

NO. 13-0467

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MARK B. OWEN,

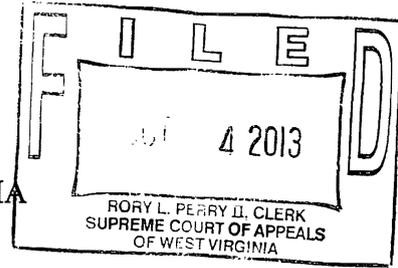
Respondent below, Petitioner herein.

v.

(CIVIL ACTION NO. 11-D-543-5)

TINA M. OWEN,

Petitioner below, Respondent herein.



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

**BRIEF IN SUPPORT OF RESPONSE TO PETITION FOR APPEAL
ON BEHALF OF RESPONDENT, TINA M. OWEN**

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

Comes now the Petitioner below and Appellant/Respondent herein, Tina M. Owen, by and through counsel, Larry W. Chafin, and submits her Response to Respondent below and Appellant's *Petition for Appeal of October 23 2012 Decree of Divorce and Memorandum of Law* in support thereof.

RESPONSE TO ASSIGNMENTS OF ERROR

- (a) The Circuit Court properly upheld the Family Court's Order Invalidating the Parties' Antenuptial Agreement under *Ware v. Ware* because the Appellee Lacked Knowledge of its contents and legal effect and the Circuit Court properly applied West Virginia law governing the formation of valid prenuptial agreements.
- (b) The Family Court properly invalidated the parties' prenuptial agreement and did not err by refusing to give Appellant credit for the inheritance he received during the marriage.
- (c) The Family Court properly refused to give Mark Owen credit for his pre-marital worth.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent/Appellee (hereinafter "Mrs. Owen") agrees with Appellant that a central issue in this case involves the invalidity of the Antenuptial Agreement entered into by the parties on December 8, 1981, four (4) days before their marriage on December 12, 1981. Appellant was thirty eight years old at the time of the marriage and had been through a divorce that "cost him a lot of money" and Mrs. Owen was twenty three years old at the time of the marriage and had been through a divorce that involved only her husband's car with respect to equitable distribution.

Contrary to Appellant's assertion, Mrs. Owen testified that she did not go through a trial in the course of that divorce.¹(Appellant's Brief at 2). Ms. Owen's un rebutted testimony in the hearing before this court at the trial of the Antenuptial Agreement matter on December 14, 2011 was that she never went through any hearing or trial in the course of her previous divorce, that she entered into a settlement agreement that involved no property distribution other than her first husband's car, and that the parties agreed on the amount of child support that she would have received from her ex husband had he paid it.

Mrs. Owen had very little information about Appellant's financial condition at the time the Antenuptial Agreement was signed and at the time of their marriage. (Appendix Exhibit C at 141; December 14, 2011 hearing disc at 11:28:00-11:30:00). She was generally aware of his real estate holdings and vehicles, although she did not know exactly who owned the cars he and his son used and she had no idea of their value. (Appendix Exhibit C at p. 123, ll. 2-18) She also did not know about his financial accounts, investment accounts or retirement accounts because he did not share that information with her. (Appendix Exhibit C at p. 54, l. 12 – p. 55, l. 17)

Mrs. Owen could not afford to engage an attorney to review the Antenuptial Agreement signed on December 14, 1981, a fact known to the Appellant. (Appendix Exhibit C at p. 110, ll. 13-14). Appellant assured her and her family that his attorney would take care of it for both of them. She had not been provided a copy of it to review prior to sitting down with C. David McMunn to sign it and was not provided a copy of it then. (Appendix Exhibit C at p. 126, l.17 – p. 127, l.3; p. 129, ll.17-20). She did not have a copy of that agreement until she filed for divorce in 2005, after which the parties reconciled and she withdrew that Divorce Petition. (Appendix

¹ Even Appellant refers to Appellee as having "been through the "trial" of a previous divorce" – the parentheses around trial having been used by Appellant.

Exhibit C at p. 107, ll. 1-3; p. 130, ll. 6-11)

When she went to Mr. McMunn's office on December 4, 1981 to sign the Antenuptial Agreement prepared by Mr. McMunn, Mrs. Owen had no knowledge about prenuptial agreements, wasn't sure what a prenup was – had no idea, had no legal training and knew no legal terms. (Appendix Exhibit C at p. 104, l. 17 -21; p. 115. L113-22; p. 116, ll. 18-p. 117, l. 1; p. 131, ll. 12-14). And she did not read the agreement while she was at Mr. McMunn's office. Her only knowledge about the agreement was from what Appellant had told her. (Appendix Exhibit C at p. 131, ll. 12-14). While at his office, Mr. McMunn went over the agreement with her generally, and not over the complete terms of the agreement, and she responded to him as she had been rehearsed by Appellant and she did not ask questions, as she was instructed to do by Appellant. (Appendix Exhibit C at p. 119, 113- p. 122, l. 13; p. 105, ll. 11-23).

Contrary to Appellant's assertions in his Brief, Ms. Owen did not have knowledge of Appellant's financial condition at the time the prenuptial agreement was entered into because Appellant did not disclose ANY of his financial information to her prior to the execution of the document on December 8, 1981. The testimony of both parties in the December 14, 2011 at trial bore that out. (Appendix Exhibit C at p. 54, l. 12 – p. 55, l. 17; p. 157, l. 1 – p. 159, l. 14) Appellant admitted in his deposition and again at trial that he did not disclose any of his monetary assets to Ms. Owen prior to the execution of the prenuptial agreement. Consistent with his admission that he did not disclose his financial information to Ms. Owen, she testified that she did not know what his income was, had no idea that he had any stock ownership, had no idea what if any retirement accounts, savings accounts, checking accounts, mortgages or other debts he had before signing the prenuptial agreement, and Appellant did not provide any testimony that in any measure disputed that testimony. (*Id.*).

The assertion that Ms. Owen had the opportunity to consult with an attorney before signing the prenuptial agreement is patently misleading and contrary to the evidence. Ms. Owen testified that she could not afford to hire an attorney at the time she entered into the prenuptial agreement, that Appellant was aware that she could not afford to engage an independent attorney to review the document (notwithstanding the fact that she was not provided a copy of it prior to its execution) and that she was told by Appellant that she did not need to because his attorney would handle it for both of them, a fact verified by Ms. Owen's sister Pamela Trippett, who was a participant in that conversation and testified to that fact at the December 14, 2011 hearing. (Appendix Exhibit C at p. 144, l. 21 – 145, l. 9) Ms. Owen testified that the first time she set eyes on the document was when she and Appellant went to Dave McMunn's office to sign it, and that her husband had rehearsed her and told her she was not to read through it while there. (Appendix Exhibit C at p. 128, ll. 11 -20).

Even after she signed the document, having been instructed at the time the Agreement was signed not to read it or to ask any questions or the wedding would be off, she was not provided a copy of the document until 24 years later when she first filed for divorce against Appellant in 2005, which is when she first discovered the unconscionable one-sidedness of the document. (Appendix Exhibit C at p. 107, ll1-7)

Beginning with the last paragraph on page 3 and continuing through page 10 of his Brief, Appellant sets out in detail the procedural history of this case, which is correct in all material respects. Mrs. Owen will not burden the Court file with a recitation of that procedural history. Mrs. Owen does note that Appellant's belief about the finality of the Family Court's January 9, 2012 Order (p.6) and his firm conviction that Order was improper and would greatly harm him should he not receive relief from it immediately (p.7) are not part of the procedural posture of the

case and Mrs. Owen does not agree with those characterizations.

On October 1, 2013 Mrs. Owen filed a *Motion on Behalf of Appellee Tina M. Owen to Suspend Rules and Allow Filing of Response Memorandum* which has not been ruled upon by this Court as of the date of this filing.

Appellant has provided a comprehensive Appendix that with the exception of a transcript of the December 14, 2011 hearing before the Family Court, (a copy of the disc from that hearing is provided by Appellant as Exhibit C), which will be referred to by Appellee throughout this Response unless specified otherwise.

SUMMARY OF ARGUMENT

Mrs. Owen contends that the Circuit Court of Harrison County, West Virginia, Chief Judge James A. Matish, did not err in its findings or conclusions in its March 25, 2013 decision affirming the October 23, 2012 *Decree of Divorce* and the January 9, 2012 *Order Pertaining to Enforceability of Antenuptial Agreement*.

With respect to the validity of the November 30, 1981 Antenuptial Agreement between the parties, the Family Court correctly resolved conflicting evidence presented regarding the formation of the agreement and Ms. Owen's lack of knowledge about Appellant's financial status, the rights she was waiving by entering into the agreement, and the legal effect and import of the agreement. It was undisputed that Ms. Owen was not represented by counsel prior to the agreement being signed by the parties and that Appellant was, by C. David McMunn, who modified a previously drafted Antenuptial Agreement he had drafted for Appellant and his prior fiancée, which Agreement was presented to Ms. Owen and the contents of the agreement were explained to her to some degree. Appellant concedes that Mr. McMunn did not provide Ms. Owen with a detailed or specific explanation of her rights under the agreement and did not represent her, regardless of

any belief to the contrary she may have had at the time. Ms. Owen contends that while in general contract law principles are applicable to the formation of any contract, including an antenuptial agreement, to the extent that *Gant v. Gant*, 174 W.Va. 740, 329 S.E.2d 106 (1985) and *Ware v. Ware*, 224 W. Va. 599, 687 S.E.2d 382 (2009) modify general contract law with respect to prenuptial agreements, the principles articulated in those cases govern with respect to the presumption of invalidity of an antenuptial agreement when only one party is represented by counsel during the formation and execution of the agreement and impose a condition that the parties entering into the agreement have knowledge of the agreement's contents and legal effect, which are provisions unique to prenuptial agreements. The Family Court and Circuit Court correctly applied the provisions of *Ware*, and accordingly the determination by those courts that the Antenuptial Agreement in this matter is invalid should be affirmed.

The Harrison County Circuit and Family Courts did not err in their respective determination and affirmation of the equitable distribution calculation between the parties. The *approximately* \$94,000.00 value that Appellant claims to have entered the marriage with was nothing more or less than a self-serving summary of properties that he owned at the time of the marriage that he prepared and that was completely unsupported by any underlying documents. The Family Court heard evidence related to the claimed value of those assets and properly determined in part that because (a) the values were not supported by any documents evidencing the value of each item claimed, (b) were reflected on a schedule prepared by the Appellant that was appended to the Antenuptial Agreement that the Court had ruled was unenforceable and (c) because Ms. Owen testified that she did not know what holdings Appellant had at the time of the marriage, and Appellant conceded that he did not make complete financial disclosure of his assets and debts, it would not give him credit for those assets in equitable distribution. With respect to the property

Appellant inherited, the Family Court correctly found that Appellant quite simply failed to carry the burden of establishing that the inherited money was not commingled with money presumed to be marital under W.Va. Code § 48-1-233 and decided that because he could not demonstrate that the monies he inherited were not commingled with marital funds when *inter alia* a portion of them was used to pay off debt on the marital dwelling it would not exclude the inherited property from the marital estate for purposes of equitable distribution.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Ms. Owen does not believe oral argument is necessary for this Court to issue a decision in this matter. While the issues are not unimportant to the parties, and Ms. Owen concedes that the provisions of Rule 18 (a)(1) & (a)(2) may apply to Appellant's request for oral argument, the provisions of Rule 18 (a)(3) & (4) do not. Authoritative decisions exist with respect to each issue raised by Appellant and the issues were developed at trial, have been considered by two courts below and are fully capable of, and have been fully briefed.

Accordingly, Ms. Owen does not believe that oral argument is necessary and resists Appellant's request for the same.

STANDARD OF REVIEW

While Rule 10 (c) does not require a Standard of Review section to be submitted to this Court in the briefs, Appellant has correctly identified that applicable standard of review as set forth in Syl. pt. 1 of *Ware*, supra.

ARGUMENT

- I. **The Circuit Court's Order Affirming the Family Court's Order Invalidating the Parties' Antenuptial Agreement was Proper Under *Gant v. Gant* and *Ware v. Ware* and Must be Affirmed.**

West Virginia has clearly set forth the standards that apply to determine the validity of a prenuptial agreement. Syllabus point 2 of *Gant v. Gant* 174 W. Va. 740, 329 S.E.2d 106 (1985) imposed the requirement that with respect to prenuptial agreements, in order for the agreement to be held valid, the agreement must have been executed voluntarily, with knowledge of its content and legal effect, under circumstances free of fraud, duress, or misrepresentation.

2. "The validity of a prenuptial agreement is dependent upon its valid procurement, which requires its having been executed voluntarily, with knowledge of its content and legal effect, under circumstances free of fraud, duress, or misrepresentation; however, although advice of independent counsel at the time parties enter into a prenuptial agreement helps demonstrate that there has been no fraud, duress or misrepresentation, and that the agreement was entered into knowledgeably and voluntarily, such independent advice of counsel is not a prerequisite to enforceability when the terms of the agreement are understandable to a reasonably intelligent adult and both parties have had the *opportunity* to consult with independent counsel."

Syl. Pt. 2, *Gant, supra*.

Appellant's assertion that Mrs. Owen entered into the prenuptial agreement voluntarily is only true if the Court completely ignores Mrs. Owen's testimony that she (a) had no opportunity to consult with an attorney before signing the agreement, (b) was not provided a copy of the agreement either before or after it was signed,² (c) was rehearsed by Appellant about what she could and could not say to his attorney, (d) she believed his attorney was representing both their interests in drafting the agreement based upon Appellant's repeated representations that Mr. McMunn would represent both of them in the drafting of the agreement, and (e) that she had no idea what Appellant's net worth was or what rights she was forfeiting when she signed the agreement. It is difficult, indeed impossible, to find a single element from Syllabus Point 2 of

² Mrs. Owen testified that she eventually got a copy of the agreement in 2005 – 24 years after it was executed – when her attorney requested a copy during her prior divorce suit against Appellant. Why she was not provided a copy of the agreement the day it was signed is a question that goes unanswered.

Gant that Appellant meets.

In *Ware v. Ware*, 224 W. Va. 599, 687 S.E.2d 382 (2009) the Supreme Court of Appeals reiterated the *Gant* standards but reversed the previously applied presumption of validity of an prenuptial agreement and clarified the burden of proof required to prove the validity of such an agreement when one party is represented by counsel and the other party is not.

5. For the presumption of validity to apply to a prenuptial agreement, both parties to that agreement must be represented by independent counsel. Moreover, where one party to a prenuptial agreement is represented by counsel while the other is not, the burden of establishing the validity of that agreement is on the party seeking its enforcement. To the extent that *Gant v. Gant*, 174 W. Va. 740, 329 S.E.2d 106 (1985), and its progeny hold otherwise, they are overruled.

Syl. Pt. 5, *Ware, supra*.

Ware v. Ware, supra, changed the standard for establishing the validity of prenuptial agreements. Prior to *Ware*, the burden of establishing the invalidity of a prenuptial agreement was on the party seeking to invalidate it. See, *Gant v. Gant*, 174 W. Va. 740, 329 S.E.2d 106 (1985). *Ware* established the presumption that if one party was represented by counsel in the matter, the burden to prove the validity of a prenuptial agreement falls onto the party seeking to enforce its provisions, and that if one attorney represented both parties to a prenuptial agreement, the agreement is void; dual representation never being allowed under the Rules of Professional Conduct. What Appellant fails to understand is that the foregoing standard is wholly inconsistent with the standards applicable to general contract law provisions as asserted by the Respondent and completely ignores the requirement that a party to a prenuptial agreement have “knowledge of its content and legal effect.” *Id.*, at Syl. Pt. 2. In this case, the burden to prove the validity of the agreement under the standard set forth in Syllabus Point 2 in *Gant* and *Ware* fell onto the Appellant pursuant to Syllabus point 5 of *Ware*. The Appellant utterly failed to carry his burden of showing

that Mrs. Owen had any knowledge of the contents and legal effect of the agreement. Accordingly the Family Court correctly found the agreement to be unenforceable and the Circuit Court correctly affirmed that decision.

The above standards are the culmination of a line of cases that ultimately placed the burden of proof of the validity of a prenuptial agreement on the party represented by counsel if either party was not. Prenuptial agreements will be held as valid only if they are executed voluntarily, with knowledge of their content and legal effect, and under circumstances free from fraud, duress, or misrepresentation. In finding that the Antenuptial Agreement between the parties was unenforceable for reasons discussed hereinbelow, the Family Court properly applied the standards in *Gant* and *Ware* to the parties' Antenuptial Agreement, and accordingly its decision that the Antenuptial Agreement at issue was invalid and unenforceable must be upheld as was found by the Circuit Court.

A. The Family Court Correctly Found That Mrs. Owen Executed the Agreement Without Knowledge of its Contents and Legal Effect

The Appellant's argument rests almost solely on the application of general principles of contract law regarding the formation of a contract to the Antenuptial Agreement at issue in this case – general principles that are contrary to and conflict directly with the specific requirements related to prenuptial agreements.³

Appellant makes the nonsensical argument that because West Virginia law “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 to explain that phrase. There are

³ The terms “Antenuptial Agreement” and “prenuptial agreement” will be used interchangeably throughout this Response.

neither undefined arcane nor technical terms that require any resort to interpretation by reference to general contract law contained in that phrase from *Gant*. Certainly “knowledge”, “contents” and “legal effect” are terms that are readily understandable and have no arcane application in contract law beyond their respective commonly understood meanings. Indeed Mrs. Owen is unable to find any definition in the case law of West Virginia where “knowledge”, “contents” or “legal knowledge” have *ever* been defined or explained beyond their commonly understood meanings, and Appellant points out none. Accordingly, resort to general contract law principles as set forth in non prenuptial contract law cases is neither necessary nor appropriate in this matter.

Appellant sought to hold Mrs. Owen responsible for knowing what is in the parties’ Antenuptial Agreement although she had not read it and had no idea what was in it, and accordingly could not have had the requisite knowledge required by *Gant* and *Ware*. Appellant’s argument is circuitous and confusing, apparently believing that although she did not read the agreement and its contents were not explained to her, much less in the context of what legal effect the agreement had, because she could have read it, could have gotten an attorney and had a general description of the agreement by C. David McMunn, she did understand the contents and legal effect of the agreement. Appellant asserts that because Mrs. Owen had a general knowledge that ONE term – distribution - appeared in the agreement, she somehow knew what was in that agreement and what legal effect its contents had.⁴ In fact, despite Appellant’s lawyer’s efforts to show that Mrs. Owen knew what was in the Antenuptial Agreement, the term “distribution” does not appear in that document. Instead the term “distributive share” a term that has a specific definition and applies only to the laws of descent and probate, and has no application to a divorce situation, is in the

⁴ Ironically, distribution is a term that would have needed definition since it can be used to refer to the separation of property upon a marriage’s dissolution or the rights of a spouse to part of the estate of her spouse upon his death.

document. (See Appendix Exhibit A at p. 4). On the other hand Appellant pretends that because West Virginia law does not elaborate on what “knowledge of its contents and legal effect” means, this Court must consider general contract law, which does not have that requirement, to divine its meaning in the context of an Antenuptial Agreement. He then goes on to say that the Family Court’s finding that Mrs. Owen did not have the requisite “*Gant*” knowledge was because Mr. McMunn did *not* explain the agreement’s contents and legal effect to her. Aside from the obvious problem of trying to have it both ways, Appellant is wrong and misstates the Family Court’s ruling. Rather, the Family Court noted that “Regardless of whether petitioner (Mrs. Owen) was under the impression that that Mr. McMunn represented her, petitioner did not have independent counsel...” (1/9/12 *Order* at p. 3, Appendix Exhibit I, p. 416) and applied the standard set forth in Syllabus point 5 of *Ware*. The Family Court went on to note that it did “not find that petitioner executed the Agreement with knowledge of its contents and legal effect.”

The Court noted that Mrs. Owen “was not provided any specific explanation of the rights she was potentially waiving with regard to assets acquired during the marriage, spousal support and child support” *Id.*, at p. 4 (Appendix Exhibit I, p. 417), but did not attribute the cause of that lack of explanation to Mr. McMunn any more than to the fact that Mrs. Owen was not represented by independent counsel and had not read the agreement. Moreover, to the extent that any fault was attributed by the Court to Mrs. Owen’s lack of counsel, it is was attributed to the Appellant by resolving conflicting accounts of what Appellant told Mrs. Owen prior to her executing the document. “... [T]he Court finds petitioner [Mrs. Owen] to be truthful in her claims that respondent [Appellant] assured her that Mr. McMunn represented both of their interests...” *Id.*, at p. 3 (Appendix Exhibit I, p. 416).

Appellant, ignoring Mrs. Owen’s clear testimony to the contrary, argues that the great

weight of the evidence fails to support Mrs. Owen's assertion that she did not read the Antenuptial Agreement and did not have knowledge of its contents or legal effect, pointing only to the assumption that the prenup was for the Appellant's benefit and had to do with distribution. Appellant ignores or wholly discounts Mrs. Owen's testimony that "I wasn't sure what a prenup was – had no legal training, no legal terms, no nothing" and that her understanding that the prenup had something to do with property distribution was based "[j]ust from what Mark had told me" despite citing that testimony in his Memorandum. (Respondent's Brief at p. 20; Appendix Exhibit C, pp. 116, l. 21 - 117, l. 1).

Respondent's comments about Petitioner's automobile insurance policy, aside from being offensive, are irrelevant since unlike in the case of a prenuptial agreement, there is no requirement that any party have any knowledge of the contents and legal effect of an automobile policy for it to be binding upon the insurance company that drafted it. *See, e.g. Keffer v. Prudential Ins. Co. of America*, 153 W. Va. 813, 172 S.E.2d 714 (1970); *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W. Va. 337, 332 S.E.2d 639 (1985). As with prenuptial agreements, there is a body of law in West Virginia governing when coverage will or will not be provided under an automobile policy (with prenuptial agreements the issue is whether they are or are not valid and enforceable). The knowledge requirements of the body of law regarding deeds or employment contracts generally, as with automobile policies, is inconsistent with and has no application to prenuptial agreements any more than the specific knowledge requirement in *Gant* applies to deeds, employment contracts or insurance contracts. It is apparently completely lost on the Appellant that there are different requirements regarding the validity and enforceability of different types of contracts, and he would apply a generic set of contract principles selectively drawn from dissimilar types of agreements to

prenuptial agreements, ignoring the specific requirements for the validity of any of those agreements regardless of type.

After setting out a lengthy quote from the December 14, 2011 hearing that manifestly evidences Mrs. Owen's almost total lack of knowledge regarding antenuptial agreements in general and the contents and legal effect of the agreement at issue in this case in particular, Appellant asserts that Mrs. Owen knew what effect the prenuptial agreement would have. (Appellant's Brief at pp. 18-21). It is beyond nonsensical to assert that her having not read the document, having no idea what the contents of the document were, having no legal training, having no knowledge of legal terms, "no nothing" and without any independent advice of counsel, Mrs. Owen knew the contents of the prenuptial agreement and what legal effect those contents would have. And Appellant concedes that during the fifteen minute meeting with Mr. McMunn "she [Mrs. Owen] just chose not to read it [the agreement]." (Appellant's Memorandum at p. 22; Appendix Exhibit C at p. 119, ll. 13-20; Dec. 14, 2011 hearing disc at 1:03:05-06:46)

As Mrs. Owen testified, "He asked me if I understood it, and I understood what my husband told me to say." And she went on to explain that while Dave McMunn went over the agreement generally⁵ he did "Not [go over] complete terms. I didn't know the words-the wording that was in the prenu... He -- he just went over general (sic) the prenu... I did not read the prenu, so I did not know what was in there." (Appendix Exhibit C at pp. 120, ll.15 – 121, l.6; Dec. 14, 2011 hearing disk at 01:09:20–11:37). Regardless of why she signed the agreement or anything she may have said that stuck in Dave McMunn's head from 30 years before, the "knowledge of its

⁵ It is difficult to determine what Appellant believes Dave McMunn's role in the explanation of the Antenuptial Agreement was. At one point he went over the contract generally with the Appellee (Appellant's Brief at p. 20), and at another he was under no duty to, and in fact, could not have, fully advised the Appellee of the contents and effects of the agreement." (*Id.* at p. 22)

content and legal effect” requirement of *Gant* is not met in any respect. Nothing Appellant tries to assert under the general contract law he advocates this court apply obviates the *Gant* requirement of knowledge of the prenuptial agreement contents and legal effect. If she did not have the agreement to read before or after the meeting with Mr. McMunn and did not read it during that meeting, and if Mr. McMunn did not explain the contents or legal effects of the provisions of the agreement, how can Appellant hope to demonstrate that the required knowledge from *Gant* is met to hold the agreement valid? In short, he cannot.

To borrow a phrase from Appellant’s own brief, Appellant simply sticks his head in the sand to ignore the fact that West Virginia has developed a body of law specifically regarding the validity of prenuptial agreements that has evolved to the state of the law as expressed in *Ware v. Ware*.⁶ Importantly, Respondent ignores the fact that Respondent’s misrepresentations to Petitioner, her father and sister and his coaching of the Petitioner about what she could and could not say in the presence of his lawyer if they were to marry as they planned led to her not reading the agreement. Although the Family Court did not so find, Appellants repeated misrepresentations themselves may have risen to the level that the agreement was not entered into voluntarily and under conditions free of fraud, duress or coercion. Regardless, this Court need not find that to affirm the Circuit Court and Family Court’s decisions.

B. The Family Court Properly Found That the Antenuptial Agreement is Invalid Because Mrs. Owen Lacked Knowledge of its Contents and Legal Effect and the Circuit Court Properly Affirmed the Family Court

Appellant draws a distinction without a difference between the factual error asserted in the prior section which he claims to be clearly erroneous and the application of the facts found

⁶ The more recent case of *Lee v. Lee*, decided in 2011, did not change the standards expressed in *Ware* and did not address issues raised in this matter.

by the Family Court that he also asserts were clearly erroneous to the law,⁷ and an abuse of discretion. (Appellant’s Brief at p. 25).

Appellant talks out of both sides of his mouth. He states first that Mrs. Owen had knowledge of the contents and effects of the prenuptial agreement then two sentences later states “[e]ven without reading the agreement, she had this knowledge.” Which is it - it cannot be both unless Mr. McMunn explained the contents and legal effects of the agreement to her, which depending upon which side of the razor’s edge that Appellant tries to balance his explanation falls – whether it was general enough and did not advise her of the contents and legal effects of the agreement sufficiently not to run afoul of dual representation proscription of Rule 1.7 of the Rules of Professional Conduct and *Ware* or whether it was specific enough to advise her of the contents and legal effects, which would place him in the position consistent with Appellant’s representations and her understanding that Mr. McMunn did represent her interests with respect to the agreement. Appellant then goes on to cite *Gant* to support his contention that “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.” This is nonsense – *Gant* says no such thing. The evidence was clear and undisputed that Mrs. Owen did not read or have the opportunity to read the agreement before she signed it. (See Appellant’s Brief at pp. 17, 20 & 23-24; Appendix Exhibit C at pp. 102, l. 18 – 104, l. 21; p.108, ll. 10-15 pp. 110, l. 13 – p. 111, l. 13; Dec. 14, 2011 hearing disc at 12:48:30-38; 01:03:05-06:6:46 & 01:09:20-11:37). Moreover, Appellant’s contention flies in the face of the piece of *dicta* he previously cited from *Gant*. As noted herein below, that *dicta* was not applied, but was stated in the context of whether “it [is]

⁷ The clearly erroneous standard is not appropriately applied to an application of law to the facts.

required that a party be advised by independent counsel before an agreement to which he or she sets his or her hand is enforceable.” *Gant, supra*, 174 W.Va. at 745.

Appellant asserts that because West Virginia law does not elaborate on what “knowledge of its contents and legal effect” means, this Court must consider general contract law, which does not have that requirement, to divine its meaning in the context of an Antenuptial Agreement. (Appellant’s Brief at p. 25). As noted above, there are no terms in Syllabus point 2 of *Gant* that need to be explained, defined or interpreted by reference to general contract law. Those are common terms that have no meaning in the law individually or as a phrase other than their commonly understood meanings. Moreover, Appellant does not cite to any general contract law that explains, defines or interprets any of the terms in that syllabus point that Appellant claims need explanation, definition or interpretation.

The cases cited by Appellant do not provide the guidance Appellant claims. *Reddy v. Comm. Health Found of Man*, 171 W.Va. 368, S.E.2d 906 (1982) dealt with whether a non-compete clause in an employment contract was reasonable, and *Southern v. Sine*, 95 W.Va. 634, 123 S.E.2d 436 (1924) dealt with whether a deed contained an accurate metes and bounds description. While *Sine* did consider whether Mrs. Sine could complain that she did not know what was in the deed she signed and claimed had a fraudulently inserted clause, unlike in this case she was provided a copy of the deed to review “a few days” before she was to execute it and was represented by counsel. These cases are hardly the appropriate source of an explanation, definition or interpretation of the terms contained in the syllabus point of a case examining the validity and enforceability of a prenuptial agreement when those cases do not use the phrase or terms that are supposedly in need of explanation through examination of those cases. In fact, Mrs. Owen’s counsel can find no definition or explanation in West Virginia law of the terms

“knowledge”, “contents” or “legal effect,” individually or used together, and Appellant provides none.

Appellant’s assertion that Mrs. Owen was not deprived of any opportunity to consult with independent counsel before signing the Antenuptial Agreement is at odds with the testimony of Mrs. Owen at trial that she could not afford an attorney, that Appellant assured her, her father and her sister that Mr. McMunn would represent both of them and that she relied upon that representation in signing the document. (Appendix Exhibit C, pp. 104, l. 22 – 105, l. 4; 108, l. 7109, l. 12; 110, l. 9 – 111, l. 2) Mrs. Owen most certainly did not have the opportunity to consult with an attorney before entering into the agreement. Her testimony was clear and undisputed that she could not afford to hire an attorney and that she was not provided a copy of the document to review before signing it and first saw it when it was presented to her for her signature. Appellant could not recall giving her a copy prior to December 8, 2011, but “was sure” he did. Indeed.

Contrary to Appellant’s assertion that the prenuptial agreement reflected that she had the *opportunity* to consult with an attorney, the document asserted that she “*has had* the advice of counsel” (Appendix Exhibit A at p. 4) which is flatly contrary to the undisputed evidence that aside from C. David McMunn, she did not have *any* advice of counsel. Even Mr. McMunn and Appellant testified to this factual discrepancy between what was in the agreement and what actually occurred prior to its signing. (Appendix Exhibit C at p. 55, l. 18 – p. 56 l7; p. 91, ll. 5-8) Respondent cannot even cite to the language of the document itself in making this argument since it is patently contrary to the evidence presented at trial. Ms. Owen testified that at the time she signed the agreement she did not know what a prenuptial agreement was, that she had not entered into any contracts that she could recall prior to this one and that at the time she signed the

agreement she had a G.E.D. and worked as a floor secretary at United Hospital Center answering the telephone and dealing with patients' family members. In a bit of legal and temporal sleight of hand that would require Ms. Owen to possess and apply knowledge before she acquired it, Respondent's counsel unsuccessfully attempted to demonstrate that her *subsequent* training as an insurance agent somehow imparted to her knowledge about contracts she should have had before signing the agreement.

Moreover, as noted above, *both parties* testified that there was an almost complete lack of asset disclosure by the Appellant (Appendix Exhibit C, pp. 54, l. 12 – pp. 55, l. 5), and Mrs. Owen testified that she was not even aware of the extent of Respondent's tangible assets (she was unsure how many houses he owned, and was not aware that the car driven by his son was actually his), much less his financial condition or net worth. (Appendix Exhibit C at p. 135, ll. 9 – 14) This distinction between the facts of this case and the facts in *Pajak v. Pajak*, 182 W. Va. 28 385 S.E.2d 384 (1989), is striking. With respect to disclosure of assets before a prenuptial agreement was signed, it is difficult to imagine two more dissimilar sets of facts. Importantly, the subject of this prenuptial agreement was broached with the wife only *after* the decision to marry was made and less than a week before the marriage occurred.

Try as he might, Appellant's counsel never had Mrs. Owen admit, concede or even suggest that she had any knowledge of the contents or legal effects of the Antenuptial Agreement at issue in this case when she signed the document.

C. The Family Court Properly Applied West Virginia Law Governing the Formation of Valid Prenuptial Agreements and the Circuit Court Properly Affirmed that Decision

Appellant devotes a significant portion of his brief (pages 28-32) to an attempt to apply

general contract law principles to Mrs. Owen that stand in direct conflict with the specific requirements of *Gant* and *Ware*, and never reconciles the *Ware*'s knowledge requirement and the general contract principle that intent of the parties governs over the technical terms in the contract, all the while failing to acknowledge that the contract was actually developed for Appellant's prior paramour (referred to herein as the Linkous agreement), and with the exception of names and reference to the parties' respective children, was not changed at all. (See Appendix Exhibit N at p. 521-525). It is difficult to fathom how the "whereas" clauses in an Antenuptial Agreement drafted for the Linkous agreement and were not developed between these two parties, but later appeared in the agreement between Appellant and Mrs. Owen, clauses (albeit clauses related to the parties' respective children were added to the Linkous prenuptial agreement), and were not seen, read or whose legal effects were explained to Mrs. Owen before she signed the agreement could possibly reflect the parties' intent. It is beyond understanding how the Appellant would insist upon the application of general contract principles, among which would if applied, impose upon a party to a prenuptial agreement constructive knowledge of its contents (and presumably legal effect) that the party had not seen, read, had any conception of or had explained to her by any attorney when she signs her name to the document without benefit of counsel when the clear, unambiguous and specific requirements of *Gant* are directly to the contrary of that application.

The singular legal principle upon which appellant rests his argument that Syl. pt. 2 of *Gant* and *Ware* has no application is the following bit of dicta from *Gant*:

Obviously, general contract law governs prenuptial agreements, 2 S. Williston, *A Treatise on the Law of Contracts* § 270 B (3d ed. 1959), but nowhere in the law of contracts is it required that a party be advised by independent counsel before an agreement to which he or she sets his or her hand is enforceable. The basic requirement of a prenuptial contract is fundamental fairness (as we shall define this term *infra*) under the totality of the circumstances.

Gant, supra, 174 W.Va. at 745.

It is noteworthy that the singular question to which the foregoing applies in relation to the validity of a prenuptial agreement is whether the party was advised by independent counsel before signing the agreement – a fact that is not in dispute in this matter and in fact is conceded at length by Appellant. Mrs. Owen was not represented by independent counsel. Neither *Gant* nor *Ware* require that both parties be represented by counsel, but the presumption that arises under *Ware* if one party is and one is not is clear, and that presumption was not overcome by Appellant. It is further noteworthy that in *Gant* the Court specifically found that:

In the case before us, the record shows no overbearing behavior on the part of Larry; Elana does not even assert that if she had wanted to consult with independent counsel Larry would have discouraged her, nor does Elana assert that Larry induced her to sign the prenuptial agreement through fraud.

Id.

The differences between the *Gant* facts and the assertions of Mrs. Owen in this case could not be more stark. Whether Appellant was overbearing unlike in *Gant* is difficult to determine since Justice Neely did not further elaborate on how the Court determined that Dr. Gant was not. In this case, Mrs. Owen alleged that Appellant indeed did dissuade her from seeking independent counsel, and knowing that she could not afford to engage counsel he assured her and her family that his attorney would represent both of their interests. And while Mrs. Gant did not assert that Dr. Gant induced her to sign the agreement through fraud, Mrs. Owen did indeed make that assertion, and continues to assert that Appellant misled Mrs. Owen about the contents and effect of the Antenuptial Agreement.

And the cherry picking of a very small piece of dicta from *Gant* in an attempt to liken this case to *Gant* is galling given the factual differences between the two cases. Both parties in *Gant* were middle aged; only Appellant in this matter was middle aged, Mrs. Owen was only 23 years

old at the time of their marriage. There was no mention of any attorneys involved in *Gant*; Appellant alone was represented by an attorney in this case. The divorce in *Gant* occurred only five years after the prenuptial agreement was entered into so no unforeseen circumstances (including the divorce) had arisen between when the agreement was entered and the time of the divorce; over thirty years elapsed between the time the agreement was signed and the divorce occurred in this case, the parties each changed jobs and careers and had children and developed a successful business.

While the “knowledge and legal effect” requirement of *Ware* is unique to Antenuptial Agreements, Respondent completely ignores the fact that the legal construct of estoppel which he seeks to apply to Mrs. Owen without calling it the same, applies to him as well and that by (1) misrepresenting to Petitioner that his attorney would handle the prenuptial agreement for both of them and (2) that if they were to marry then Petitioner must lie to his attorney and say she had read and understood the agreement and (3) that she could ask no questions of his attorney about the agreement and (4) even going so far as to coach her as to what she must tell his attorney when they went to his office to sign the agreement, he is estopped he from asserting that any reliance on her part on those misrepresentations – which were clearly and emphatically testified to by the Petitioner – serves to estop Respondent from attempting to assert that the Petitioner failed to have the document reviewed by an attorney under the general contract law principles he would apply in contravention of *Gant* and *Ware*’s knowledge of content and legal effect requirement. “In antenuptial agreements a confidential relationship exists between the contracting parties and it is the duty of the prospective husband to fully disclose the amount of his property and to deal fairly with his prospective bride and to honestly carry out the provisions of the contract.” *Gieseler v. Remke*, 117 W. Va. 430, 432, 185 S.E. 847, __ (1936). That requirement to deal fairly with his

prospective bride arising from that confidential relationship went totally lacking in this case.

Appellant makes the offensive and inaccurate statement that the Family Court is “clearly misinformed in its belief that general contract law does not apply to prenuptial agreements.”

(Appellant’s Brief at p. 31) The Family Court instead correctly explained to Appellant’s counsel:

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.**

(Appellant’s Brief at p. 29-30.)

The sole issue regarding the formation of the prenuptial agreement that Appellant fails to understand is specifically overridden by Syl. Pt. 2 of *Ware* and not subject to general contract law principles is the requirement that the party entering into the prenuptial agreement have knowledge of its content and legal effect. Appellant would have this court in effect overrule with a piece of dicta the specific knowledge requirement reflected in a syllabus point in the case (*Gant*) in which the dicta appears AND in the subsequent case (*Ware*) in which the dicta appellant relies on does not appear. If Appellant is correct, Syl. pt. 2 of *Gant* should have and would have been phrased to reflect general contract law or subsequently modified in *Ware* from its form in *Gant* to reflect that the knowledge requirement did not apply. That it was not so phrased or modified evidences this Court’s intent that the requirement that the party have knowledge of the contents and legal effects of the prenuptial agreement actually applies to prenuptial agreements, such as the one at issue in this matter, notwithstanding general rules of contract formation applicable to contracts other than prenuptial agreements that conflict with that knowledge requirement.

Appellant’s citation to *Toothman v. Courtney*, 62 W. Va 167, 58 S.E.2d 915 (1907) aside from being quaint, cherry picks even the dicta in that case. Indeed, the one partial citation from

Toothman is a quotation from Chief Justice Kent of the New York Supreme Court to illustrate that in the case of some contracts (*Toothman* involved a contract that was either a gas and oil deed or a lease) “Courts not infrequently restrain the operation of such terms so as to effectuate the clear intent of the parties, deducible from the instrument as a whole, viewed in the light of its subject-matter and the situation of the parties.” Since Chief Justice Kent served as Chief Justice of the New York Supreme Court in 1804 until no later than 1814, and died in 1847, it is not practical to retrieve that case to determine in what context the comment was made. It is difficult to understand how that case, or *Toothman* for that matter, could possibly overrule *Gant* or *Ware* and serve as authority to apply in the face of those cases, which require that a party have “knowledge of its content and legal effect, under circumstances free of fraud, duress, or misrepresentation” Syl. Pt. 2, *Gant*, *supra*. Appellant simply cannot and does not acknowledge that this specific requirement related to prenuptial agreements stands in contrast to and overrides any general contract principles to the contrary.

What is manifestly clear is that Appellant is completely unable to cite any West Virginia law or any case since *Ware* that applied the general principles of contract law urged by Appellant as applicable to this case to uphold the validity of a prenuptial agreement where the party challenging the validity of the agreement did so on the basis that he (or she) was not represented by counsel and failed to read the agreement before signing it. *See, e.g. Teed v. Teed*, (No. 12-0421, 5/17/2013) (This Court upheld an antenuptial agreement where both parties were represented by independent counsel although wife claimed she had not read the agreement in its entirety and she had inadequate assistance from her counsel). Had the Family Court applied general principles of contract law that are at odds with the specific requirements as set forth in Syl. pt. 2 of *Gant*, it would have erred if it found by application of those general principles that the Antenuptial

Agreement was valid although none of the requirements of *Gant* had been met. And had the Circuit Court reversed the Family Court's invalidation of the prenuptial agreement, it would have had to ignore *Gant* and *Ware* to do so.

II. If the Family Court's January 9, 2012 Order Invalidating the Parties' Prenuptial Agreement was Correct, the Family Court Did Not Err with Respect to the Issues Claimed as Error by the Respondent

Underlying almost all of the Appellant's remaining assignments of error is (1) a willful neglect of the fundamental definition of marital property under W. Va. Code § 48-1-233(1) as being "all property and earnings acquired by either spouse during a marriage ... regardless of the form of ownership ... whether individually held...or held by the parties in some form of co-ownership...", (2) the fact that it was Appellant's burden to prove to the Court that any property he claimed was his separate property had not been transmuted into marital property by commingling it with marital property, and (3) that the Family Court, sitting as the trier of fact in the divorce action, has the ability to hear the evidence, judge the credibility of the witnesses, and resolve disputed evidentiary matters based upon its observations during the trial. In each of the assignments of error alleged by the Appellant, Appellant ignores one or all of these basic tenets.

A. The Family Court Did Not Err by Refusing to give Appellant Credit for the Inheritance he Received During the Marriage

Appellant correctly identified that portion of the Decree of Divorce related to the Family Court's decision to include in equitable distribution that portion of the inheritance received by the Appellant during the course of the marriage that Appellant failed to prove was not transmuted into marital funds by commingling with funds from the marital effort. Related to his claim for credit for that portion of the money and property inherited that was used to pay off the mortgage on the

marital home, the Court noted that “[i]f 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.” (Appendix Exhibit KK at p. 879; Divorce Decree at p. 2)

Appellant asks this Court to ignore the definition of marital property under W.Va. Code § 48-1-233 and to ignore that Appellant quite simply failed to carry the burden of establishing that the inherited money was not commingled with money presumed to be marital under that Code section. Central to his argument is Appellant’s denial that “any such marital estate existed *according to the terms of the prenuptial agreement.*” (Appellant’s Brief at p. 34).

Even in his Brief, Appellant fails to demonstrate that the accounts into which the inherited funds were deposited did not contain marital funds or what the value of the funds used to pay off the mortgage on the marital home were. Mrs. Owen concedes that Appellant may not have intended to make a gift to the marriage by depositing the funds into his bank accounts or by paying off the mortgage of the marital home, but contends that his lack of intent alone is not sufficient to overcome the fact that his burden was to show the value of the separate assets he claimed were used to pay off the marital home mortgage.

In essence, Appellant asked the Family Court and now this Court to trace the funds that he alleges he had prior to the marriage, received through inheritance, and earned during the marriage (which he persists in claiming are separate) that were used to purchase or reduce the debt on assets presumed to be marital, which were properly found to be marital by the Family Court. “The source of funds doctrine is ordinarily not available to characterize as separate property that

property which has been transferred to joint title during the marriage.” *Whiting v. Whiting*, Syl. pt. 6, 183 W. Va. 451, 396 S.E.2d 413 (1990).

Appellant contends that he sold all of the stock he received through inheritance and paid off his home mortgage. (Appendix Exhibit MM at p. 1146). The home referred to in that testimony is the home the Family Court found to be a marital asset (Appendix Exhibit KK at p. 879, Divorce Decree at p. 2; Appendix Exhibit KK at pp. 884-85, Equitable Distribution Worksheet). Appellant did not provide the court any evidence concerning the amount of the payoff of the marital home that was allegedly made by the Appellant through the sale of stock he inherited. He would have the Family Court give him credit for the entire amount of stock, cash and money received through the sale of inherited real estate although there was no evidence presented that all of those funds were used to pay off marital debt or that none of the proceeds from the inheritance were commingled with funds from the marital effort and no evidence of the amount used to pay off the marital home debt. It was Appellant’s burden at trial to prove that the property he asserted was not marital was his separate property. The Family Court found that the marital home was a marital asset, the Appellant used a portion of the inheritance to pay off the marital home and that the Appellant failed to provide any evidence that no monies from the marital effort had been commingled in the account in which his inheritance was placed or what amount of his separate funds were used to pay off the mortgage on the marital home. (Appendix KK at p. 879) Absent that evidence the Family Court properly found that Appellant failed in his burden to establish how much credit he would be due had he established that the funds used to pay off the marital home were his separate property that had not been converted to marital property through commingling with marital funds.

B. The Family Court Properly Refused to Exclude Appellant's Separate Property Owned Prior to the Marriage From its Equitable Distribution Analysis

Appellant's assignment of error that the Family Court refused to exclude his separate property owned prior to the marriage in its equitable distribution calculation mirrors the foregoing argument regarding the issue of his inheritance. The evidence of the value of Appellant's premarital estate was in the form of an Asset Disclosure⁸ attached to the Antenuptial Agreement that the Family Court found to be unenforceable. Appellant asserts without reference to the record that the "testimony and record are clear that the assets were not commingled" or were not intentionally commingled. W, Va. Code § 48-1-237(1)-(2) does indeed define separate property as property acquired before a marriage or during a marriage in exchange for property acquired before the marriage. Aside from an Asset Disclosure attached to the Antenuptial Agreement, which agreement was held unenforceable by the Family Court and which decision the Circuit Court affirmed, Appellant did not offer a single shred of evidence of the value of his premarital assets, and further offered no evidence that tended to prove that in the thirty years of the parties marriage, the assets that comprised Appellant's alleged \$94,000.00 premarital worth were not commingled with marital funds or assets. In short, Appellant simply failed in his burden to demonstrate that the property he held thirty years before the parties' separation retained its character as separate property.

CONCLUSION

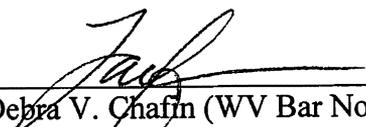
Based upon the foregoing, Appellee Tina M. Owen respectfully requests that this Honorable Court enter an Order Denying Appellant Mark B. Owen's Appeal from the Circuit

⁸ While Mrs. Owen has seen such asset schedule, it does not appear with any version of the Antenuptial Agreement appearing in the Appendix at Exhibit A, Exhibit D or Exhibit N.1.

Court of Harrison County's March 25, 2013 *Order Affirming Decree of Divorce in Part and Reversing Decree of Divorce in Part* of the Harrison County Family Court's October 23, 2012 *Decree of Divorce* and *January 9, 2012 Order Pertaining to Enforceability of Antenuptial Agreement* and Affirm the foregoing Orders of the Harrison County Circuit and Family Courts and dismiss his Petition for Appeal from the Court's docket.

Tina M. Owen

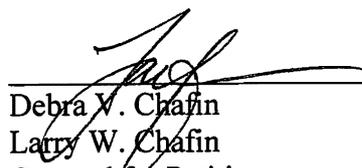
Petitioner, By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2013 I served the foregoing ***BRIEF IN SUPPORT OF RESPONSE OF PETITION FOR APPEAL ON BEHALF OF RESPONDENT, TINA M. OWEN***, upon counsel for respondent, Debra Tedeschi Varner, Allison S. McClure and Mark Gaydos, via facsimile at 304-623-3035.



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Larry W. Chafin
Counsel for Petitioner