 48-1-237(1)-(2). Mr. Owen testified at the final hearing that he had approximately \$94,000.00 in pre-marital assets, as reflected in the parties’ prenuptial agreement. While assets were purchased during the marriage using some of the pre-marital property or proceeds from such pre-marital property, the testimony and record are clear that the assets were not commingled, or, in the case of the Canaan Valley condominium, were not intentionally commingled; thus, any assets purchased during the marriage using the pre-marital assets are still Mr. Owen’s separate property. Mr. Owen, given that he had these assets prior to marriage and used them for the purchase of assets that were not marital in nature, is entitled to a deduction from the marital estate of the entire amount of his pre-marital worth of \$94,000.00. The family court’s failure to give Mr. Owen (or Ms. Owen, for that matter), a deduction for this pre-marital worth is reversible error.

**CONCLUSION**

The family court committed reversible error when it invalidated the parties’ prenuptial agreement. Mr. McMunn did not represent both parties, as acknowledged by the family court, and Ms. Owen had knowledge of the contents and effects of the prenuptial agreement. She knew that the prenuptial agreement had to do with distribution, would prevent her from getting “anything” from Mr. Owen, and that Mr. Owen wanted it because the divorce from his first wife cost him a lot of money. Simply because Mr. McMunn did not fully review the meaning and ramifications of every single provision of the agreement with her does not divest her of this knowledge. In fact, Mr.

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<sup>5</sup> Petitioner’s pre-marital worth of approximately \$7,000.00 was also not deducted from her portion of the marital estate.

McMunn could not have ethically reviewed the document with her in such a manner because then he would be acting in such a way that Ms. Owen could have inferred that he represented her interests. Because he acted appropriately in reviewing the document with her but not advising her concerning the document, he did not commit dual representation, and Ms. Owen still had the requisite knowledge to enter into the agreement.

Further, the family court erred in failing to give Mr. Owen credit for his inheritance and pre-marital worth. Inheritances and pre-marital worth are separate property according to the West Virginia Code. With respect to the inheritance, it was not commingled and was not given to the marital estate. With respect to Mr. Owen's pre-marital worth, given that he had these assets prior to marriage and used them for the purchase of assets that were not marital in nature, Mr. Owen should receive a credit for those assets, instead of them being lumped in to the marital estate.

**WHEREFORE**, based upon all the foregoing reasons, the Petitioner, Mark B. Owen, respectfully requests this Honorable Court enter an Order granting his Petition for Appeal and permitting oral argument on said Petition, if the Court deems said oral argument necessary. Additionally, Mr. Owen further requests this Honorable Court enter an Order reversing family court's and circuit court's rulings regarding the invalidation of the parties' pre-nuptial agreement, or, in the alternative, enter an Order reversing the equitable distribution issues regarding his inheritance and pre-marital worth.

Respectfully submitted this 26th day of July, 2013.

**Petitioner herein, MARK B. OWEN,  
By Counsel:**



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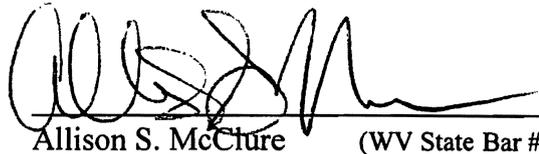
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**CERTIFICATE OF SERVICE**

This is to certify that on the 26th day of July, 2013, I served the foregoing "***BRIEF IN SUPPORT OF PETITION FOR APPEAL ON BEHALF OF PETITIONER, MARK B. OWEN***" and "***APPENDIX OF EXHIBITS***" upon counsel of record via hand delivery as follows:

Debra V. Chafin, Esquire  
Larry W. Chafin, Esquire  
314 South Second Street  
Clarksburg, WV 26301  
*Counsel for Respondent*

A handwritten signature in black ink, appearing to read 'Allison S. McClure', written over a horizontal line.

Allison S. McClure (WV State Bar #10785)