

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**KIMBERLEY A. MORRIS,  
Respondent Below, Petitioner,**

**vs.) No. 13-0742 (Gilmer County 12-D-08)**

**DOUGLAS SHANE MORRIS,  
Petitioner Below, Respondent.**

**FILED**  
**March 28, 2014**  
released at 3:00 p.m.  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

The petitioner herein, Kimberley A. Morris (“Mrs. Morris”), appeals from an order entered July 15, 2013, by the Circuit Court of Gilmer County. By that order, the circuit court found the postnuptial agreement entered into by Mrs. Morris and the respondent herein, Douglas Shane Morris (“Mr. Morris”), to be valid and enforceable, thus reversing an order entered by the Family Court of Gilmer County on February 19, 2013. In its order, the family court had set aside the parties’ postnuptial agreement, finding it to be invalid and unenforceable because it did not achieve an equitable distribution of the parties’ property; the family court additionally had ordered the equitable distribution of the parties’ property in accordance with W. Va. Code § 48-7-101 *et seq.* Before this Court, Mrs. Morris challenges the circuit court’s ruling reversing the family court’s order and enforcing the parties’ postnuptial agreement.

Upon our review of the parties’ arguments, the appendix record, and the pertinent authorities, we reverse the circuit court’s decision upholding the parties’ postnuptial agreement and remand this case to the family court for further proceedings to equitably distribute the parties’ marital property. In reaching this decision, we conclude that the parties’ postnuptial agreement is not valid because it was based upon misrepresentations of the character and value of the parties’ property at the time that the parties entered into said agreement. We further find it necessary to remand this case for the equitable distribution of the parties’ marital property as required by W. Va. Code § 48-7-101 (2001) (Repl. Vol. 2009). On remand, the family court is instructed to determine the character of (1) the subject ownership interests in Flying “W” Plastics, Inc., and (2) the corporation’s retained earnings in light of Mr. Morris’s contention that such interests, and associated earnings, are his separate property and this Court’s prior decisions in *Shank v. Shank*, 182 W. Va. 271, 387

S.E.2d 325 (1989), and *Mayhew v. Mayhew*, 205 W. Va. 490, 519 S.E.2d 188 (1999), explaining the process for evaluating the marital components of separate property. Finally, this case does not present a new or significant issue of law. Accordingly, for the reasons set forth herein, we find this case satisfies the “limited circumstances” requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure and is proper for disposition as a memorandum decision.

On June 30, 1992, Mr. and Mrs. Morris married, and, during their marriage, they had two children, who are now emancipated. When they were first married, the couple resided in Gilmer County, West Virginia. In 2002, Mr. and Mrs. Morris moved to Roanoke, Virginia, where they resided in a spacious 6,700 square foot house in an upscale neighborhood. During their marriage, the couple separated and reconciled twice—first in 2004 and again in 2009. In 2005, when the Morrises reconciled, they returned to Gilmer County, West Virginia, and moved first into an airplane hangar,<sup>1</sup> and then into a modular home pending the construction and completion of their new home, which Mr. Morris promised would be comparable to their Roanoke residence.<sup>2</sup>

Prior to Mr. and Mrs. Morris’s marriage, they entered into a prenuptial agreement, which was substantially similar to the instant postnuptial agreement, but which they rescinded at some point during their marriage. Also during their marriage, Mr. Morris received a 50% ownership interest in Flying “W” Plastics, Inc. (“Flying ‘W’”).<sup>3</sup> It appears from the record in this case that Mr. Morris contributes to the administration of Flying “W” and is employed by, and receives his income from, this company. In 2007, Flying “W” elected to become a “Subchapter S” corporation,<sup>4</sup> and from that time throughout the remainder of the parties’ marriage, the Morrises paid income taxes on the company’s retained

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<sup>1</sup>The airplane hangar was owned by Mr. Morris’s father’s company.

<sup>2</sup>Mrs. Morris claims that Mr. Morris’s promise to build a new family home in Gilmer County was an inducement for her first reconciliation with him.

<sup>3</sup>This company was formed on February 6, 1992, before the parties married, but it appears that Mr. Morris did not receive his ownership interest therein until sometime during the parties’ marriage. Mr. Morris’s sister holds the remaining 50% ownership interest in Flying “W” Plastics, Inc.

<sup>4</sup>A “Subchapter S” corporation is “a pass-through entity utilized for federal tax purposes. In other words, the corporation’s income ‘passes through’ to the shareholders, who then report that income on their individual tax returns.” 35 Am. Jur. 2d *Federal Tax Enforcement* § 449, at p. 463 (2010) (footnotes omitted).

earnings. While Mr. Morris occasionally received a distribution of the company's profits, the majority of Flying "W"'s profits were not distributed but were classified as "retained earnings" and reinvested as assets of the company.<sup>5</sup>

On February 11, 2009, Mr. and Mrs. Morris signed the postnuptial agreement that is at issue in this case. It is apparent from the appendix record that Mr. Morris had asked his father for monetary assistance to construct the parties' new residence upon their return to Gilmer County, but that Mr. Morris's father conditioned his contribution of funds upon the parties' signing of the instant postnuptial agreement. The agreement, itself, was drafted by corporate counsel for Mr. Morris's father's business interests, and these attorneys also represented Mr. Morris with respect to this agreement. A local attorney, who was a friend of both Mr. and Mrs. Morris,<sup>6</sup> represented Mrs. Morris in the negotiation of the terms of the postnuptial agreement, but he advised her not to sign the agreement. Contrary to her attorney's advice, Mrs. Morris signed the agreement because she had been led to believe that if she did not sign the postnuptial agreement, the new house that Mr. Morris had promised to build the family in Glenville would not be built. The parties both acknowledge that while construction of the new marital residence in Gilmer County was commenced, it was not completed; however they disagree as to the nature and extent of work remaining to be done. In summary, the postnuptial agreement classified the majority of the parties' property as Mr. Morris's separate property, including bank accounts valued at \$150,000; his interest in Flying "W" valued at \$4.5 million; and real estate labeled as "Home" valued at \$75,000.<sup>7</sup> The agreement classified Mr. Morris's separate property as being comprised of assets totaling \$4,662,738; Mrs. Morris's separate property as having assets totaling \$90,000;<sup>8</sup> and the

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<sup>5</sup>Flying "W" had retained earnings of \$11,853,631.13 in December 2011 and \$14,343,307.86 in December 2012.

<sup>6</sup>Mr. Morris paid Mrs. Morris's attorney by providing assistance with household projects at the attorney's home.

<sup>7</sup>Mr. Morris's asset sheet listed a zero balance for life insurance.

<sup>8</sup>The sole asset attributed to Mrs. Morris as her separate property was described as "[f]urniture, furnishings, clothing, jewelry, personal effects, and other tangible personal property including motor vehicles." Mrs. Morris's asset sheet reflected a zero balance for bank accounts and similar liquid assets, life insurance, and real estate, including the real estate identified as "Home."

parties' marital property as consisting of \$20,000.<sup>9</sup>

Despite the repeated reconciliations, the parties ultimately separated on January 7, 2012, and Mr. Morris filed the underlying divorce action on February 23, 2012. By order entered August 7, 2012, the family court initially upheld the parties' postnuptial agreement. However, by final order entered February 19, 2013, the family court found the postnuptial agreement to be unenforceable because its inequitable distribution of the parties' property was unfair to Mrs. Morris. Specifically, the family court found that

upholding the Post-Nuptial Agreement particularly when considering the distribution of other assets not covered by such Agreement, would not achieve an equitable distribution of the parties' property as contemplated by W. Va. Code § 48-7-101 *et seq.* Other assets not covered by the Post-Nuptial Agreement include the Accumulated Adjustment Account of Flying "W" Plastics, Inc., otherwise known as retained earnings, which had earlier been determined by this Court to be a marital asset.

Based upon these determinations, the family court ordered the equitable distribution of the parties' property pursuant to W. Va. Code § 48-7-101 *et seq.*, including the retained earnings of Flying "W," and awarded Mrs. Morris "one-half of the retained earnings (AAA account) attributable to [Mr. Morris] of . . . Flying 'W' Plastics, Inc., as of January 7, 2012." Finally, the family court ordered,

[p]ursuant to W. Va. Code § 48-8-103, [Mr. Morris] shall forthwith transfer to [Mrs. Morris], one-half (½) of all of his interests in Flying "W" Plastics, Inc., a closely held corporation, as lump sum spousal support. The Court **FINDS** that this asset would have been the "separate property" of [Mr. Morris], had the post-nuptial agreement been upheld. After the transfer, [Mrs. Morris] shall own 25% of all of [Mr. Morris's] shares of all classes of his corporate stock in this corporation, and [Mr. Morris] shall own 25%, with the Court acknowledging that [Mr. Morris's] sister owns the remaining 50%. In making this award of spousal support, the Court acknowledges that this is a marriage of nearly twenty (20) years duration, that [Mrs. Morris] was not employed for substantial periods during the marriage by agreement of the parties while [Mr. Morris] worked and made significant income, and she enjoyed an above-average standard of living. By transfer of this asset to [Mrs. Morris], she should have the means with which to provide for her support in the future.

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<sup>9</sup>The description of the parties' marital property of \$20,000 was comprised of "[f]urniture, furnishings, clothing, jewelry, personal effects, and other tangible personal property including motor vehicles."

(Emphasis in original).

Both parties appealed from the family court's order to the Circuit Court of Gilmer County. By order entered July 15, 2013, the circuit court reversed the family court's order and found the parties' postnuptial agreement to be valid and enforceable. In so ruling, the court found that Mrs. Morris's "desire to have a house built, in order to leave the residence shared by her family, does not constitute fraud, duress, or misrepresentation on the part of the parties." The court further concluded that the postnuptial agreement was valid and noted that, in the postnuptial agreement, Mrs. Morris had "waived and released any claim or right she may have had in Flying 'W' Plastics as a result of being married to [Mr. Morris]. [Mrs. Morris] also waived and released any claim or right she may have had in the interest or assets of Flying 'W' Plastics." Finally, in light of these rulings upholding the parties' postnuptial agreement, the circuit court determined that "there is no need to address the issue of whether or not Retained Earnings are marital property in this case, as [Mrs. Morris] signed away any potential rights or claims she may have had to the Flying 'W' Plastics in the Post-Nuptial Agreement." From this order, Mrs. Morris now appeals to this Court.

On appeal to this Court, Mrs. Morris contends that the circuit court erred by reversing the family court's order and upholding the parties' postnuptial agreement. We previously have held that,

[i]n reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.  
Syl., *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).

The primary assignment of error in the case *sub judice* concerns the validity of the parties' postnuptial agreement. W. Va. Code § 48-7-102 (2001) (Repl. Vol. 2009) permits parties to a divorce action to enter into a separation agreement to effectuate a distribution of their property as a result of their impending divorce:

In cases where the parties to an action commenced under the provisions of this chapter have executed a separation agreement, then the court shall divide the marital property in accordance with the terms of the agreement, unless the court finds:

- (1) That the agreement was obtained by fraud, duress or other unconscionable conduct by one of the parties; or
- (2) That the parties, in the separation agreement, have not expressed themselves in terms which, if incorporated into a judicial order, would be enforceable by a court in future proceedings; or

(3) That the agreement, viewed in the context of the actual contributions of the respective parties to the net value of the marital property of the parties, is so inequitable as to defeat the purposes of this section, and such agreement was inequitable at the time the same was executed.

*Cf.* Syl. pt. 2, in part, *Gant v. Gant*, 174 W. Va. 740, 329 S.E.2d 106 (1985) (“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[.]”), *overruled on other grounds by Ware v. Ware*, 224 W. Va. 599, 687 S.E.2d 382 (2009); Syl. pt. 3, *Gant*, 174 W. Va. 740, 329 S.E.2d 106 (“At the time a prenuptial agreement is presented to a court for enforcement a court may consider whether the agreement’s terms are ostensibly fair. Unless, however, the agreement is unconscionable, as that term has been defined in the general law of contracts, a court’s review of the agreement’s ostensible ‘fairness’ is limited to an inquiry into whether circumstances have changed to such an extent from what the parties foresaw at the time they entered into the agreement that enforcement would be inequitable.”); *Smith v. Smith*, 125 W. Va. 489, 24 S.E.2d 902 (1943) (“Under [former] Code, 48-3-8, enabling a wife to contract with her husband, a contract for separation of the two spouses which, on its face, does not disclose any injustice, inequity or other vitiating circumstance, is presumptively valid; but, nevertheless, will be set aside in a suit for divorce at the instance of the husband where said relief is specially prayed for and he affirmatively shows that it is unjust or inequitable.”). The purpose of the equitable distribution statutes is set forth in W. Va. Code § 48-7-101 (2001) (Repl. Vol. 2009) and directs that, “[e]xcept as otherwise provided in this section, upon every judgment of annulment, divorce or separation, the court shall divide the marital property of the parties equally between the parties.”

The parties to the case *sub judice* signed the instant postnuptial agreement in the course of reconciling from their 2009 separation. From our review of the parties’ postnuptial agreement and the appendix record in this case, we conclude that the parties’ postnuptial agreement is not valid as a means of distributing the parties’ property in their divorce action because it misrepresented the character and value of the parties’ property that was purportedly subject to the agreement and failed to include all of the parties’ assets and liabilities within its terms.<sup>10</sup> When viewed in the context of the parties’ financial information

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<sup>10</sup>While the terms of a postnuptial agreement need not achieve a fair or equal division of the parties’ assets and liabilities, it is imperative that the parties to such an agreement fully disclose the nature and the value of their property that is subject to the postnuptial agreement. *See generally* Syl. pt. 8, *In re Marriage of Traster*, 48 Kan. App. 2d 356, 291 P.3d 494 (2012) (“The appropriate standard for assessing the enforceability of a postmarital agreement is review of the agreement by the court to determine whether (1) each party had an

and property disclosures, the subject postnuptial agreement reveals that it is fraught with glaring omissions and gross inaccuracies. Assets that were omitted from the parties' property lists include the parties' interests in working oil and gas wells that were purchased during the marriage; the retained earnings of Flying "W";<sup>11</sup> and the projected value of the parties' new marital home to be built in Glenville, which also served as the consideration for Mrs. Morris's decision to sign the postnuptial agreement. Noticeably absent from the parties' list of marital liabilities is the mortgage debt for their new marital home as well as the income tax liability attributable to the retained earnings of Flying "W," which taxes the parties paid with marital funds from the time Flying "W" became a "Subchapter S" corporation in 2007 through the date of their separation. Moreover, it seems unusual that Mrs. Morris's sole asset consists of nothing but "[f]urniture, furnishings, clothing, jewelry, personal effects, and other tangible personal property including motor vehicles"; odd that the only bank accounts noted are on Mr. Morris's separate property list with neither Mrs. Morris nor the marital estate possessing any liquid assets; and inconceivable that, given their societal status, neither of the parties possesses a policy of life insurance as none are included on their respective asset lists.

In addition to the noted glaring omissions, the postnuptial agreement's property lists also contain gross inaccuracies insofar as other information contained therein either received an uncharacteristic classification or was grossly misrepresented in terms of value. Despite the fact that, at the time that the parties entered into their postnuptial agreement, they shared a marital home, *i.e.*, the modular home, what may be presumed to be this residence appears not on the parties' listing of joint marital assets but rather is inexplicably included on Mr. Morris's own list of his separate assets. Additionally, Mr. Morris's projected income is significantly understated. According to Mr. Morris's financial information attached to the parties' postnuptial agreement, he estimated that, as of January 31, 2009, his annual income would include a salary of \$150,000. However, according to Mr. Morris's income tax return, the actual salary income that he reported for tax year 2009, which was calendar year 2008 (the year immediately preceding the parties' postnuptial agreement), was \$345,330; thus, in his postnuptial agreement financial information, Mr. Morris estimated that he would receive

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opportunity to obtain separate legal counsel of each party's own choosing; (2) there was fraud or coercion in obtaining the agreement; (3) *all material assets were fully disclosed by both parties before the agreement was executed*; (4) each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of material assets and all marital rights in the event of a divorce; (5) the terms of the agreement were fair and reasonable at the time of execution; and (6) the terms of the agreement are not unconscionable at the time of dissolution." (emphasis added)); *Ansin v. Craven-Ansin*, 457 Mass. 283, 291, 929 N.E.2d 955, 963-64 (2010) (same).

<sup>11</sup>See *supra* note 5.

as salary an amount that was less than one-half the amount he actually earned in the immediately preceding year. Mr. Morris's income tax return for tax year 2010, which was calendar year 2009 (the year in which the parties signed the postnuptial agreement), reveals an even greater disparity between the amount he anticipated he would earn that year as reflected in the agreement's financial information, *i.e.*, \$150,000, and his actual salary income reported on his tax return, \$404,613, which actual salary was almost three times greater than his estimated salary income.

Given the glaring omissions and gross inaccuracies in the postnuptial agreement's listing of the parties' assets and liabilities, we find that the family court correctly set aside such agreement. We further conclude that, based upon the foregoing discussion, the circuit court erred by reversing the family court's order and upholding the parties' postnuptial agreement. Accordingly, the July 15, 2013, order of the Circuit Court of Gilmer County is hereby reversed, and this case is remanded to the family court for the equitable distribution of the parties' marital property. On remand, the family court is instructed to determine the character of (1) the subject ownership interests in Flying "W" Plastics, Inc., and (2) the corporation's retained earnings in light of Mr. Morris's contention that such interests, and associated earnings, are his separate property and this Court's prior decisions in *Shank v. Shank*, 182 W. Va. 271, 387 S.E.2d 325 (1989), and *Mayhew v. Mayhew*, 205 W. Va. 490, 519 S.E.2d 188 (1999), explaining the process for evaluating the marital components of separate property.

Reversed and Remanded.

**ISSUED:** March 28, 2014

**CONCURRED IN BY:**

Chief Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Margaret L. Workman  
Justice Menis E. Ketchum  
Justice Allen H. Loughry II