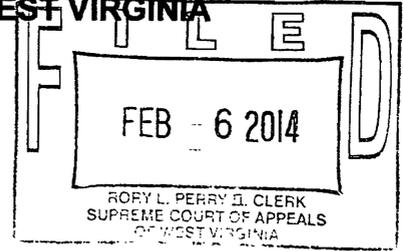


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0960



**Ross Stanley, Petitioner Below,
Petitioner**

vs.

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

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

PETITIONER'S REPLY BRIEF

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Although Petitioner believes that this Honorable Court has been provided with sufficient information on which to make a memorandum decision in this matter, Petitioner disagrees with Respondent that “no new or novel issues are being presented on this record.” Because there are no previous cases in which this Honorable Court has ruled on the exact application of West Virginia Code §43-1-2, Petitioner submits that this is a “new and novel issue” for this Court. Therefore, Petitioner continues to be available for oral argument in this matter should this Honorable Court deem it necessary or helpful in rendering a decision.

ARGUMENT

Pursuant to Rule 10 (g) and Rule 10 (d) of the Rules of Appellate Procedure, Petitioner is submitting this Reply Brief without specifically restating the assignments of error that were clearly outlined in Petitioner’s Brief.

Rather than an additional Statement of the Case, this Argument will address the inaccuracies and omissions in Respondent’s Brief. All references to the “Appendix” in this Brief are to the Appendix, and the corresponding page numbers, filed by Petitioner with his original brief on November 30, 2013.

Although Respondent admitted in her Statement of the Case that Petitioner contributed \$30,000.00 (actually \$36,000.00) to the reduction of the debt against Respondent’s real estate after the marriage of the parties and “made some improvements to the real estate,” Respondent actually paid off the existing mortgage on Respondent’s real estate and, during the subsequent years of their marriage, built multiple buildings on the farm, added to and remodeled the marital home, built fences,

and improved the quality of the land itself. All of this was done in exchange for Respondent's promise to add Petitioner's name to the deed for her real estate, which she did not do.

Respondent continues to misstate the order from the Family Court and to misstate the intentions of West Virginia Code §43-1-2, and Respondent has attempted to muddy the waters further by referring to the same, incorrect statute that the Circuit Court referred to, specifically West Virginia Code §42-3-1. See Appendix pages 14 & 99-100.

It is unclear to Petitioner whether the Circuit Court initially simply scrambled the numbers of the relevant statute, §43-1-2, and incorrectly referred to §42-3-1, or whether the Circuit Court actually intended to review additional code sections. The result, however, was that the Circuit Court misapplied the law to the facts of this case.

Petitioner reasserts that the only code section relevant to the issue before this Court is West Virginia Code §43-1-2. WV Code §43-1-2 is the statute that was argued to the Family Court in the original hearing on equitable distribution. See Appendix pages 31-42. WV Code §43-1-2 is the statute that was applied by the Family Court in its Order entered April 19, 2013. See Appendix pages 43 & 44. WV Code §43-1-2 is the statute that was addressed in the briefs provided by both parties to the Family Court prior to entry of its Order. See Appendix pages 45 - 66. WV Code §43-1-2 is the statute that was included in the appeal from the Family Court to the Circuit Court filed by Respondent below. See Appendix pages 128 - 132. WV Code §43-1-2 is the statute that was argued by both parties in oral argument presented to the Circuit Court

on July 30, 2013. See Appendix pages 67 - 78.

The first time any pleading, argument, hearing, order, counsel, party, or judge even mentioned West Virginia Code §42-3-1 was in the Order of the Circuit Court entered July 30, 2013. See Appendix pages 1-5. Except for the Circuit Court's references to the specific language of the inappropriate statute, §42-3-1, it could be thought that, in the haste to enter the Circuit Court Order on the same day that oral argument was held, the Circuit Court simply scrambled the numbers of the statutes. However, the Circuit Court's Order went on to inappropriately apply the language of the erroneous statute to the facts of the case at hand, and to, consequently, issue an erroneous Order in this matter.

To reiterate, West Virginia Code §42-3-1 does not apply to the case at bar. WV Code §42-3-1 is a statute entitled "Right to elective share" and which addresses the right of a **surviving** spouse to elect to take against the estate of a **deceased** spouse who died domiciled in the state of West Virginia. See Appendix pages 99 & 100. Both of these parties were alive at the time of the Family Court hearing on September 19, 2012. Both of these parties were alive at the time the Family Court Order was entered on April 19, 2013. Both of these parties were alive at the time the Family Court Order was appealed to the Circuit Court on or about May 16, 2013. Both of these parties were alive at the time counsel presented oral argument to the Circuit Court on July 30, 2013. Both of these parties were alive when Petitioner's Brief was filed on November 30, 2013. Both of these parties were alive when Respondent's Brief was filed on January 14, 2014. And...both of these parties are still alive today. Therefore, the

application of a statute designed to deal with a surviving spouse's rights to a deceased spouse's estate is completely irrelevant to the case at bar. This indicates, quite clearly, that the Circuit Court erred in its application of West Virginia Code §42-3-1 to this matter, and the resulting Order entered by the Circuit Court on July 30, 2013, was quite clearly in error.¹

While continuing to argue the incorrect statute that was first applied to this matter in the Circuit Court Order, Respondent also misstates what the Circuit Court actually said. In Respondent's Argument, page 2, she stated, "The Circuit Court of Greenbrier County, West Virginia properly found that W. Va. Code §42-3-1 was not enacted for the purpose of the division of separate property." Petitioner does not dispute that conclusion, however, Petitioner submits that that conclusion is totally irrelevant to the case at bar as is the application of WV Code §42-3-1. Respondent's misstatement is in her following sentence in which she incorrectly includes the language of §43-1-2, but references it as the language of §42-3-1 in an attempt to justify the erroneous Order from the Circuit Court. Therefore, Respondent's entire response is irrelevant because she is referencing the wrong statute, as did the Circuit Court.

Respondent then changes her argument from any that she advanced to the Family Court or in her appeal to the Circuit Court or in her oral argument to the Circuit

¹It is important to note here that the Circuit Court, on pages 1 and 2 of its Order and the Appendix in this matter, properly referenced West Virginia Code §51-2A-14(b) and stated that, "the circuit court may only consider the record, which consists of the recording of the Family Court hearing and the exhibits, together with all documents filed in the proceeding." The Circuit Court then went on to base its entire conclusion and resulting order on a statute that was not included in the record from Family Court, was not argued in the hearing before the Family Court, was not included as a document filed in the Family Court proceeding, and was not argued before it in oral argument. By its own reference to the law applicable to an appeal from Family Court, the Circuit Court proved the erroneous nature of its own resulting order.

Court, to now advance the same, erroneous argument that was supplied by the Circuit Court Order entered on July 30, 2013. See Appendix pages 1-5. The Respondent now, for the first time, argues that the Code section (incorrectly referenced as §42-3-1 but quoting the language of §43-1-2), which was enacted in 1992 does not apply to a marriage which occurred five years later in 1997. This argument is not only absolutely ludicrous but, if applied, would potentially render every law passed by our Legislature to be retrospective in nature only, when the bulk of laws that are passed are prospective in nature.

Petitioner was the one who first argued that West Virginia Code §43-1-2 applies to the case at bar. That argument was made in the Family Court hearing held on September 19, 2012, carried forward in the brief the Petitioner filed with the Family Court on November 19, 2012, and continued in the oral argument presented to the Circuit Court on July 30, 2013. See Appendix pages 31-42, 45-61, and 67-78.

Petitioner is well aware that dower and curtesy were abolished in 1992, as he was the one who first brought that fact to the attention of the lower courts in this matter.

However, both the Respondent and the Circuit Court have completely misinterpreted the language of West Virginia Code §43-1-2. The relevant language states that the married person who conveys an interest in real estate shall notify his or her spouse of said 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.**" Emphasis added. See Appendix page 14. The statute is clear and unambiguous in its language. The statute includes no requirement

for when the marriage occurred. The statute includes no requirement that dower or curtesy **actually** apply...in fact, quite the contrary. This statute is provided as a protection for married persons precisely because dower and curtesy no longer attach.

These parties were married in 1997. The transfer of the real estate was made in 2011. The parties are still in the process of obtaining a divorce. Therefore, with the facts of this case, if this conveyance had been made prior to the date of enactment of West Virginia Code §43-1-2, curtesy would have attached. Petitioner would have retained a curtesy interest in the real estate that Respondent transferred to her children. Therefore, the test that is established in this statute is met. Curtesy would have attached, therefore, this statute applies to the transfer that Respondent made on October 18, 2011, and Respondent was required to give notice to her spouse, the Petitioner in this action.

Respondent goes on to argue that the holding of this Honorable Court in Rosier v. Rosier, 227 W.Va. 88, 705 S.E.2d 595 (2010) “only applied in a divorce action which was initiated within five years of the [sic] transfer of dower would have attached.” See Appendix pages 80-98. This argument is also ludicrous. To apply Respondent’s argument, first that would indicate that only persons who divorced between 1992 and 1997 would be afforded the protections of West Virginia Code §43-1-2. That argument is not only ridiculous, but, if applied, would render any legislation that refers to a previously held right to be ineffective.

Second, if the Legislature intended West Virginia Code §43-1-2(b) to only be effective for a specific time period, it would have included that information in the language of the statute. It did not do so. This Honorable Court did not do so in Rosier

either. This Honorable Court recognized both the language and the intent of West Virginia Code §43-1-2.

Respondent is attempting to take the language of West Virginia Code §43-1-2(d) and totally misapply it to the case at bar. In §43-1-2(d), the Legislature provided the remedy that the court is required to apply if a married person fails to comply with the notification requirement of §43-1-2(b). That remedy states that, “in the event of a subsequent divorce within five years of said conveyance, the value of the real estate conveyed...shall be deemed a part of the conveyancor’s marital property. . . .” See Appendix page 14. Therefore, it is clear that the Legislature did intend to provide a time limit of five years, but that is only with reference to the timing of the divorce of the parties with relation to the transfer of real estate for which notice was not provided.

In this matter, the real estate was transferred on October 18, 2011, and the Petitioner filed for divorce on or about February 14, 2012, well within the five year period established in §43-1-2(d). In fact, that five year period for the parties to be divorced will not expire until October 18, 2016. The statute very clearly includes the five year period solely as a requirement for the timing of the divorce in relation to the transfer of the real estate. This five year period has no relevance to the application of WV Code §43-1-2(b) because said statute will be applicable until it is either amended or abolished by the Legislature of the State of West Virginia or ruled unconstitutional by this Honorable Court. As this Honorable Court has already referenced the entirety of West Virginia Code §43-1-2 in Rosier, and verified its applicability for divorcing parties, it is applicable to the case at bar. See Appendix pages 80-98.

Petitioner does not disagree with Respondent’s interpretation of Mayhew v.

Mayhew, 197 W.Va. 290, 475 S.E.2d 382 (1996) but asserts that her argument is misplaced in an appeal regarding the application of West Virginia Code §43-1-2. See Appendix pages 15-30. Petitioner agrees that Mayhew provides a method for a spouse to be reimbursed for enhancements to and appreciation of property separately owned by the other spouse. Petitioner is quite willing to permit this Honorable Court to apply the protections cited in Mayhew to require the Respondent to reimburse him and to also apply the protections included in §43-1-2 by including the value of the real estate transferred by Respondent when calculating the value of marital property to be equitably divided. There is no indication in either the applicable statutory language or the language in Mayhew that the two are mutually exclusive and cannot both be applied in a given matter.

Although Mayhew does provide Petitioner with a “remedy to recoup his active appreciation of separate property” it does not address the actions that Respondent took in making a surreptitious transfer of real estate out of her name in an attempt to defeat any potential interest that Petitioner may have alleged in the said real estate.

While Respondent continues to argue that the “Legislature did not intend to give Petitioner a windfall by lack of notice,” that is not the result of the proper application of §43-1-2. To apply the provisions of West Virginia §43-1-2(d) in this matter and include the **value** of the real estate conveyed, not the real estate itself, in calculating the value of marital property to be equitably divided, Petitioner would not be granted a “windfall.” Rather, Petitioner would be compensated for the devious actions that Respondent took in trying to keep Petitioner from potentially recouping anything from the large amounts of money he provided in payment of the mortgage and erecting substantial

improvements on the real estate. The intent of the Legislature is clear. If a married person chooses to make a surreptitious transfer of separately owned real estate without following the requirement to legally notify the spouse, that married person subjects herself to the remedy included in West Virginia Code §43-1-2(d), to have the value of that transferred real estate included in a calculation of the value of marital property for purposes of equitable distribution. See Appendix page 14.

If Respondent had simply asked the Petitioner to sign the deed transferring her real estate to her children, or if Respondent had provided an affidavit verifying that she notified Petitioner of the transfer, and he refused to sign the deed, then this matter would not be before this Honorable Court. But Respondent did neither. Instead, while allowing Petitioner to believe that she accepted the terms of his settlement proposal for their upcoming divorce, Respondent secretly transferred the ownership of her real estate to her children.

The timing of the transfer, occurring 14 years after Respondent's marriage to Petitioner, but only four months prior to Petitioner filing for divorce, and during a time the parties were discussing potential equitable distribution, makes it patently obvious that Respondent's motive in transferring the real estate to her children was to defeat any potential interest Petitioner may argue he was entitled to. The fact that Respondent requested the deed to be mailed to one of her sons instead of being returned to the marital home where Petitioner may have seen it is clear evidence that Respondent was hiding the conveyance from Petitioner.

However, as previously stated to this Honorable Court, regardless of the motives Respondent had in conveying the real estate to her children, West Virginia Code §43-1-

2 applies to first, require that Respondent notify her spouse of the conveyance, and second, to provide the remedy for Respondent's non-compliance with the notice provision by requiring that the value of the real estate be included in a calculation of the value of marital property for the purpose of equitable distribution. See Appendix page 14. This is the remedy afforded to the innocent spouse in such a situation, and Petitioner is the innocent spouse in the case at bar.

CONCLUSION

The Circuit Court erred in applying West Virginia Code §42-3-1 to the case at bar because that statute is an inheritance statute and has no relevance in a divorce action. Additionally, because §42-3-1 was not included in any of the record from the Family Court or any of the pleadings filed, the Circuit Court erred by considering it in this matter.

The Circuit Court erred in its interpretation of West Virginia Code §43-1-2. Indeed, as this Honorable Court has ruled multiple times, because the language of §43-1-2 is clear on its face, it does not even require interpretation by the courts...it simply requires that the courts follows its provisions. Therefore, because Respondent, who was a married person, conveyed real estate without notifying her spouse of the conveyance, pursuant to §43-1-2(b), and because the parties are divorcing within five years of the said conveyance, then pursuant to §43-1-2(d) 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"

The Family Court of Greenbrier County correctly applied West Virginia Code §43-1-2 in making a proper determination of equitable distribution pursuant to the

mandated provisions of West Virginia Code §48-7-101. Therefore, the Circuit Court erred when it ruled that the Family Court abused its discretion.

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

By Counsel



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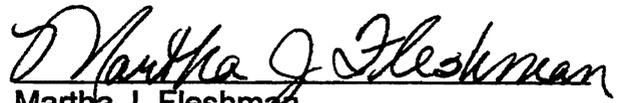
Carolyn Haynes Stanley, Respondent Below,
Respondent.

CERTIFICATE OF SERVICE

I, Martha J. Fleshman, do hereby certify that a true and correct copy of the foregoing *Petitioner's Reply Brief* has been served upon Respondent by placing the same in the 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 address, this 4th day of February, 2014.


Martha J. Fleshman