No. 22399 -- Carlos James Burnside v. Jacquelin Nagle Burnside

Neely, C.J., dissenting:

Double, Double toil and trouble;
Fire burn and cauldron bubble.

WILLIAM SHAKESPEARE, MACBETH act 4, sc. 1.

Once again the majority stirs the cauldron created by Whiting v. Whiting, 183 W. Va. 451, 396 S.E.2d 413 (1990). A mere three months before the separation, Mrs. Burnside succumbed to Mr. Burnside's pressure and used part of her inheritance to pay off the mortgage on the couple's house. The family law master and the circuit court applied the Whiting gift presumption and Mr. Burnside was awarded a half-interest in the jointly titled house. Mrs. Burnside cried foul and foul it is!

Eye of newt, and toe of frog,
Wool of bat, and tongue of dog.

WILLIAM SHAKESPEARE, MACBETH act 4, sc. 1.

No easy solution exists under Whiting. The majority, concerned about this woman who is "self-employed cleaning houses," added some unique items to the mix because Whiting's "coercion, duress, or deception" methods for rebutting the presumption of a gift did not work in this case. But wait, the family law master and the circuit court "failed to make a specific finding regarding

Mrs. Burnside's 'intent' to make a gift." Slip op. at 15.[1] Careful on remand, because the cauldron of Whiting refuses to accept the "estate planning" or "adverse consequences" explanation. Slip op. at 16. The majority hints of an "unjust enrichment. . . at the division state of equitable distribution" (Slip op. at 18 n.15) loophole, which might be used to bring some equity to Whiting.

Out, damned spot! out, I say!

WILLIAM SHAKESPEARE, MACBETH act 5, sc. 1.

Whiting undermines family security by refusing to recognize that married persons title property jointly to: (1) reassure a spouse of a marital commitment; (2) ease the management of the property; (3) protect property from creditors; and, (4) take advantage of federal estate tax laws. Mrs. Burnside used her inheritance to reassure Mr. Burnside of her commitment to their marriage. Mrs. Burnside should not be penalized for her efforts. An exception was crafted to protect Mrs. Charlton who entrusted the investment of her inheritance to Mr. Charlton. See Charlton v. Charlton, 186 W. Va. 670, 413 S.E.2d 911 (1991). See Whiting, supra, 183 W. Va. at 464-65, 396 S.E.2d at 426-27 (Neely,

[1]The facts of this case required the majority, after citing the standard of review, to apply a more stringent standard because Whiting requires the inequitable result reached below. There was no abuse of discretion, no clear error in determining the facts; there was only the logical and inequitable consequences of Whiting.

C.J., dissenting for a discussion of the incentives to title property jointly).

Who would have thought the old man to have had so much blood in him?

WILLIAM SHAKESPEARE, MACBETH act 5, sc. 1.

I dissent because the tragedy of Whiting continues. The bloodstains are not easily removed. The Mrs. Burnsides, Mrs. Carltons and others going through a divorce should not be required to seek a handcrafted Whiting loophole or exception. We could, of course, write the following sex-neutral syllabus point to accommodate the Charlton and Burnside gloss on Whiting:

> Where, during the course of the marriage, one spouse transfers title to his or her separate property into the joint names of both spouses, a presumption that the transferring spouse intended to make a gift of the property to the marital estate is consistent with the principles underlying our equitable distribution statute unless the transfer is made to the phallically challenged spouse by the phallically advantaged spouse.

See, Syl. pt. 4, Whiting, supra.