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OF WEST VIRGINIA

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Albright, Justice, dissenting:

The problem with the majority opinion is that it mechanically applies Rule 60(b), a procedural rule whose objective is equitable in nature, to achieve an unjust result in an action that sounds historically in equity. *See Di Vito v. Fidelity & Deposit Co.*, 361 F.2d 936, 939 (7th Cir. 1966) (recognizing that “the relief provided by Rule 60(b) is equitable in character and to be administered upon equitable principles”). By rigidly relying on Rule 60(b), all in the name of finality of judgments, the majority has ignored the significance of the remedy at issue--equitable distribution of property--a theory first adopted by this Court,¹ and subsequently embraced with enthusiasm by the Legislature. The majority opinion undeniably represents a high water mark in the succession of “form over substance” decisions that have marred legal jurisprudence over the years.

One issue that has been raised in connection with the lower court’s refusal to grant Appellant’s Rule 60(b) motion is whether a mistake that significantly affects property valuation has been made. The lower court prevented additional evidence from being considered which suggests that the valuation of the parties’ marital home was \$28,168, rather than the

¹*See LaRue v. LaRue*, 172 W.Va. 158, 304 S.E.2d 312 (1983) (recognizing the doctrine of equitable distribution).

figure of \$13,000, which was the purchase price of the home.

While Rule 60(b) was not designed to encourage or permit the relitigation of issues, it was designed to provide a flexible means of correcting unjust and unfair results. The rule has universally been held to apply in a wide range of circumstances to correct errors of fact or law or judgment. *See generally* Charles A. Wright, Arthur R. Miller, and Mary K. Kane *Federal Practice and Procedure: Civil 2nd* §§ 2851 to 2873 (1995).

Even a cursory examination of the countless state and federal cases applying the rule discloses that no one circumstance either mandates or precludes application of Rule 60(b). *See, e.g., Bateman v. U.S. Postal Serv.*, 231 F.3d 1220 (9th Cir. 2000) (granting Rule 60(b) relief on attorney error basis where attorney failed to timely respond to summary judgment motion on grounds of excusable neglect); *Whitaker v. Associated Credit Servs., Inc.*, 946 F.2d 1222 (6th Cir. 1991) (recognizing that while gross negligence is generally not enough to set aside judgment under Rule 60(b), mistakes made due to excusable neglect may permit application of rule, especially if circumstances warrant same on equitable grounds); *Blois v. Friday*, 612 F.2d 938 (5th Cir. 1980) (holding that doubt on motion to set aside default judgment should be resolved in favor of judicial decision on merits despite technical error or slight mistake by attorney); *L.P. Steuart, Inc. v. Mathews*, 329 F.2d 234 (D.C. 1964) (finding that counsel's preoccupation with other matters and failure to notify client that case was dismissed for failure to prosecute justified Rule 60(b) relief after lapsing of one year); *but cf.*

Solaroll Shade & Shutter Corp., Inc. v. Bio-Energy Sys., Inc., 803 F.2d 1130 (11th Cir. 1986) (holding that attorney's negligent failure to respond to motion was not excusable neglect despite preoccupation with other litigation); *Coffman v. West Virginia Div. of Motor Vehicles*, 209 W.Va. 736, 551 S.E.2d 658 (2001) (finding absence of exceptional circumstances required reversal of grant of Rule 60(b) relief in case where driver's license was reinstated); *Stanley v. Stanley*, 201 W.Va. 174, 495 S.E.2d 273 (1997) (holding that circuit court erred in not granting Rule 60(b) motion where husband's pension plan was incorrectly valued and parties entered into settlement agreement based on incorrect valuation).

The full range of factual circumstances in any given case must be analyzed to determine if the beneficent purposes of the rule should be applied. An examination of the factual circumstances of this case suggests that Rule 60(b) should be applied to prevent a blatant miscarriage of justice. In instances such as this case where the alleged errors arise from the fault or oversight of individuals other than the parties to the litigation, the need for a rule such as Rule 60(b), which prevents a mistake from creating a permanent injustice as a result of blind adherence to the procedural rules of our judicial system, is even more apparent.

In the case before us, it appears likely that, barring a grant of relief under Rule 60(b), the following results will unfortunately obtain:

1. One party will receive substantially less than half of the marital property for reasons either not articulated or grounded in the failure of counsel to fully prepare;

2. It is (or was) within the easy ability of the trial court to remedy the situation if the evidence there discloses what appears to be the case from the record before us;
3. The sole reason asserted by the majority for not utilizing Rule 60(b) to reach the equitable issues presented by this case is an overblown concern for the finality of a judgment that has not been fully executed and may be modified in one respect or another for years to come; and
4. It appears that the “equitable” division of property here was made in disregard of the general rule of law that a transfer of property from sole ownership by one spouse to joint ownership by both spouses constitutes a gift of one-half of the formerly separate property to the other spouse, converting the transferred property to “marital” property.

Thus, to deny Appellant the right to have her equitable distribution claim fully resolved on its merits is clearly to work an injustice in this case. I cannot sanction such a result, nor do I think that Rule 60(b) requires such a harsh result. As we recognized in *N.C. v. W.R.C.*, 173 W.Va. 434, 317 S.E.2d 793 (1984): “‘The provisions of this rule [60(b)] must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court’s conscience that justice be done in light of *all* the facts.’” 173 W.Va. at 437, 317 S.E.2d at 796 (quoting *Bankers Mortgage Co. v. U.S.*, 423 F.2d 73, 77 (5th Cir. 1970)). Finality at the cost of fully considering the merits of an action is simply not the balance of interests that Rule 60(b) requires. Accordingly, I respectfully dissent.