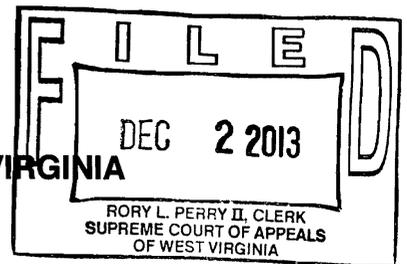


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET NO. 13-0960

**Ross Stanley, Petitioner Below,
Petitioner**

vs.

Appeal from a final order
of the Circuit Court of
Greenbrier County
(12-D-65)

**Carolyn Haynes Stanley, Respondent Below,
Respondent**

PETITIONER'S BRIEF

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PETITIONER’S BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court of Greenbrier County erred in applying W.Va. Code §42-3-1 to this matter in its finding that "W.Va. Code §42-3-1 was created as an inheritance mechanism for spouse [sic] whose decedent [sic] died domiciled in this state not for the purpose of equitable distribution of separate property," as W.Va. Code §42-3-1 has no relevance to the case at bar.
2. The Circuit Court of Greenbrier County erred in finding that "Petitioner had no dower or curtesy interest in the Respondent's the [sic] real estate acquired prior to their marriage 'which would have attached if the conveyance had been made prior to the date of the enactment of this statute.' "
3. The Circuit Court erred in finding that the "Petitioner fails to meet the condition enumerated in Virginia [sic] Code §43-1-2" and in stating that the "Respondent had no duty to notify the Petitioner of the conveyance because the parties were not married prior to the enactment of the statute and dower and curtesy were abolished prior to their marriage."
4. The Circuit Court erred in finding that the "Family Court's application of the law to the facts is an abuse of discretion."
5. The Circuit Court erred in finding that the "Family Court is without jurisdiction to resolve matters relating to West Virginia Code §43-1-1 et seq."
6. The Circuit Court erred in applying W.Va. Code §42-3-1 to this matter in its finding that "W.Va. Code §42-3-1 was not enacted for the purpose of the division of separate property," as W.Va. Code §42-3-1 has no relevance to the case at bar.
7. The Circuit Court erred in granting the petition for appeal; reversing the final order entered by the Family Court; ruling that the value of the real estate is the respondent's separate property for the purpose of equitable distribution;" and in remanding this matter back to the Family Court for distribution of real estate pursuant to West Virginia Code §48-7-101 *et seq.*

STATEMENT OF THE CASE

This is an appeal of the Greenbrier County Circuit Court order entered July 30, 2013, wherein the Circuit Court judge reversed an earlier Greenbrier County Family

Court ruling and remanded the case back to Family Court with instructions. See Appendix pages 1 - 5. The Family Court Judge, on April 19, 2013, entered an Order of equitable distribution in which he ruled that the Respondent had transferred real estate to her children, without notice to her spouse - the Petitioner in this matter, and, therefore, the provisions of West Virginia Code §43-1-2 applied. See Appendix pages 6 - 10. The Family Court judge ruled that, pursuant to W.Va. Code §43-1-2, the value of the real estate that the Respondent transferred without proper notice to her spouse would be included in the calculation of marital property for the purposes of equitable distribution, pursuant to W.V. Code §43-1-2(d). *Id.*

In reversing and remanding the Family Court order, the Circuit Court not only ignored the proper application of W.Va. Code §43-1-2, but the Circuit Court also, erroneously, analyzed and applied W.Va. Code §42-3-1, a code section that was not relevant to the case at bar and was not argued by either party in the Family Court proceedings that the Circuit Court considered in this matter. See Appendix pages 1-5.

For these and the other reasons set forth herein, the Petitioner respectfully submits that the Circuit Court erred in reversing the previous Family Court ruling and in remanding this matter back to the Family Court for proceedings consistent with that erroneous Circuit Court ruling.

BRIEF FACTUAL STATEMENT

The parties in this matter were married on July 3, 1997. At the time of their marriage, the Respondent owned approximately 27 acres of agricultural real estate, with significant debt attached, that she had received in a divorce from a previous husband.

After these parties were married, Petitioner received a settlement from the Veteran's Administration and provided \$36,000.00 to assist Respondent in paying off the existing mortgage on her farm. In exchange for that payment, Respondent agreed to add Petitioner's name to the deed for the real estate. Respondent did not do so.

Also during the marriage, Petitioner made numerous, costly improvements and additions to the buildings and real estate that Respondent owned in the form of a wraparound porch on the house, repairs to a garage attached to the house, construction of a detached garage with a shed, construction of a five stall machinery/equipment shed, and construction of several hundred feet of fencing. All of these improvements to Respondent's real estate were done by Petitioner in exchange for Respondent's continued promise that she would add Petitioner's name to the deed for the real estate. Respondent did not do so.

Over time the marriage deteriorated to the point that a divorce seemed inevitable, and, because Respondent had not followed through on the promise she made multiple times to add Petitioner's name to the deed for the real estate, Petitioner made a settlement proposal to Respondent. Petitioner proposed that he would move out of the marital home, file for divorce, and make no further claim on Respondent's real estate, if Respondent would reimburse him the \$36,000.00 payment he made on her mortgage and a small portion of the costs of improvements and additions that he had made to her real estate and the buildings thereon. Initially, Respondent agreed to do so.

However, shortly after agreeing to Petitioner's proposed settlement, Respondent reneged on her agreement, and Petitioner subsequently filed for divorce. Several

hearings were held with a bifurcated divorce granted on July 12, 2012, and a final hearing on equitable distribution scheduled for September 19, 2012.

In preparing for the final equitable distribution hearing, Petitioner's counsel discovered a deed wherein Respondent had transferred the 27 acres into her five adult children's names, and retained a life estate for herself. See Appendix pages 11 - 13. The transfer was made on October 18, 2011, between the time that Respondent had initially agreed to Petitioner's settlement proposal and the time that she reneged on that agreement, and just four months prior to Petitioner filing for divorce.

Subsequently, at the Family Court hearing held on September 19, 2012, Petitioner argued that Respondent had violated West Virginia Code §43-1-2(b) which states that "any married person who conveys an interest in real estate shall notify his or her spouse prior to or within thirty days of the time of the conveyance if the conveyance involves an interest in real estate to which dower would have attached if the conveyance had been made prior to the date of enactment of this statute" by transferring the 27 acres of real estate without any notice to her husband. See Appendix page 14.

Petitioner further argued that, because Respondent transferred real estate without any notification to her husband, West Virginia Code §43-1-2(d) was applicable. W.Va. Code §43-1-2(d) states "when a married person fails to comply with the notification requirements of this section, then in the event of a subsequent divorce within five years of said conveyance, the value of the real estate conveyed, as determined at the time of the conveyance, shall be deemed a part of the conveyancer's marital property for purposes of determining equitable distribution" *Id.* Applying W.Va.

Code §43-1-2(d) to the facts of this matter requires that the value of the value of the 27 acres of real estate Respondent transferred to her children be included in the calculation of the value of marital property for the purpose of equitable distribution.

Respondent disagreed and argued that Petitioner was only entitled to a percentage of the enhanced value of the real estate that resulted from the improvements he had made. Respondent argued that Mayhew v. Mayhew, 197 W.Va. 290, 475 S.E.2d 382 (W.Va., 1995) controlled and that W.Va. Code §43-1-2 was not applicable. See Appendix pages 15 - 30.

The Family Court judge opined that there would be a different set of "rules" involved based on whether W.Va. Code §43-1-2 was applicable, in which case the value of Respondent's real estate would be included in the calculation of marital property value. The Family Court judge stated that, if he determined that W.Va. Code §43-1-2 was not applicable, he would then look to the guidelines established in Mayhew to make a determination as to what reimbursement Petitioner should receive. See Appendix pages 38 - 39.

Therefore, the Family Court judge, on September 20, 2012, entered a Temporary Order in which he ordered counsel for Petitioner to brief Petitioner's argument within 60 days of the entry of the Temporary Order and ordered counsel for Respondent to respond to Petitioner's brief within 60 days of its submission. See Appendix pages 43 - 44.

Petitioner's counsel submitted a 17 page brief with 12 exhibits, including both applicable statutory and case law, and served the same on Respondent's counsel on November 19, 2012. See Appendix pages 45 - 61. Respondent's counsel did not

submit his brief until March 20, 2013, which was 121 days after Petitioner's brief was filed, rather than the 60 days originally ordered.¹ See Appendix pages 62 - 66.

Although Respondent did not comply with the deadline for filing her brief, both briefs were considered by the Family Court Judge before he issued his Order on April 19, 2013, in which he ruled that W.Va. Code §43-1-2 was applicable and that the value of the real estate that Respondent had transferred to her children would be included in calculating the value of marital property for purposes of equitable distribution. See Appendix page 9.

Thereafter, on or about May 16, 2013, Respondent appealed the April 19, 2013, Family Court Order to the Circuit Court. In a virtually unprecedented move locally, the Circuit Court scheduled oral argument in the appeal, and both counsel provided such oral argument to the Circuit Court on July 30, 2013. See Appendix pages 67 - 78.

In that oral argument, Petitioner's counsel provided a breakdown of W.Va. Code §43-1-2 applying the facts of this case to each element of the statute. See Appendix page 79. Petitioner's counsel also analogized the case at bar with the holding in Rosier v. Rosier, 227 W.Va. 88, 705 S.E.2d 595 (W.Va., 2010), in which this Honorable Court

¹ Petitioner's counsel submitted Petitioner's required brief to the Family Court and served on Respondent's counsel on November 19, 2012, within the required 60 day time frame. Respondent's brief was, therefore, due on January 19, 2013. Respondent did not file any brief, but 40 days after Respondent's brief was due, on February 28, 2013, counsel received a letter from the Family Court judge granting Respondent, *sua sponte*, an additional 30 days to respond to Petitioner's brief. Petitioner's counsel, at the September 19, 2012, hearing, opined that, because both parties had already argued their positions in Court, both briefs should be due at the same time. However, the Family Court judge initially gave Respondent an additional 60 days to "respond" to Petitioner's brief and then, when Respondent didn't comply, she was given an additional 70 days to respond. Although the Family Court judge subsequently ruled in Petitioner's favor, Petitioner's position on appeal to the Circuit Court was prejudiced because Respondent was given that additional time to respond...and therefore, have a written argument on the record for the Circuit Court judge to review. Petitioner respectfully submits that Respondent's brief, filed with the Family Court 70 days after the original deadline, should not have been considered by either the Family Court or the Circuit Court on appeal.

clearly addressed the appropriate applications of W. Va. Code §43-1-2. See Appendix pages 80 - 98 and pages 71 - 73.

Although Respondent's counsel also referred to Rosier during oral argument, he completely misstated the facts and application of the law to the facts from that holding. See Appendix pages 68 - 69. At the end of oral argument, the Circuit Court judge advised counsel that he would issue his decision within ten days, which would have given the Circuit Court sufficient time to review the relevant statute and case law. However, the Circuit Court order was signed by the judge on the same day, July 30, and contained the many errors that Petitioner is addressing in this appeal.

SUMMARY OF ARGUMENT

The Circuit Court of Greenbrier County erred in its entire analysis of the law and application to the facts in this matter.

The Circuit Court erroneously applied the provisions of West Virginia Code §42-3-1, a statute dealing with inheritance issues rather than with equitable distribution, as is the issue in the case at bar.

The Circuit Court grossly misinterpreted the relevant statute, West Virginia Code §43-1-2, in reaching the erroneous conclusions that the Petitioner had no dower or curtesy interest in the real estate transferred by Respondent to her children because the parties were not married prior to the enactment of West Virginia Code §43-1-2 and because dower and curtesy were abolished prior to their marriage.

The Circuit Court also erroneously ruled that the Family Court did not have jurisdiction to resolve matters relating to West Virginia Code §43-1-1 *et seq* apparently because it is not contained in chapter 48 of the West Virginia Code. Although Chapter

48 is the domestic relations chapter of the West Virginia Code and details jurisdictional guidelines for the Family Court in making equitable distribution determinations, that does not preclude the Legislature from issuing statutory directives within other chapters of the Code. That is exactly what is contained in W.Va. Code §43-1-2, and, because that section addresses an issue for divorcing parties and directs a resolution that is required through equitable distribution, the Family Court obviously has jurisdiction to make the necessary rulings to accomplish that resolution.

The Family Court took the extra step in this matter of requiring the parties to file briefs, with accompanying statutory and case law, in order to assist the Family Court in making a determination. The Family Court carefully reviewed the applicable and relevant statutes and cases before making the proper determination that, because the Respondent transferred real estate without notifying her spouse and because the parties were then divorcing within five years of that transfer, the value of the real estate so transferred was to be included in the calculation of the value of marital property for the purposes of equitable distribution.

The Circuit Court, therefore, erred in reversing the thoroughly reasoned and accurately applied decision of the Family Court and remanding the case back to the Family Court for an erroneous application of existing statutory and case law.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Your Petitioner is available for oral argument in this matter should this Honorable Court deem it necessary or helpful in rendering a decision.

ARGUMENT

1. The Circuit Court of Greenbrier County erred in applying W.Va. Code §42-3-1 to this matter in its finding that "W.Va. Code §42-3-1 was created

as an inheritance mechanism for spouse [sic] whose decedent [sic] died domiciled in this state not for the purpose of equitable distribution of separate property," as W.Va. Code §42-3-1 has no relevance to the case at bar.

6. The Circuit Court erred in applying W.Va. Code §42-3-1 to this matter in its finding that "W.Va. Code §42-3-1 was not enacted for the purpose of the division of separate property," as W.Va. Code §42-3-1 has no relevance to the case at bar.

In his Notice of Appeal, Petitioner listed two separate assignments of error from the Circuit Court's application of West Virginia Code §42-3-1 in this matter. The Circuit Court, at item 2 of the Conclusions of Law in the July 30, 2013, Order, stated that "W.Va. Code §42-3-1 was created as an inheritance mechanism for spouse [sic] whose decedent [sic] died domiciled in this state not for the purpose of equitable distribution of separate property." See Appendix page 3. The Circuit Court included a similar reference in its Discussion of the facts and the law it incorrectly applied in this matter. *Id.* at page 4. However, because Petitioner's argument against the analysis and application in both sections is the same, Petitioner is combining his arguments for Assignments of Error Numbers 1 and 6.

West Virginia Code §42-3-1 is contained within the chapter of the Code entitled Descent and Distribution and applies solely in a situation where an individual has died while domiciled in West Virginia and left a surviving spouse who wishes to exercise a right to an elective share of inheritance. See Appendix pages 99 - 100. That statute has absolutely no relevance to the case at bar.

In this matter, both of the parties are still alive. There can be no right of one spouse to choose an elective share of the other's estate while the other spouse is still

living. Additionally, for a surviving spouse to choose to exercise the right to an elective share, the spouses had to be married to each other when one spouse died, hence the characterization of "spouse" in the statute. In this matter, the parties were already divorced at the time the Family Court made the determination of equitable distribution.

Not only does W.Va. Code §42-3-1 have no relevance to the case at bar, neither party so much as mentioned this code section in either the proceedings in Family Court or in oral argument in the appeal to Circuit Court. West Virginia Code §51-2A-14(b), relating to an appeal from Family Court to Circuit Court, states, "[i]n considering a petition for appeal, the circuit court may only consider the record as provided in subsection (d), section eight of this article." See Appendix page 101. West Virginia Code §51-2A-8(d) identifies the "record" as, "[t]he recording of the hearing or the transcript of testimony, as the case may be, and the exhibits, together with all documents filed in the proceeding, constitute the exclusive record. . . ." See Appendix page 102. Therefore, because there was no reference to W.Va. Code §42-3-1 in the exclusive record from the Family Court in this matter, any application of that code section to this matter is not only completely irrelevant but is prohibited by statutory mandate.

Although the Circuit Court's conclusion of law, in the July 30, 2013, Order that W.Va. Code §42-3-1 was created as an inheritance mechanism and not for the purpose of equitable distribution of separate property may be correct, that conclusion was irrelevant to the matter at hand as there is no element of inheritance or elective share in the case at bar. Further, because the Family Court matter which was appealed to the Circuit Court did not include any reference whatsoever to that statute, any conclusion of

law based on W.Va. Code §42-3-1 was erroneously included in the Circuit Court's Order based on the record established in the Family Court.

2. The Circuit Court of Greenbrier County erred in finding that "Petitioner had no dower or curtesy interest in the Respondent's the [sic] real estate acquired prior to their marriage 'which would have attached if the conveyance had been made prior to the date of the enactment of this statute.' "

Not only is the quoted first sentence of Conclusions of Law number 4 from the Circuit Court's July 30, 2013, Order incorrect, it also fails to include any Findings of Fact, reasoning, or analysis to support the erroneous conclusion. See Appendix pages 1 - 5, more specifically page 3.

Prior to the abolition of dower and curtesy by the Legislature in 1992, W.Va. Code §43-1-1 provided an interest for a surviving spouse as follows: "A surviving spouse shall be endowed of one third of all the real estate whereof the deceased spouse, or any other to his or her use, or in trust for him or her, was, at any time during the coverture, seised of or entitled to an estate of inheritance, either in possession, reversion, remainder, or otherwise, unless the right of such surviving spouse to such dower shall have been lawfully barred or relinquished," as quoted in footnote 2 in Timberlake v. Heflin, 180 W.Va. 644, 379 S.E.2d 149 (W.Va., 1989). See Appendix pages 103 - 109.

There is no dispute in this matter that Respondent was seised of 27 acres of real estate from before her marriage to Petitioner on July 3, 1997, and continuing for the next 14 years "during the coverture," until she conveyed the real estate to her children on October 18, 2011. If dower and curtesy had not been abolished by the Legislature in 1992, Petitioner would have had an inchoate curtesy interest in that 27 acres of real

estate. The former W.Va. Code §43-1-1 included no requirement as to the time of acquisition of the property, whether it was before or after marriage, but rather provided the dower/curtesy interest if the party was "seised" of the "real estate" or other property "at any time during coverture." *Id.* Because Respondent was seised of the real estate for 14 years during her marriage to Petitioner, curtesy would have attached.

Because dower/curtesy was abolished in 1992, it is a given that Petitioner did not, at the time Respondent transferred the 27 acres to her children in 2011, have a curtesy interest in that real estate. However, Petitioner never argued that he had acquired an actual curtesy interest in Respondent's real estate. Rather, what Petitioner argued was that, if the "conveyance had been made prior to the date of the enactment of the statute," the language of W.Va. Code §43-1-2, he would have had a curtesy interest at that time. That is the test of W.Va. Code §43-1-2...whether dower/curtesy would have attached if the conveyance had been made prior to 1992 when the statute was enacted...not whether dower/curtesy was actually attached to the real estate being conveyed subsequent to 1992. See Appendix page 14.

Therefore, the Circuit Court erred in the conclusion reached in the first sentence of Conclusions of Law number 4 in the Circuit Court's July 30, 2013, Order that Petitioner had no curtesy right that would have attached if the conveyance had been made prior to enactment of the statute, and there are no findings of fact to support that erroneous conclusion. See Appendix pages 1 - 5, more specifically page 3.

3. The Circuit Court erred in finding that the "Petitioner fails to meet the condition enumerated in Virginia [sic] Code §43-1-2" and in stating that the "Respondent had no duty to notify the Petitioner of the conveyance because the parties were not married prior to the enactment of the statute and dower and curtesy were abolished prior to their marriage."

The Circuit Court appeared to rely on the same, flawed, line of reasoning, again without any findings of fact to support it, in the second half of Conclusions of Law number 4.

The Circuit Court erroneously concluded that the “Respondent had no duty to notify the Petitioner of the conveyance because the parties were not married prior to the enactment of the statute. . . .” See Appendix page 4. However, there is no language in W.Va. Code §43-1-2 that specifies any requirement for a specific date of marriage, either prior to or after the date of enactment of the statute. W.Va. Code §43-1-2(b) begins with “any married person. . . .,” and §43-1-2(d) begins with “when a married person,” with absolutely no caveat, for purposes of this statute, as to the date that person became a “married person.” See Appendix page 14. Both of these references indicate that this statute applies to **any** marriage, whether it was celebrated prior to the enactment of the statute in 1992 or anytime thereafter.

Additionally, to limit the protections of W.Va. Code §43-1-2 to only persons who were married prior to its enactment in 1992 would be contrary not only to the prospective nature of legislative enactments in general, but it would also be contrary to the legislative intent in passing W.Va. Code §43-1-2 to offer spouses the future protection that was removed with the abolishment of dower/curtesy. To suggest that any parties who didn't happen to celebrate their union until after 1992 would be left with no protection from either the former dower/curtesy statute or W.Va. Code §43-1-2 is not only completely inaccurate but borders on the ridiculous.

The legislative intent of W.Va. Code §43-1-2 was memorialized by this Honorable Court in Rosier v. Rosier, 227 W.Va. 88, 705 S.E. 2d 595 (W.Va., 2010), previously

referenced herein, in discussing the abolishment of dower and the passage of W.Va. Code §43-1-2. See Appendix pages 80 - 98. Therein, this Honorable Court stated: “The intent of the notice provision was to make certain that transfers of real estate holdings solely in one spouse’s name were known to the other spouse.” See Appendix page 94. The Rosier ruling was entered in 2010 and, when referring to the applications of W.Va. Code §43-1-2, it made no limitation of those protections only to persons married prior to 1992. See Appendix pages 80 - 98.

The Circuit Court made a two-part conclusion in the final sentence of Conclusions of Law number 4, as the “Respondent had no duty to notify the Petitioner of the conveyance because . . .dower and curtesy were abolished prior to their marriage.” See Appendix page 4.

The arguments that Petitioner provided herein for assignment of error number 2 are also applicable here. As previously stated, Petitioner did not argue that he actually has a curtesy interest in Respondent’s real estate, because Petitioner recognizes that dower and curtesy were abolished in 1992. However, the protections afforded to married persons under W.Va. Code §43-1-2 are not exactly the same protections that were afforded as dower/curtesy rights.

It appears that the Circuit Court could not recognize that the provision in W.Va. Code §43-1-2 relating to dower is simply the test to be employed to determine whether the provision applies and notice is required. Regardless of whether the parties were married before or after the abolishment of dower/curtesy, because both have been abolished there is no longer any protection to a married person via those interests. Even if these parties had been married prior to 1992, and the Respondent conveyed the

interest in her real estate in 2011, W.Va. Code §43-1-2 would still be the applicable statute to be applied today.

It is difficult to try to follow the Circuit Court's logic in concluding that W.Va. Code §43-1-2 doesn't apply because dower/curtesy had been abolished prior to the parties' marriage, when the very statute referred to is one that includes a test that requires one to apply its provisions as if dower/curtesy would have attached. The basic premise behind the entire statute at W.Va. Code §43-1-2 is to prevent married persons from being prejudiced in their real estate interests because dower/curtesy were abolished. To then conclude that the statute did not apply because dower/curtesy were abolished is completely contradictory to the provisions of the statute itself. Again, in addition to this conclusion of the Circuit Court being incorrect, it borders on being ridiculous.

For all of these reasons, Petitioner submits the Circuit Court erred in finding that Respondent had no duty to notify Petitioner of the conveyance either because the parties were not married prior to 1992 or because dower/curtesy were abolished prior to their marriage.

4. The Circuit Court erred in finding that the "Family Court's application of the law to the facts is an abuse of discretion."

It is appropriate for the Circuit Court to review the Family Court's application of the law to the facts under an abuse of discretion standard. However, after so doing in the instant case, the Circuit Court erred in concluding that the Family Court did abuse its discretion.

Although the West Virginia Legislature has not codified a definition for "abuse of discretion," this Honorable Court has addressed what constitutes an abuse of discretion as recently as March, 2013. In Cochran v. Cochran, Supreme Ct of Appeals, January,

2013, Term, No. 11-0998, a per curiam opinion, this Honorable Court cited several, previous rulings and quoted them as follows:

"[u]nder the abuse of discretion standard, we will not disturb a [family] court's decision unless the [family] court makes a clear error of judgment or exceeds the bound of permissible choices in the circumstances." *quoting Wells v. Key Communications, L.L.C.*, 226 W.Va. 547, 551, 703 S.E.2d 518, 522 (2010);

"[i]n general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the [family] court makes a serious mistake in weighing them." *quoting Shafer v. Kings Tire Service, Inc.*, 215 W.Va. 167, 177, 597 S.E.2d 302, 310 (2004);

"a [family] court necessarily abuses its discretion if it bases its ruling on an erroneous assessment of the evidence or an erroneous view of the law." *quoting Beto v. Stewart*, 213 W.Va. 355, 3590360, 582 S.E.2d, 802, 806-807 (2003.)

See Appendix pages 110 - 120.

Petitioner asserts that the Family Court judge did not abuse his discretion but, rather, ruled not only within the bounds of his authority, but ruled also according to statutory mandate.

In the Family Court Order, there are very clear findings of fact and conclusions of law that make it obvious that the Family Court judge carefully reviewed the relevant statute, W.Va. Code §43-1-2, as well as the most relevant case law, Rosier to arrive at the correct conclusion that W.Va. Code §43-1-2 was applicable to this matter. See Appendix pages 6 - 10. As a result of that carefully reviewed application of the law to the facts of this matter, the Family Court ruled that the value of the real estate transferred by Respondent to her adult children on October 18, 2011, is to be included in the value of marital property for the purposes of equitable distribution. *Id.* at page 9.

The Family Court has jurisdiction to hear, pursuant to W.Va. Code §51-2A-2(a) (1), all actions for divorce brought under the provisions of W.Va. Code §48-5-402, among others. See Appendix pages 121 - 122. The Petitioner properly filed his Petition for Divorce pursuant to Chapter 48, the same was served on Respondent in February, 2012, and jurisdiction was established.

Following multiple proceedings in Family Court, including a final hearing in which a bifurcated divorce was granted to the parties, the Family Court judge, as mandated by W.Va. Code §§48-7-101, 103, 104, & 105, held the necessary hearing, obtained the relevant evidence, and, thus, began the required process of identifying marital property, determining the value of that marital property, and making an equitable division of that marital property. See Appendix pages 123 - 127. To that end, the Family Court judge evaluated the briefs provided by counsel and reviewed W.Va. Code §43-1-2 and relevant case law before issuing his Order on April 19, 2013. See Appendix pages 6 - 10.

In so doing, it cannot reasonably be concluded that the Family Court, as this Honorable Court also determined in Cochran, "made an error of law, exceeded the bound of permissible choices, ignored a material factor, relied upon an improper factor, or wrongly weighed the factors in making its decision." See Appendix page 117.

It is clear that the Family Court did not abuse its discretion in ordering that the "value of the real estate, at the time of the conveyance, owned by respondent and conveyed to her children will be included in the marital estate." See Appendix page 9. Therefore, the Circuit Court erred in concluding that the "Family Court's application of the law to the facts is an abuse of discretion."

5. The Circuit Court erred in finding that the "Family Court is without jurisdiction to resolve matters relating to West Virginia Code §43-1-1 *et seq.*"

It is difficult to understand how the Circuit Court could conclude that the Family Court does not have "jurisdiction to resolve matters relating to West Virginia Code §43-1-1 *et seq.*" when W. Va. Code §43-1-2, the statute argued in this matter and ruled upon by the Family Court, deals directly with divorcing parties and equitable distribution.

As previously stated herein, presumably the Circuit Court reached this erroneous conclusion because W.Va. Code §43-1-2 is not contained within Chapter 48 of the West Virginia Code, which is the chapter that gives the Family Court jurisdiction to make determinations regarding separate and marital property, ascertain the values of each, and divide those properties through equitable distribution. Simply because West Virginia Code §43-1-2 is not contained within chapter 48, the Circuit Court erroneously ruled that it did not apply, completely failing to recognize and acknowledge that the Family Court **did** act within the jurisdictional mandates of West Virginia Code §48-7-101 *et seq.*, because the Family Court was making an equitable distribution of property. See Appendix pages 123 - 127.

The hearing held in the Family Court on September 9, 2012, was for the sole purpose of providing evidence and testimony to the Family Court on all matters regarding the marital property of these divorced parties so the Family Court could make an appropriate equitable distribution of that property. That is exactly what the Family Court did in its Order entered on April 19, 2013. See Appendix pages 6 - 10.

Further, as previously stated, the Family Court acted within the jurisdictional requirements of West Virginia Code §51-2A-2, which gives the Family Court the right to

exercise jurisdiction over all actions for divorce that are brought under Chapter 48 of the West Virginia Code, because the divorce action in which the Family Court was making equitable distribution was correctly filed. See Appendix pages 121 - 122. Pursuant to W. Va. Code §51-2A-2, the Family Court had exclusive jurisdiction to make a determination of equitable distribution in this matter. Therefore, there was no court other than the Family Court that did have jurisdiction to apply the provisions of W.Va. Code §43-1-2 in ruling on equitable distribution.

Furthermore, the Family Court not only had jurisdiction to apply W.Va. Code §43-1-2 to make rulings regarding equitable distribution in the divorce matter that is the subject of this appeal, but the Family Court was mandated to do so under the provisions of the very chapter that the Circuit Court erroneously alleged the Family Court did not follow. West Virginia Code §48-7-101 *et seq* **requires** the Family Court to determine which property of the parties is marital, determine the value of that marital property, and then equitably divide the same between the divorcing parties. See Appendix pages 123 - 127. That is exactly what the Family Court did, and, therefore, the Circuit Court erred in ruling that the "Family Court is without jurisdiction to resolve matters relating to West Virginia Code §43-1-1 *et seq.*"

7. The Circuit Court erred in granting the petition for appeal; reversing the final order entered by the Family Court; ruling that the value of the real estate is the respondent's separate property for the purpose of equitable distribution;" and in remanding this matter back to the Family Court for distribution of real estate pursuant to W.Va. Code §48-7-101 *et seq.*

Respondent's Petition for Appeal of Family Court Order Entered April 18, 2013, did not contain any argument whatsoever that the Family Court abused its discretion. See Appendix pages 128 - 132. Said Petition for Appeal did not contain any allegations

that the ruling entered by the Family Court on April 19, 2013, contained any inaccurate findings of fact or flawed reasoning in arriving at the conclusion that the value of the real estate Respondent conveyed to her children, without the legally required notice to her spouse, would be included as a marital asset for purposes of equitable distribution. There was absolutely nothing contained in Respondent's Petition that supported the Circuit Court granting an appeal, but the Circuit Court did just that.

In fact, Respondent's Petition for Appeal was almost exactly the same as her Response to Petitioner's Brief that was previously filed with the Family Court. Therefore, the Family Court had fully reviewed, analyzed, and, largely, rejected Respondent's arguments with clear findings of fact and conclusions of law. Therefore, when the Petition for Appeal to the Circuit Court contained no allegations of an abuse of discretion by the Family Court and provided no new argument(s) that had not already been rejected by the Family Court, the Circuit Court erred in granting the appeal.

Rather than containing any support for having an appeal granted, Respondent's Petition for Appeal contained several pages of argument about the proper application of Mayhew to a calculation of enhancement of value of separate property by improvements made by the non-owner spouse. *Id.* However, the rulings in the Family Court Order that was being appealed to the Circuit Court did not rely on Mayhew nor its applications. In fact, the Family Court Order did not so much as mention the Mayhew case. See Appendix pages 6 - 10. Therefore, again, the Circuit Court erred in granting an appeal of the Family Court Order when the Petition for Appeal of the same contained no allegations of any abuse of discretion and contained no arguments against the actual ruling the Family Court had entered.

Respondent's brief also contained multiple pages of counsel's opinion that the Legislature never intended, when it enacted W.Va. Code §43-1-2, the consequence that the Family Court ruled is appropriate in this matter. Respondent included an analogy of the potential for him to convey ownership of a \$300,000.00 condo in Florida without notifying his spouse, and opined that if he divorced his spouse would not then be entitled to \$150,000.00 of value. Presumably, Respondent's counsel believed that if he included values that were high enough, he might convince the Circuit Court to grant the appeal. Although his ploy apparently worked, because the Circuit Court did grant the appeal, the analogy was not only rather ludicrous, but his conclusion was completely false. If Respondent's counsel conveyed ownership of said condo in Florida without notifying his spouse, and they divorced within five years, his spouse very definitely would be entitled to have that \$300,000.00 value included as marital property in the calculation of equitable distribution. That's exactly what W.Va. Code §43-1-2 states, and that's how the Family Court correctly ruled in this matter.

Respondent ridiculed the Legislature and its intent in enacting W.Va. Code §43-1-2 by stating, in both the Response to Petitioner's Brief and the Petition for Appeal to Circuit Court, that the "Law does not require a useless act and the failure to write a letter and buy a stamp to notify a spouse you are gifting separate property . . ." See Appendix page 63 and page 130. The Legislature, in W.Va. Code §43-1-2, made no mention of "writing a letter" or "buy[ing] a stamp." What the Legislature did say, at W.Va. Code §43-1-2(c), is that "A person making a conveyance described in the previous sections shall have the burden of proof to show compliance with this section. Such burden shall be met either by: (1) The signature of the spouse of the conveying

party on the conveyance instrument; or (2) Such other forms of competent evidence as are admissible in a court of general jurisdiction in this state under the rules of evidence." See Appendix page 14. Therefore, it is clear from the language of W.Va. Code §43-1-2(c) that merely sending a letter to the spouse would not be sufficient notice, and a mere letter would not permit the conveying spouse to satisfy the burden of proving that notice had been given. Notice is required to be in the form of evidence that would be admissible to the Court, with the suggested form of evidence being a signature on the conveying deed. *Id.*

As previously stated herein, the intent of the Legislature in enacting W.Va. Code §43-1-2 was to "make certain that transfers of real estate holdings solely in one spouse's name were known to the other spouse," as stated in Rosier. See Appendix page 94. In both Respondent's brief to the Family Court and in the Petition for Appeal to Circuit Court, Respondent attempts to minimize the fraudulent actions taken by Respondent in conveying real estate without notice to Petitioner by saying things like, she just failed to write a letter and buy a stamp, so Petitioner shouldn't get a "windfall" from that. See Appendix page 65 and page 131. That whole line of argument fails to take into consideration what Respondent actually did.

The parties herein were in the midst of serious marital issues. They had reached a point of no return in their marriage, and Petitioner was seeking to reach a settlement with Respondent when he proposed that, because Respondent had never added Petitioner's name to the deed as Respondent had promised many times, Respondent should reimburse the separate funds Petitioner had expended on the mortgage for Respondent's farm and a reasonable amount for the many improvements Respondent

had made there. In exchange, Petitioner would move out and would make no further claim on Respondent's real estate. First, apparently to appease Petitioner so he wouldn't initiate legal action at that time, Respondent agreed to Petitioner's settlement proposal.

Respondent then hurried to an attorney in Lewisburg, a fact admitted by Respondent in both her Response to Petitioner's Brief and in her Petition for Appeal to Circuit Court, and had him draft a deed conveying her 27 acres of real estate to her adult children. See Appendix page 62 and pages 128 - 129. Respondent executed the deed, Respondent caused the deed to be recorded in the County Clerk's office, and Respondent requested that the recorded deed be mailed back to one of her sons, as is evidenced by the address on the top of the executed deed. That way, there would be no evidence of what Respondent had done that would arrive in the mail at her marital residence, where Petitioner still resided and would potentially see the executed deed. See Appendix page 11.

Only after the deed was executed and recorded did Respondent then tell Petitioner that Respondent was backing out of the settlement agreement she had originally agreed to.

This was no mere "failure to write a letter and buy a stamp." This was a calculated act on Respondent's part to transfer the 27 acres of real estate out of her name because she believed that Petitioner would attempt to convince the Family Court that he was entitled to a portion of the real estate. That is the evidence that was presented to the Family Court. That is the evidence that the Circuit Court had available.

That is a portion of the evidence that the Circuit Court apparently ignored in granting the appeal in this matter.

Although it is obvious in this matter that Respondent deliberately ignored the requirements of W.Va. Code §43-1-2, that statute does not delve into any potential motivations for when a spouse conveys real estate and does not properly notify the other spouse. W.Va. Code §43-1-2(b) very clearly states that "any married person who conveys an interest in real estate **shall** notify his or her spouse . . ." See Appendix page 14. W.Va. Code §43-1-2(d) very clearly states that, "[w]hen a married person fails to comply with the notification requirements of this section, then in the event of a subsequent divorce within five years of said conveyance, the value of the real estate conveyed, as determined at the time of the conveyance, **shall** be deemed a part of the conveyancer's marital property for purposes of determining equitable distribution. . . ." *Id.*

The Circuit Court had the entire record from the Family Court available to review. Petitioner's brief to the Family Court clearly applied W.Va. Code §43-1-2 to the facts of this case. See Appendix pages 45 - 61. Respondent's brief ridiculed the Legislature, misstated the intent of W.Va. Code §43-1-2, and failed to cite any authorities that supported any of Respondent's contentions. See Appendix pages 62 - 66.

The Circuit Court also had available for review the Petition for Appeal of Family Court Order Entered April 18, 2013, which contained, almost word-for-word, the same

arguments that were included in Respondent's brief, which had already been analyzed by the Family Court and found to be non-persuasive.² See Appendix pages 128 - 132.

The Circuit Court also granted oral argument in this matter and had the availability of Petitioner's arguments, in which Petitioner's counsel broke down all of the elements of W.Va. Code §43-1-2 and applied the facts of this case to each element; Petitioner's counsel restated the position that this Honorable Court had taken regarding W.Va. Code §43-1-2 in Rosier; Petitioner's counsel analogized the protections afforded the innocent spouse in W.Va. Code §43-1-2 to the protections previously afforded through dower/curtesy rights; and Petitioner's counsel reminded the Court that the proper standard to be applied was abuse of discretion, and the Family Court had not done so. See Appendix pages 67 - 78.

In oral argument, Respondent's counsel reiterated the fact that Respondent did, in fact, convey 27 acres of real estate to her children without notifying Petitioner; Respondent's counsel misstated the holding in Rosier by saying in that case "the Court did include the property," when in fact, as Petitioner's counsel pointed out, this Honorable Court did not include the property because the parties in Rosier weren't divorcing; and Respondent's counsel again referred to the applications of Mayhew, which was not relevant in this appeal because Petitioner was not arguing for an enhancement in value of the real estate. *Id.* Petitioner was arguing that Respondent violated the provisions of W.Va. Code §43-1-2, and this Honorable Court in Rosier stated, the "remedy for violations of this notice provision is contained in W.Va.

² Petitioner in this matter chose not to file a response to the Petition for Appeal as Petitioner's Brief to the Family Court clearly stated Petitioner's arguments and was dispositive of the issues. Because Respondent's Petition for Appeal was largely a repetition of Respondent's Brief, Petitioner did not believe a response was necessary for the Circuit Court to ascertain Petitioner's position.

Code§43-1-2(d) . . ." and continued by saying, "[t]he statutory language is clear that a remedy for violations of the statute is only available for divorced or divorcing persons." See Appendix page 94.

The Family Court, in its April 19, 2013, Order that was being appealed, after including multiple findings of fact and well-reasoned conclusions of law, clearly applied W.Va. Code §43-1-2 in making a ruling on equitable distribution. See Appendix pages 6 - 10. The Family Court issued such a ruling based on the authority conferred on it to exercise jurisdiction in all actions for divorce, pursuant to W.Va. Code §51-2A-2 and to identify what property is marital, what the value of that marital property is, and how that marital property should be divided between the parties in equitable distribution, pursuant to the requirements of W.Va. Code §48-7-101 *et seq.*

Therefore, it is quite clear that the Circuit Court erred in granting the petition for appeal and remanding this matter to the Family Court "for the distribution of the real estate acquired by the Respondent prior to the marriage, pursuant to West Virginia Code §48-7-101 *et seq.*" as the Family Court did not abuse its discretion in its April 19, 2013, Order and had already issued a legally sound ruling on equitable distribution. See Appendix page 5.

CONCLUSION

The Circuit Court erred in considering West Virginia Code § 42-3-1 and applying it in any manner to this matter as this is a code section relating to the right of a surviving spouse to take an elective share of the deceased spouse's estate. The parties in this matter are both still living, so this statute does not apply. Furthermore, the Circuit Court, in considering the Petition for Appeal, was only permitted to consider the record from

the Family Court, and that code section was never even mentioned in any of the Family Court proceedings or any of the pleadings, exhibits, or documents filed therein.

The Circuit Court erred in concluding that the Family Court did not have jurisdiction to apply the provisions of West Virginia Code §43-1-2 in this matter because the Family Court not only has jurisdiction over all divorce actions, pursuant to West Virginia Code §51-2A-2, but it also has the authority and the responsibility for making determinations of equitable distribution pursuant to West Virginia Code §48-7-101 *et seq*, and that is exactly what the Family Court did in this matter.

The Circuit Court erred in concluding that West Virginia Code §43-1-2 did not apply in this matter because the parties were not married prior to the enactment of the statute. There is no language in W.Va. Code §43-1-2 that indicates it is to be applied only to parties who were married prior to 1992, and to conclude that is to deny all parties married subsequent to that date the protections that the Legislature clearly intended for all married persons to have and would render the entire statute virtually moot. The Circuit Court does not have the authority to do so.

Additionally, because Petitioner did not allege that dower/curtesy actually attached to the real estate that Respondent fraudulently conveyed without proper notice, because W.Va. Code §43-1-2 refers only to a test of whether dower/curtesy would have attached if the conveyance had been made prior to that date, and because the Family Court correctly analyzed and applied the requirements of W.Va. Code §43-1-2, the Circuit Court erred in concluding that Respondent had no duty to notify Petitioner of the conveyance simply because dower and curtesy were abolished prior to their marriage.

Prior to enactment of W.Va. Code §43-1-2 and prior to the abolition of dower/curtesy, Petitioner would have had an inchoate curtesy interest in the 27 acres of real estate that Respondent conveyed to her children. A similar transfer at that time would have required Petitioner to join in the transfer to waive his curtesy interest, or the same would have traveled with the real estate. Similarly, Petitioner was required to be notified of Respondent's transfer of this real estate, or Petitioner was to be afforded the protections of W.Va. Code §43-1-2, and that's what the Family Court ordered.

Petitioner is the innocent spouse in this matter. Respondent in this matter conveyed 27 acres of real estate to her adult children, in an apparent effort to defeat any potential interest that Petitioner may have had in that real estate. Respondent ignored the provisions of W.Va. Code §43-1-2(b) which states: "[a]ny married person who conveys an interest in real estate shall notify his or her spouse prior to or within thirty days of the time of the conveyance if the conveyance involves an interest in real estate to which dower would have attached if the conveyance had been made prior to the date of enactment of this statute." See Appendix page 14.

West Virginia Code §43-1-2(d) states that "[w]hen a married person fails to comply with the notification requirements of this section, then in the event of a subsequent divorce within five years of said conveyance, the value of the real estate conveyed, as determined at the time of conveyance, shall be deemed a part of the conveyancer's marital property for purposes of determining equitable distribution. . . ."

Id. Petitioner filed for divorce within four months of that transfer., well within the five year limitation.

This Honorable Court has ruled that the language of W.Va. Code §43-1-2 is clear, and, therefore, both the Family Court and the Circuit Court are required to apply the same without resorting to any further interpretation. In this matter, the Family Court correctly applied W.Va. Code §43-1-2, but the Circuit Court erroneously reversed the Family Court Order and remanded, with no factual or legal basis to do so.

Petitioner in this matter is entitled to have the Circuit Court Order, entered on July 30, 2013, reversed with the Family Court Order, entered on April 19, 2013, being fully reinstated.

ROSS STANLEY

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0960

**Ross Stanley, Petitioner Below,
Petitioner**

vs.

Appeal from a final order
of the Circuit Court of
Greenbrier County
(12-D-65)

**Carolyn Haynes Stanley, Respondent Below,
Respondent**

CERTIFICATE OF SERVICE

I, Martha J. Fleshman of John Bryan Law, do hereby certify that a true and correct copy of the foregoing *Petitioner's Brief*, with appendix, has been served upon Respondent by placing the same in regular United States Mail, postage paid, and addressed to her counsel of record as follows:

J. Michael Anderson
702 Main Street
Rainelle, WV 25962

the same being the last known fax number, this 30th day of November, 2013.


Martha J. Fleshman