

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1996 Term

No. 23263

NANCY H. MAYHEW,
Plaintiff Below, Appellant,

v.

ROBERT E. MAYHEW,
Defendant Below, Appellee

Appeal from the Circuit Court of Hampshire County
Honorable John M. Hamilton, Judge
Civil Action No. 93-C-166

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: May 2, 1996

Filed: July 5, 1996

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JUSTICE ALBRIGHT delivered the Opinion of the Court.

JUSTICE WORKMAN dissents and reserves the right to file a dissenting opinion.

JUSTICE RECHT concurs in part and dissents in part.

SYLLABUS BY THE COURT

1. "In reviewing challenges to findings made by a family law master that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review." Syllabus point 1, *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995).

2. "Questions relating to alimony and to the maintenance and custody of the children are within the sound discretion of the

court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused." Syllabus, *Nichols v. Nichols*, 160 W.Va. 514, 236 S.E.2d 36 (1977).

3. ""In a suit for divorce, the trial [court] . . . is vested with a wide discretion in determining the amount of . . . court costs and counsel fees, and the trial [court's] . . . determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that he has abused his discretion." Syllabus point 3, *Bond v. Bond*, 144 W.Va. 478, 109 S.E.2d 16 (1959).¹ Syl. Pt. 2, *Cummings v. Cummings*, 170 W.Va. 712, 296 S.E.2d 542 (1982)." Syllabus point 4, *Ball v. Wills*, 190 W.Va. 517, 438 S.E.2d 860 (1993).

4. A transmutation occurs when the contributing spouse evidences his intent to make a gift of the nonmarital property to the marriage by significantly changing the character of the property to marital.

5. A trial court must address the question of what portion of any appreciation in value in separate property occurring during the marriage is marital property and of what portion remains separate property. That portion which is marital property is, like other marital property, subject to marital distribution.

6. With respect to a business owned or partially owned by either or both of the parties to a divorce action, the spouses are

entitled to share equally in the appreciation in the value of that business during the marriage arising from the investment of marital property or the work of either party in the business, absent one or more of the factors enumerated in W.Va. Code § 48-2-32(c).

7. Under equitable distribution, the contributions of time and effort to the married life of the couple -- at home and in the workplace -- are valued equally regardless of whether the parties' respective earnings have been equal or not. Equitable distribution contemplates that parties make their respective contributions to the married life of the parties in that expectation.

8. The burden is on both parties to the litigation to adduce competent evidence on the values to be assigned in equitable distribution cases.

9. The burden of persuasion is on the party asserting a right to the property, that is to say that the burden of persuasion with respect to characterizing the property as separate property is on the one claiming the property to be separate and the burden of persuasion with respect to characterizing the property as marital is on the party claiming the benefit of that result.

10. Sound policy favors the continuation of short-term alimony past the untimely death of the payor in the absence of evidence that the payor's estate, should the payor die, is likely to be

insufficient to meet other obligations, or other matters appear which would make such continuation after death inequitable.

11. The right of the payee to receive rehabilitative alimony ceases with payee's death.

12. Pursuant to W.Va. Code § 48-2-13(a)(6)(A), the court in a divorce proceeding may compel either party to pay attorney's fees and court costs reasonably necessary to enable the other party to prosecute or defend the action in the trial court.

13. Under W.Va. Code § 48-2-13(a)(6)(B), the assertion of unfounded claims or defenses for "vexatious, wanton or oppressive

purposes" by a party is made a fact relevant to a party's responsibility for attorney fees and costs.

Albright, Justice:

This is an appeal by Nancy H. Mayhew from a final order entered by the Circuit Court of Hampshire County in a divorce proceeding. On appeal, the appellant claims that the circuit court erred in holding that twenty-four shares of Mayhew Chevrolet-Oldsmobile, Inc., titled in the name of her husband, the appellee, Robert E. Mayhew, were his separate, nonmarital property and that the circuit court also erred in valuing certain other shares of Mayhew Chevrolet-Oldsmobile, Inc., which were declared to be marital property. The appellant at another point claims that the trial court erred in failing to award her permanent alimony and in failing to award her rehabilitative alimony which would extend

beyond her death in the event she died within the period of such rehabilitative alimony. She additionally claims that the circuit court erred in failing to award her full legal and accounting fees and that the court erred in deducting certain payments made by her husband for mortgage payments and car payments during the pendency of the divorce from her equitable distribution share. Lastly, she claims that the circuit court erred in failing to order both parties to exchange financial information until the parties' youngest child turned eighteen years of age.

The appellant, Nancy H. Mayhew, and the appellee, Robert E. Mayhew, were married on April 28, 1979. Shortly thereafter, they purchased a farm house on a one-acre tract in Romney,

Hampshire County, West Virginia, and they resided there until Robert E. Mayhew moved out of the marital home in May, 1993.

During all but a brief time during the parties' marriage, Robert E. Mayhew worked for Mayhew Chevrolet-Oldsmobile, Inc., which previously known as Pancake Motors, located in Romney, West Virginia. Robert E. Mayhew's father, James Mayhew, was originally a part owner of the dealership, and later he acquired full ownership.

During the first four years of the parties' marriage, Nancy H. Mayhew worked at various jobs which paid minimum wage or slightly above minimum wage. The parties' first child, Elizabeth Anna Mayhew, was born on August 30, 1983, and their second child,

Hillary Leigh Mayhew, was born on April 5, 1986. After the birth of the first child, the appellant became a full-time mother and homemaker. She continued as a full-time mother and homemaker during the rest of the parties' marriage.

On January 2, 1985, Robert E. Mayhew's father gave Robert E. Mayhew eight shares of the one hundred twenty-five outstanding shares of Mayhew Chevrolet-Oldsmobile, Inc., (or its predecessor Pancake Motors) as a gift. In May, 1988, Robert E. Mayhew purchased an additional ten shares of Mayhew Chevrolet-Oldsmobile, Inc., for \$2,200.00 per share. At that time, according to the corporate minutes, an additional two shares were given to Robert E. Mayhew as a gift by his father. The corporate

minutes also show that on January 4, 1989, James Mayhew gave Robert E. Mayhew seven additional shares, valued at \$2,200.00 per share, and on January 3, 1990, he gave Robert E. Mayhew a further seven shares. After the 1990 transaction, Robert E. Mayhew held thirty-four shares of the one hundred twenty-five shares of Mayhew Chevrolet-Oldsmobile, Inc., stock, and Robert E. Mayhew's father, James Mayhew, owned the remaining ninety-one shares.

In February, 1990, after the last gift of stock to Robert E. Mayhew, a major fire erupted at the Mayhew Chevrolet business location in downtown Romney, West Virginia. In that fire, the dealership's garage burned to the ground. It appears that following the fire Robert E. Mayhew and his father were at odds as to the

course of action to be taken with regard to the dealership. Robert E. Mayhew was of the view that a parcel of land outside town should be purchased and that the dealership should be moved away from the downtown area. James Mayhew apparently did not agree.

Ultimately, the dealership was moved to the location outside of town, and in December, 1991, the corporation, Mayhew Chevrolet-Oldsmobile, Inc., purchased James Mayhew's ninety-one shares of the corporation for \$250,000.00. The ninety-one shares became treasury stock, and at that point Robert E. Mayhew held all thirty-four shares of outstanding stock. In effect, Robert E. Mayhew became the sole owner and made all business decisions with regard to the operation of Mayhew Chevrolet.

Late in 1992, Nancy E. Mayhew learned that Robert E. Mayhew was possibly involved in an intimate relationship with another female. Nancy H. Mayhew confronted Robert E. Mayhew over this matter, and he did not deny the relationship, but indicated that he wanted a divorce. Shortly thereafter, he moved out of the marital home.

Divorce proceedings were subsequently instituted, and a temporary order was entered on October 13, 1993. In the temporary order, Nancy H. Mayhew was awarded legal custody of the parties' two children, exclusive possession of the marital home, child support in the amount of \$875.00 per month, and alimony in the

amount of \$500.00 per month. Robert E. Mayhew was additionally required to pay all marital indebtedness on a monthly basis.

Pursuant to the temporary order, Robert E. Mayhew paid the mortgage on the parties' marital home in the amount of \$402.01 per month. He also made a car payment in the amount of \$142.17 per month, paid the utilities for the marital home, and paid health-related expenses for the two children and Nancy H. Mayhew.

Prior to actual trial of the issues in the case, the parties stipulated as to the ownership and value of their assets, except for the ownership and value of the thirty-four shares of Mayhew Chevrolet-Oldsmobile titled in the name of Robert E. Mayhew. As a

consequence, the only actual equitable distribution issue during trial of the case was the value of Robert E. Mayhew's thirty-four shares of Mayhew Chevrolet-Oldsmobile, Inc.

During the trial of the case, Robert E. Mayhew took the position that of the thirty-four shares of Mayhew Chevrolet-Oldsmobile, Inc., stock which he held, twenty-four shares were his separate property, since those shares of stock had been transferred to him as gifts by his father, James Mayhew. He conceded that his remaining ten shares of Mayhew Chevrolet-Oldsmobile, Inc., stock were marital property, since they were purchased during marriage.

Nancy E. Mayhew took the position that, even though it appeared that the twenty-four shares which Robert E. Mayhew claimed as separate property had been given to Robert E. Mayhew by his father, the facts suggested that the gift stock had actually been consideration for work performed by Robert E. Mayhew for the Chevrolet dealership. The appellant adduced evidence, and on appeal argues, that the record shows that in 1985 Robert E. Mayhew's total salary was only \$28,748.95, and in 1986 it was \$32,792.00. On January 2, 1985, the first eight shares of Mayhew Chevrolet-Oldsmobile, Inc., stock were allegedly given to Robert E. Mayhew. She further points out that for the first eight months of 1988 Robert E. Mayhew had a salary of \$28,000.00 and that his salary for the full year of 1989 was \$49,664.00. Seven additional

shares of stock were transferred to Robert E. Mayhew on January 4, 1989, and another seven shares were transferred on January 3, 1990. For the year 1990, Robert E. Mayhew's salary was reduced to \$42,000.00.

Evidence was also adduced showing that after Robert E. Mayhew had obtained complete control of the corporation, a single new stock certificate was issued to him, in his name alone, for the thirty-four shares of stock in the corporation which he held, the twenty-four shares which he claimed were gift shares, as well as the ten shares which were purchased during marriage. During trial and on appeal, Nancy H. Mayhew takes the position that when the gift shares were joined with the purchased shares in the issuance of the

single new stock certificate, there was, in effect, a commingling of gift shares, if they were in truth a gift, with marital property and that, as a consequence, the gift shares, even if they originally were intended as gifts, became marital property.

To counter Nancy H. Mayhew's contention that the gift shares were not in truth gifts, Robert E. Mayhew introduced evidence indicating that at the time of the gifts to him, his father, James Mayhew, also gave his brother certain other assets of considerable value, although no stock. Additionally, he adduced corporate minutes which indicated that the shares were, in fact, gifts. To counter Nancy H. Mayhew's argument that the gifts of stock were actually transfers of assets made in lieu of salary, Robert E. Mayhew

pointed out that all gifts of stock were made before his salary was, in fact, reduced. He also indicated that the reduction in his salary which occurred was made after the fire destroyed the corporation's facility in downtown Romney and that a reduction was required to provide sufficient funds for rebuilding the dealership. He also showed that James Mayhew, his father, and at the time the majority owner of the business, also took a reduction in salary for the same reasons.

Relating to the question of the value of the shares of Mayhew Chevrolet-Oldsmobile, Inc., stock, Nancy H. Mayhew called as a witness Don Conley, who testified that, based on the net equity method, capitalization of earnings method, and cash flow method, the thirty-four shares of Mayhew Chevrolet-Oldsmobile, Inc., stock held

by Robert E. Mayhew at the end of 1993 were worth \$771,800.00.

Robert E. Mayhew's expert, Judith Schubert, using the net equity method, capitalization of earnings method, and sales method, estimated that the thirty-four shares of stock were worth \$458,949.00. Ultimately, the family law master concluded, and the circuit court agreed, that the value of the thirty-four shares was \$648,586.00, or about \$19,076.00 per share. The value thus determined may be assigned \$190,760.00 to the ten shares purchased with marital assets and \$457,826.00 to the twenty-four gift shares at issue below.

During the proceedings, although the parties did not dispute the other property distribution questions, Nancy E. Mayhew

did testify that as of August 25, 1994, her legal and accounting fees were approximately \$15,000.00. Later, she submitted an itemized bill from her attorney for attorney fees in the amount of \$31,585.65 for services through March 16, 1995.

In resolving the issues in the case, the family law master prepared recommended findings of fact and conclusions of law. In addition to requiring Robert E. Mayhew to pay child support in the amount of \$996.00 per month and medical and other expenses for the children, the family law master recommended that Nancy H. Mayhew receive \$500.00 per month as rehabilitative alimony for a period of forty-eight months, beginning on October 1, 1994. The family law master also indicated, contrary to the wishes of Nancy H. Mayhew, that the rehabilitative alimony end at the death of either of

the parties or upon the remarriage of Nancy H. Mayhew. The family law master also found, in effect, that twenty-four of the thirty-four shares of Mayhew Chevrolet-Oldsmobile, Inc., were the separate property of Robert E. Mayhew and awarded him the remaining ten marital shares of the corporation. The family law master recommended that Nancy H. Mayhew receive one-half of \$174,425.00 for her one-half marital interest in those ten shares. In arriving at this figure, the family law master deducted from the \$190,760.00 value assigned to the ten marital property shares the sum of \$16,335.00, being amounts expended by Robert E. Mayhew which he had been required to pay for the joint benefit of the parties during the pendency of the proceedings, over and above the alimony,

child support, and suit money ordered paid to or for the benefit of Nancy H. Mayhew.

The propriety of the family law master's findings and recommendations were submitted to the trial court. In its final order, the court first found that the value placed on the Mayhew Chevrolet-Oldsmobile, Inc., stock was supported by the evidence and was not clearly wrong. In reaching that conclusion, the court detailed the evidence adduced on the value of the stock, and, in consideration of that evidence, approved and adopted the family law master's recommendation on the valuation of the stock.

The court also agreed with the family law master's determination that the twenty-four shares of stock were actually gifts. The trial court said:

He [the family law master] reviewed the corporate records and heard the witnesses, none of whom effectively disputed that the shares were a bona fide gift by a father to his son of shares of stock as was the gift by the father to another son of an automobile and monies at or near the same time, so long as both sons worked with him in the agency. The Master correctly found the 24 shares to be a gift and not payment to Defendant of added compensation over and above his salary for services performed.

Also, the Master correctly refused to apply the transmutation theory so as to hold the 24 shares as marital property. The mere issuance of a new stock certificate which represented all the shares theretofore acquired over a period of time by a shareholder does not alter the status of the nature of the acquisition of such shares. In this case the new certificate was issued on advice of counsel in a restructuring of the

corporate records during a reorganization of the company. Never did there exist any intent to change the nature of ownership of the shares, but rather only to consolidate and clean up the business records. The Master would have had to stretch the evidence considerably to find support for either the added compensation theory or that of transmutation. The father may have recognized and appreciated the work by the son, but they disagreed on the manner in which the business should be operated, and the business was not growing and expanding under the father's method of operation. Defendant quit the company for a time and upon his return, he obtained more control in the operation of the business and under his method, the business again began to grow and prosper. The father recognized the change and terminated his interest so that Defendant would have complete control and responsibility.

The Master correctly found from the evidence that the 24 shares and all increases in the value thereof were non-marital property and were truly the result of a gift by a father to his son.

The court also addressed the question of whether the master properly awarded Nancy H. Mayhew rehabilitative alimony rather than permanent alimony and whether the master erred in failing to provide that the rehabilitative alimony would extend beyond the untimely death of Robert E. Mayhew.

The court found that the record indicated that Nancy H. Mayhew had a four-year Board of Regents degree, was in good health, and, although she had been a homemaker during her marriage, she was fully capable of entering the job market. The court also found that she had elected to train for a career as a court reporter. The court further noted that the evidence suggested that

both parties were somewhat at fault in the breakup of the marriage and that Robert E. Mayhew, because of his devotion to his business interests, had been away from home more and more and that he had associated with friends other than his wife. The court concluded that this conduct had created the suspicion on the part of the appellant that he had committed adultery. Although the court found that the evidence was not sufficient to show adultery, the court recognized that the husband's relationship with another female was such as to be a partial cause of the termination of the marriage. On the other hand, the court also found that the evidence showed that Nancy H. Mayhew had, whether intentionally or not, interfered with the parties' children's relationship with their paternal grandparents and that Nancy H. Mayhew, during the pendency of the divorce, had

unnecessarily incurred expenses on her home to update it when she believed that it would be conveyed to her and that she had also incurred expenses with a competitor of her husband for the repair of her automobile and for new tires for her automobile. The court also found that the evidence suggested that Nancy H. Mayhew's motivation for revenge was alive and strong. The court concluded:

No doubt the Master recognized this mutual fault and rightly concluded that each party was well provided for so that neither was entitled to permanent alimony from the other. The election by Plaintiff to seek a career as a Court Reporter likely is why the Master awarded rehabilitative alimony at all. His finding in this regard is believed to be generous, but under all the circumstances, will not be disturbed. Upon review of the assets of each party and the nature thereof, and it appearing the Defendant is borrowing money to meet his obligations, the Master was correct in not ordering a lump sum payment of rehabilitative alimony.

Inasmuch as the court agrees with the Master's finding that permanent alimony will not be awarded, the question of such extending beyond the death of Defendant is moot.

In addressing the question of suit money, the court noted that the itemization for attorney fees and charges filed by Nancy H. Mayhew included much which had been incurred for matters which were unnecessary and which should not have been incurred. The court stated:

It is apparent that Plaintiff went out of her way to attempt to gig Defendant with costs for many items for herself and to salve the sore she thinks only Defendant caused. When the financial ability of each of the parties is considered, along with the costs and expenses of each, it would be the inclination of the Court that each should pay his or her own attorney

fees and costs without the other being compelled to contribute thereto. However, the Master thought otherwise, and his findings cannot be said to be clearly wrong, therefore, are affirmed and adopted. However, no additional amounts will be awarded either party for attorney fees or costs.

STANDARD FOR REVIEW

In syllabus point 1 of *Burnside v. Burnside*, 194 W.Va.

263, 460 S.E.2d 264 (1995), this Court stated:

In reviewing challenges to findings made by a family law master that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review.

The Court has also stated, with regard to alimony:

Questions relating to alimony and to the maintenance and custody of the children are within the sound discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused.

Syllabus, Nichols v. Nichols, 160 W.Va. 514, 236 S.E.2d 36 (1977).

See also Marilyn H. v. Roger Lee H., 193 W.Va. 201, 455 S.E.2d 570

(1995); *McVay v. McVay*, 189 W.Va. 197, 429 S.E.2d 239 (1993);

and *Martin v. Martin*, 187 W.Va. 372, 419 S.E.2d 440 (1991).

Lastly, with regard to court costs and attorney fees, the

Court has ruled:

""In a suit for divorce, the trial [court] . . . is vested with a wide discretion in determining the amount of . . . court costs and counsel fees, and the trial [court's] . . . determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that he has abused his discretion." Syllabus point 3, *Bond v. Bond*, 144 W.Va. 478, 109 S.E.2d 16 (1959).¹ Syl. Pt. 2, *Cummings v. Cummings*, 170 W.Va. 712, 296 S.E.2d 542 (1982)."

Syl. pt. 4, *Ball v. Wills*, 190 W.Va. 517, 438 S.E.2d 860 (1993).

VALUATION OF SHARES OF STOCK

Nancy H. Mayhew claims that the circuit court erred in establishing the value of the ten shares of stock which were determined to be marital property.

An examination of the record shows that the court valued the entire thirty-four shares of stock which were in the hands of Robert E. Mayhew at the time of this proceeding at \$648,586.00. It appears that the court placed a value on the entire thirty-four shares since a number of experts were called who valued the shares as a whole. This Court notes that the value placed on the shares was considerably above the value placed on the shares by Robert E. Mayhew's expert, Judith Schubert, who found the shares to be worth \$458,949.00. The value, on the other hand, was somewhat lower than the \$771,800.00 value placed on the shares by Nancy H. Mayhew's witness, Don Connelly.

It appears that there was extensive evidence on the value of the shares presented by expert evaluators of such property, that such expert evaluators used appropriate methods for valuing the property, and that the family law master resolved the conflict in the evidence in that regard properly and valued the shares in a manner consistent with the evidence of value advanced by the evaluators. This Court cannot conclude that the findings of fact made by the family law master and the circuit court as to the value of the shares were clearly wrong. Accordingly, under the rule set forth in *Burnside v. Burnside*, *supra*, the circuit court's ruling is affirmed.

GIFT SHARES

As previously indicated, in the present proceeding Nancy H. Mayhew is claiming that the trial court erred in finding that twenty-four shares of Mayhew Chevrolet-Oldsmobile, Inc., stock titled in the name of Robert E. Mayhew were his separate property and were not marital property.

In reviewing the evidence relating to the ownership of the twenty-four shares of Mayhew Chevrolet-Oldsmobile, Inc., stock in issue under this assignment of error, the Court notes that Robert E. Mayhew adduced evidence showing that those twenty-four shares were gifts from his father. Nancy E. Mayhew took issue with this and claimed that, although they outwardly appeared to be gifts, Robert E. Mayhew received a low salary while working for his father

and that the salary was actually reduced shortly after he received his last gift of shares. Robert E. Mayhew countered this by introducing evidence suggesting that his brother had received gifts of other property at the same time he received gifts of stock. He also introduced evidence indicating that his salary was reduced, as was his father's salary at the same time, due to the fact that the corporation had suffered severe losses from a devastating fire and needed to restore its financial standing.

West Virginia Code § 48-2-1(f) defines separate property as, among other things, property acquired by a party during marriage by gift. Specifically, the relevant portion of the statute provides:

"Separate property" means:

** * **

(4) Property acquired by a party during marriage by gift, bequest, devise, descent or distribution

In reviewing the evidence relating to the "gift" shares of stock involved in the present case, the Court notes that the evidence indisputably shows that the shares were obtained by Robert E. Mayhew from his father. There was evidence that they were transferred as a gift and that at the same time a gift was made to Robert E. Mayhew's brother. Although the evidence relating to Robert E. Mayhew's salary was conflicting and potentially could have supported a finding that the shares were not in fact gift shares, the

family law master and the circuit court adopted the finding that that evidence did in fact show that they were intended as gift shares and concluded that the twenty-four shares were gifts to Robert E. Mayhew. We cannot say that the findings of the family law master and the circuit court in this regard are clearly wrong.

Nancy E. Mayhew also suggests that the twenty-four shares should be considered marital property because they were commingled in a single certificate with ten shares which clearly were purchased during marriage with marital funds and which clearly were marital property.

The legal argument that such commingled separate shares become marital property is based upon the theory of "transmutation", addressed by this Court in *Miller v. Miller*, 189 W.Va. 126, 428 S.E.2d 547 (1993). In that divorce case, the husband's mother had deeded her farm to the husband, in his name only, during his marriage, for "love and affection". The husband and wife had invested marital assets in the construction of outbuildings and other improvements on the farm and had also invested marital assets in the improvement of the house constituting the marital domicile, which was located on the farm. Before this Court, the wife argued that because the improvements to the farm and the house constituted marital property and were, of necessity, commingled with the farm, the separate interest of the husband in the farm, acquired by the gift

of his mother, had become marital property by transmutation. In *Miller v. Miller*, *supra*, we recognized the theory set forth in syllabus point 1 of *Kuehn v. Kuehn*, 55 Ohio App.3d 245, 564 N.E.2d 97 (1988), as follows: "This transformation may be effected by an agreement between the parties or by the affirmative act or acts of the parties.' *Westbrook v. Westbrook*, 5 Va.App. 446, 364 S.E.2d 523, 528 (1988)." *Miller v. Miller*, 189 W.Va. at 130, 428 S.E.2d at 551. We also said in *Miller*: "[A] transmutation occurs when the contributing spouse evidences his intent to made a gift of the nonmarital property to the marriage by significantly changing the character of the property to marital.' *In re Marriage of Nicks*, 177 Ill.App.3d 76, 126 Ill.Dec. 442, 444, 531 N.E.2d 1069(1988)." *Miller*, 189 W.Va. at 130, 428 S.E.2d at 551. However, the *Miller*

Court refused to find a transmutation, saying: "In the case before us, however, there was no agreement effected between the parties, nor was there evidence of any intent by the appellee to change the character of the property. For instance, the appellee did not transfer title of his separate property in the joint names of both parties." *Id.*

This Court also addressed transmutation in *Whiting v. Whiting*, 183 W.Va. 451, 396 S.E.2d 413 (1990). In that case, the intent to make a gift of the separate property to the marriage was evidenced by a prior transfer of the separate property to the joint names of the parties. In syllabus point 4 of that case, we held:

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.

In *Whiting*, the Court recognized that the joint titling of previously separate property gives rise only to a rebuttable presumption of a gift to the marital estate, and the Court outlined factors which would overcome the presumption. Specifically, the Court stated:

The presumption may be overcome by a showing that the transferring spouse did not intend to transfer the property to joint ownership or was induced to do so by fraud, coercion, duress, or deception. See *Bonnell v. Bonnell*, [117 Wis.2d 241, 344 N.W.2d 123 (1984)]; *Trattles v. Trattles*, 126 Wis.2d 219, 376 N.W.2d 379 (App. 1985).

183 W.Va. at 459, 396 S.E.2d at 421 (footnote omitted).

In the present case, there is no transfer of title to the joint names of the parties, and thus the essential predicate of *Whiting*, the titling of the property in joint names, is not present.

The extent of any commingling of marital property with separate property is that ten shares of stock clearly subject to definition as marital property were evidenced on the same stock certificate evidencing the ownership of twenty-four shares transferred to Robert E. Mayhew by gift, and the resulting single certificate remained in the sole name of the legal owner of those shares, Robert E. Mayhew. By introducing evidence that the ten marital shares were combined with the twenty-four gifts shares in a single certificate

solely because of a corporate reorganization, Robert E. Mayhew adduced evidence which was sufficient, if believed by the fact finder, to support a conclusion that the reissuance of a single certificate representing all thirty-four shares was for a separate business purpose and evidenced no intention to make a marital gift of the separate shares to Nancy H. Mayhew. In determining that the twenty-four shares retained their character as separate property, it rather clearly appears that the family law master and the circuit court believed the evidence and concluded that no intent to make a gift of nonmarital property to the marriage was established.

After applying the test set forth in *Burnside v. Burnside*, *supra*, the Court cannot conclude that the circuit court or family law

master were clearly wrong or that they otherwise erred in reaching the conclusion that the shares in fact had been gifts to Robert E. Mayhew or in refusing to declare the twenty-four gift shares marital property because of the registration of such shares on the same certificate which evidenced the ten shares of marital property. We, therefore, affirm the ruling below that the twenty-four shares are the separate property of Robert E. Mayhew.

APPRECIATION AND ITS VALUATION

In reviewing the overall question of the gift shares, the Court does believe that the circuit court and the family law master failed to take all actions required by West Virginia's marital

distribution law in dealing with the twenty-four separate property shares. Specifically, the Court notes that W.Va. Code § 48-2-1(e) provides that:

"Marital property" means:

* * *

(2) The amount of any increase in value in the separate property of either of the parties to a marriage, which increase results from (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property, or (B) work performed by either or both of the parties during the marriage.

Correspondingly, W.Va. Code § 48-2-1(f) provides:

"Separate property" means:

* * *

(6) Any increase in the value of separate property . . . which is due to inflation or to a change in market value resulting from conditions outside the control of the parties.

The record indicates that the twenty-four shares of stock which were given to Robert E. Mayhew, and which the circuit court properly concluded were his separate property, appreciated in value during marriage. West Virginia Code § 48-2-1(e), cited above, requires that such appreciation in value as occurred by reason of the investment of martial assets or the work of the parties is marital property, even though the shares themselves remain separate property. On the other hand, W.Va. Code § 42-2-1(f) provides that the portion of appreciation due to inflation or to a change in market

value resulting from conditions outside the control of the parties is separate property. This Court believes that to give full effect to the legislative intent regarding marital distribution, a trial court must address the question of what portion of any appreciation in value in separate property occurring during the marriage is marital property and of what portion remains separate property. That portion which is marital property is, like other marital property, subject to marital distribution.

In the case before us, the appreciation in value of separate property during the marriage subject to allocation under the provisions of law just reviewed is appreciation in the value of a corporate business, one which may be generally classified as both small

and closely-held. It is fundamental to the concept of equitable distribution that, with respect to a business owned or partially owned by either or both of the parties to a divorce action, the spouses are entitled to share equally in the appreciation in the value of that business during the marriage arising from the investment of marital property or the work of either party in the business, absent one or more of the factors enumerated in W.Va. Code § 48-2-32(c). That

¹West Virginia Code § 48-2-32(c) states:

(c) In the absence of a valid agreement, the court shall presume that all marital property is to be divided equally between the parties, but may alter this distribution, without regard to any attribution of fault to either party which may be alleged or proved in the course of the action, after a consideration of the following:

(1) The extent to which each party has

contributed to the acquisition, preservation and maintenance, or increase in value of marital property by monetary contributions, including, but not limited to:

(A) Employment income and other earnings; and

(B) Funds which are separate property.

(2) The extent to which each party has contributed to the acquisition, preservation and maintenance, or increase in value of marital property by nonmonetary contributions, including, but not limited to:

(A) Homemaker services;

(B) Child care services;

(C) Labor performed without compensation, or for less than adequate compensation, in a family business or other business entity in which one or both of the parties has an interest;

(D) Labor performed in the actual maintenance or improvement of tangible marital property; and

(E) Labor performed in the management or investment of assets which are marital property.

(3) The extent to which each party expended his or her efforts during the marriage in a manner which limited or decreased such party's income-earning ability or increased the income-earning ability of the other party, including, but not limited to:

(A) Direct or indirect contributions by either party to the education or training of the other party which has increased the income-earning ability of such other party; and

(B) Foregoing by either party of employment or other income-earning activity through an understanding of the parties or at the insistence of the other party.

entitlement arises because, under equitable distribution, the contributions of time and effort to the married life of the couple -- at home and in the workplace -- are valued equally, regardless of whether the parties' respective earnings have been equal. Equitable distribution contemplates that parties make their respective contributions to the married life of the parties in that expectation.

(4) The extent to which each party, during the marriage, may have conducted himself or herself so as to dissipate or depreciate the value of the marital property of the parties: Provided, That except for a consideration of the economic consequences of conduct as provided for in this subdivision, fault or marital misconduct shall not be considered by the court in determining the proper distribution of marital property.

In the case before us, Robert E. Mayhew worked in the family business throughout the married life of the parties. Since 1985, he has owned some part of that business, later acquired greater interests by gift and by purchase, and in late 1991 acquired all the outstanding shares. Since then the business has apparently invested a part of its earnings and assets to pay Mr. Mayhew's father for his former interest in the business. Against that background, the principles of equitable distribution and the statutory direction that the appreciation in the value of Mr. Mayhew's separate property holdings in the business should be allocated between marital property and separate property are clearly applicable. Such principles appear to be particularly appropriate here, where there is evidence that Nancy H. Mayhew, the wife, by her efforts at home, enabled the

husband to be absent from the home frequently, attending civic and other meetings and events that were considered likely to foster the success of the business whose stock is at issue here.

Accordingly, this Court believes that the family law master and the trial court should properly have conducted an inquiry into, and the parties were obligated to adduce evidence as to, the allocation of the appreciation in value of the twenty-four shares of separate property stock of Robert E. Mayhew to determine what portion, if any, of such appreciation is marital property and what portion remains separate property. Because the family law master and the trial court did not conduct such an inquiry, we conclude that the

judgment of the circuit court must be reversed, and this case must be remanded for the appropriate inquiry and action.

We recognize that such an inquiry will not be an easy task.

In *Miller v. Miller, supra*, this Court addressed a part of the problem we are now confronting. In that case, as noted above, the parties to the marriage had clearly invested marital assets in the construction and improvement of the various structures on a farm which was the separate property of the husband. In the trial of the matter, evidence had been adduced as to the value of various improvements to the real estate. However, the wife was unable to introduce competent evidence of the value of improvements to the house located on the farm, the former marital domicile. The evidence was adduced

by the wife through an appraiser. The appraiser was unable to segregate the value added to the house by improvements made to it from marital assets, but did give separate values for the house, for the farm, and for improvements paid for from marital assets and made to the remainder of the farm, other than the house. The family law master awarded the wife one half of the value of the improvements the appraiser was able to identify but made no award for improvements to the house. The circuit court refused to disturb that ruling. So did this Court, pointing out that in litigating marital distribution issues, both parties have the burden of presenting competent evidence concerning the value of marital property and concluding:

Based upon the fact that the appellant
[wife] was unable to meet her burden of

presenting competent evidence regarding the value of the improvements made to the house during the parties' marriage, we find that the circuit court was correct in denying the appellant one-half of the same.

Miller v. Miller, 189 W.Va. at 130, 428 S.E.2d at 551.

Indeed, we could leave the parties where we found them, as this Court did in *Miller*, since neither party here, it appears, addressed the issue as we have drawn it, of allocating the appreciation in value of the separate property. However, since this Court has also not considered the issue as drawn here, especially in terms of the allocation of appreciation in the value of small, closely-held corporations, we think it appropriate that the matter be remanded to give both parties a fair opportunity to seek an allocation of the

increase in value which occurred after the dates of the various gifts of stock.

We have examined authorities on the subject of equitable distribution and looked for guidance in the decisions of other courts without success. Therefore, we offer only the following general comments to suggest at least the outlines of the inquiry to be conducted:

(1) The appreciation at stake here is not insignificant. The value of the business, as affirmed herein, has been fixed at \$648,586.00. If one assumes that, at the times given, all twenty-four gift shares had the \$2,200.00 per share value recorded

for the first such gift, the appreciation may be calculated at a sum in excess of \$400,000.00. We make these assumptions and calculations to indicate the order of magnitude of the issue being remanded, not to find the values or in any way inhibit the inquiry below.

(2) It may be helpful to ascertain the book value of the shares as of the date previously used by the court below to determine the overall value of the business and, perhaps, to compute book value on other dates. We note that qualified appraisers or accountants may adduce sound reasons to adjust book value for a variety of reasons, such as reversing accelerated depreciation or adjusting for other tax considerations, in order to better reflect the actual net cost of assets and proper amount of liabilities or net book equity. Any

such book value exercises, with or without adjustments that may appear justified under the evidence, may aid the court in determining what the actual earnings of the whole business have been for any given period the court deems helpful, what earnings have been retained in the business or otherwise invested, and how such decisions may have contributed to the previously found present value of the business.

(3) It may be possible to identify which assets in the business, if any, appreciated in value above their net book or carrying value and perhaps how any such appreciation was treated by the experts previously testifying for each party in the formulation of their previously expressed opinions as to the value of the business. The

court may hear still other opinions as to book value of assets, appreciation, and current value, as the court may be advised. The court below may thus obtain at least a preliminary indication of appreciation by reason of inflation or other outside factors.

(4) Perhaps evidence can be developed regarding the performance of this business relative to others of similar size, character and circumstances which will aid the court. In this connection, comparisons of typical or average sales, gross margins and expenses, including the usual level of salaries and benefits of executives of other businesses, and the degree to which inflation, the particular success of the product line of the business, or some other factor

directly influenced by or beyond the control of the manager of this business may be helpful in making the required allocation.

(5) We note that segregating the increase in value attributable to the work and effort of a stockholder may or may not bear any relationship to the value of his or her shares or the percentage of ownership. An owner may expend virtually all or very little time and effort in the business. Or the business may reap substantial benefits from the labors of others, some of whom may have been selected, trained, or directed by the owner and some of whom may not have been so selected, trained, or directed. The business may prosper or suffer from a unique or distinctive product line, or from purely fortuitous circumstances. Moreover, one case

may be more difficult to assess than another, because the owner of the stock being valued holds only a fractional interest in the business and has more, or less, opportunity to contribute to the overall success of the business than is indicated by ownership percentages. In such situations, the increase in value attributable to the work and effort of the share owner may indeed be quite difficult to assess.

(6) None of the factors we have set out here are intended to control or limit the inquiry below. As the Court indicated in *Miller*, the burden is on both parties to the litigation to adduce competent evidence on the values to be assigned in equitable distribution cases. We recognize that this matter of segregating the increase in value attributable respectively to marital and separate

property is novel for this Court and the tribunal below. We leave the court below free to rule on issues such as the competency of experts, the relevancy of expert testimony, and like issues. We think it unlikely that the parties or the tribunal below will achieve precision; as in appraisal matters generally, substantial justice, fairly supported by the evidence, is perhaps the best we can expect.

(7) We perceive that the burden of going forward with the evidence is on both parties as to their respective claims, as indicated by *Miller*, and that the burden of persuasion is on the party asserting a right to the property, that is to say that the burden of persuasion with respect to characterizing the property as separate property is on the one claiming the property to be separate and the

burden of persuasion with respect to characterizing the property as marital is on the party claiming the benefit of that result. We are cognizant of the prior holding of this Court that our law shows a preference for characterizing property as marital property. Syllabus point 3, *Whiting v. Whiting*, *supra*. However, we do not see that holding as very helpful in this novel area. Indeed, the court below has already characterized the property at issue as separate. We cannot now see a benefit to creating any new presumption, especially a presumption that might be rebutted by adducing only slightly contrary evidence. We leave to another day, or perhaps to legislative initiative, the development of any more specific formulations. At this point, it appears best to rely on the sound and reasoned discretion of the trier of fact.

After making the inquiry here required, the family law master, or the court, if it so elects, should make specific findings on the value of the gift shares when transferred to the husband and on the allocation of the increase in their value thereafter to marital and separate property as the evidence, as weighed and considered by the trier of fact, shall justify, and enter such further order as shall be necessary to effectuate equitable distribution of the marital property thus determined.

²West Virginia Code § 48-2-25 allows the court either to refer the case to a family law master or to hear it itself.

OTHER ASSIGNMENTS

Nancy H. Mayhew next challenges the fact that the circuit court awarded her only rehabilitative alimony, did not provide her with permanent alimony, and did not provide that the rehabilitative alimony should extend beyond the death of Robert E. Mayhew, in the event that he should die before the period of rehabilitative alimony expires.

A review of the evidence in this case shows that Nancy H. Mayhew had a college education, was in good health, and was fully capable of entering the job market. There was also evidence that she either elected to train for a career as a court reporter or in some

other way pursue a career as a court reporter. In this Court's view, these facts fail to suggest that the circuit court or family law master were clearly wrong in denying Nancy H. Mayhew a permanent alimony award. The record also suggests that Nancy H. Mayhew received a considerable distribution of assets as a result of the orders in this case and may well receive a greater award after the inquiry regarding the increase in value of the gift stock in the business herein ordered. The judgment below is affirmed with respect to the denial of permanent alimony, but the entire issue of alimony must be revisited after the court has concluded the inquiry regarding the allocation of appreciation in value of the shares of stock.

Nancy E. Mayhew further complains that the period of rehabilitative alimony was too short and that payment of that rehabilitative alimony should continue for whatever period it is awarded, whether or not Robert E. Mayhew should sooner die. Essentially, the Court believes that the period of rehabilitative alimony was within the discretion of the trial court and that the court did not err in the length of time for which it was ordered.

With respect to extending the rehabilitative alimony beyond the death of Robert E. Mayhew, the court below said only:

Inasmuch as the Court agrees with the Master's finding that permanent alimony will not be awarded, the question of such extending beyond the death of Defendant is moot.

It does not appear that the ruling of the court below adequately disposed of the issue under discussion. It is within the power of the trial court to require that alimony be paid notwithstanding the death of the payor, and this Court has held that if the court does not specify that alimony will stop upon the death of the payor, a claim may be had against the estate of a deceased payor for continued payment of alimony, which claim will be sustained in certain circumstances. *In re Estate of Hereford*, 162 W.Va. 447, 250 S.E.2d 45 (1978). We note that the Legislature has required that, in the case of a separation agreement to be approved by the court, if the separation agreement does not resolve the question of alimony after the death of the payor, the court must do so incident

to examining and approving the agreement. It appears that the discretion of the trial court, in cases not involving a separation agreement, to award or not award alimony past the death of the payor has been left undisturbed by W.Va. Code § 48-2-15 and that the best practice for the trial court in all circumstances is to address

³ The portion of W.Va. Code § 48-2-15(f) covering this specifically states:

When alimony is to be paid pursuant to the terms of a separation agreement which does not state whether the payment of alimony is to continue beyond the death of the payor party or is to cease, or when the parties have not entered into a separation agreement and alimony is to be awarded, the court shall specifically state as a part of its order whether such payments of alimony are to be continued beyond the death of the payor party or cease.

and decide the issue of whether alimony is to cease upon the death of the payor.

In the case of rehabilitative alimony, we perceive that the policy consideration underlying the award of rehabilitative alimony -- to enhance the earning capacity and self-sufficiency of the payee -- favors the continuation of alimony notwithstanding the death of the payor. Although alimony will usually be awarded from the income of the payor, the award of alimony is not foreclosed by the absence or inadequacy of income. It may be awarded from the payor's assets. W.Va. Code § 48-2-15. Thus, it appears that sound policy favors the continuation of short-term alimony past the untimely death of the payor in the absence of evidence that the payor's estate, should

the payor die, is likely to be insufficient to meet other obligations, or other matters appear which would make such continuation after death inequitable.

Similarly, we perceive that the right of the payee to receive rehabilitative alimony ceases with payee's death. Absent some compelling circumstance for otherwise providing in the order awarding such alimony, the right to receive rehabilitative alimony should and would end at the death of the payee, since the issue of enhancing the earning capacity and self-sufficiency of the payee would be moot in the event of payee's untimely death. In the rare case where a court wishes to provide otherwise, it would be essential

that the order expressly provide for the enforcement of that right in payee's personal representative.

As noted, in the present case the trial court offered no adequate reason why the award of rehabilitative alimony, apparently aimed at assisting Nancy H. Mayhew in re-entering the job market, should not be for the full period awarded, regardless of the untimely death of Robert E. Mayhew. As noted, this case must be remanded for a reconsideration of the value of the twenty-four gift shares of stock involved in the case. It will be necessary to review the entire issue of alimony after the allocation of value issues are resolved. The continuation of any alimony awarded beyond the death of the payor

should be addressed within the discretion of the court, and the decision and its basis clearly articulated.

Next, Nancy H. Mayhew claims that the circuit court erred in failing to award her full legal and accounting fees.

The circuit court found that Nancy H. Mayhew "went out of her way to attempt to gig" Robert E. Mayhew with the costs of many items for herself during the pendency of the divorce and that the court's inclination would be to rule that each party was to pay his or her own attorney fees and accounting fees. The court, however, noted that the family law master had concluded that Robert E. Mayhew should be required to pay Nancy H. Mayhew \$6,500.00 in

attorney fees and accounting fees. The court, after examining the record, concluded that the family law master's finding, which was different from the court's own, could not be said to be clearly wrong and, therefore, affirmed and adopted that finding.

West Virginia Code § 48-2-13(a)(6)(A) provides that "[t]he court [in a divorce proceeding] may compel either party to pay attorney's fees and court costs reasonably necessary to enable the other party to prosecute or defend the action in the trial court." Also, under W.Va. Code § 48-2-13(a)(6)(B), the assertion of unfounded claims or defenses for "vexatious, wanton or oppressive purposes" by a party is made a fact relevant to a party's responsibility for attorney fees and costs.

It appears that the appellant has been able to prosecute the proceedings thus far in this case. The family law master found the \$6,500.00 attorney and accounting fee award to be appropriate.

The court noted that the appellant had itemized items for attorney fees and charges that were unnecessary and attempted "to gig the defendant" with costs. In spite of this, the court acceded to the recommendation of the family law master.

As suggested in syllabus point 4 of *Ball v. Wills, supra*, the question before this Court is whether the lower court's ruling constituted an abuse of discretion. Since the appellant was able to prosecute the action successfully, and since the evidence shows that

the appellant has a substantial income, this Court cannot conclude that the trial court's ruling constituted an abuse of discretion.

We note that this opinion requires additional proceedings, and, in conjunction with those proceedings, the court below should ascertain that the parties are financially able to carry the burden of the additional proceedings and make such orders as will allow both parties a full and fair hearing, requiring the parties to bear reasonable costs from their own assets, from the assets of the other party, or from assets to be awarded as a result of the further proceedings as the court finds fair and just.

Lastly, Nancy E. Mayhew claims that the trial court erred in failing to order both parties to exchange financial information each year until the parties' youngest child reaches the age of eighteen.

Under the law, Nancy H. Mayhew may appropriately petition the court from time to time for an adjustment of child support. In such a proceeding, Robert E. Mayhew could be legally compelled to reveal financial information relating to his affairs. In view of this circumstance, the Court cannot conclude that the trial court committed reversible error by failing to order the annual exchange of information.

Because this Court believes that the trial court should examine the question of what portion of the gift shares appreciation was attributable to work performed by Robert E. Mayhew during marriage and what portion was due to inflation or other conditions outside the control of the parties and that that inquiry may require an adjustment in the alimony and other factors in the overall settlement of this case, the judgment of the circuit court is reversed, and this case is remanded for action consistent with the principles set forth herein.

reversed and
remanded with directions.