

IN THE CIRCUIT COURT OF BARBOUR COUNTY, WEST VIRGINIA

IN RE THE MARRIAGE OF:

BARBARA JO WEAVER,  
Petitioner,

v.

HAROLD LEE WEAVER,  
Respondent.

FILED

AUG 11 2020

Barbour County Circuit Clerk

CIVIL ACTION NO. 17-D-70  
Judge: Shawn D. Nines

ORDER

The Respondent, Harold Lee Weaver, by Counsel, Phillip S. Isner, filed a *Petition for Appeal* on May 29, 2020, from an order of the Family Court of Barbour County entered on March 5, 2020, and filed on March 5, 2020. Petitioner, Barbara Jo Weaver, by Counsel Shannon R. Thomas, sent a response to Respondent's *Petition for Appeal* on June 17, 2020, which was outside the fifteen (15) days set forth to file a response as found in West Virginia Code § 51-2A-11 *Petition for appeal*.

This Court reviews the findings of fact of the Family Court under a clearly erroneous standard and the lower court's application of law to facts under an abuse of discretion standard as set forth in WV Code §51-2A-14(c).

Respondent states six grounds for his appeal: Ground One - *Denial of Motion to Continue*; Ground Two - *Improper Valuation of Real Property*; Ground Three - *Refusing to Permit Testimony Regarding Value of Property*; Ground Four - *Improper Designation of Funds Paid*; Ground Five - *Improper Designation of Account as Entirely Marital*; and Ground Six - *Improper Award of Attorney Fees*.

Ground one of Respondent's appeal states "*Denial of Motion to Continue*." This Court has listened and reviewed the Family Court hearings conducted on January 14 and January 16, 2019, as well as the Memorandum of Law attached to the *Petition for Appeal* in the matter. Rule 19

(Continuances, Scheduling Conflicts and Consolidation) of the Rules of Practice and Procedure for Family Court states: "(a) Requirements for Motion for Continuance. A motion for a continuance shall be in writing and shall concisely state the grounds. The motion shall be filed with the circuit clerk, and provided to the court and served on all parties not less than seven days before the hearing. **A motion for continuance filed with the court less than seven days before the hearing shall be granted only in exigent circumstances that could not have been anticipated prior to seven days before the hearing.** (b) Action on the Motion. No continuance shall be granted except for good cause shown, and absent exigent circumstances, no motion for a continuance shall be granted unless all parties have been accorded an opportunity to respond. The failure of a client to adhere to financial arrangements with an attorney does not constitute good cause for a continuance. **The grant or denial of a motion for a continuance rests with the sound discretion of the court, except that a party shall not be granted more than one continuance.** The order granting a continuance shall set the continued proceeding for a date certain, within 75 days from the date of the hearing being continued."(Emphasis added.)

This Court is unable to find the Family Court's order clearly erroneous or that there was any abuse of discretion in the Family Court's application of law as it deals with denial of a continuance in the matter.

Ground two of Respondent's appeal states "Improper Valuation of Real Property." This Court has listened and reviewed the Family Court hearings conducted on January 14 and January 16, 2019, as well as the Memorandum of Law attached to the Petition for Appeal in the matter. The Supreme Court of Appeals of West Virginia has stated in syllabus point one (1) of *Somerville v. Somerville*, 179 W.Va. 386, 369 S.E.2d 459 (1988), "1. In the absence of a valid agreement, the trial court in a divorce case shall presume that all marital property is to be divided equally between the parties, but may alter this distribution, without regard to fault, based on consideration of certain statutorily enumerated factors,

*including: (1) monetary contributions to marital property such as employment income, other earnings, and funds which were separate property; (2) non-monetary contributions to marital property, such as homemaker services, child care services, labor performed without compensation, labor performed in the actual maintenance or improvement of tangible marital property, or labor performed in the management or investment of assets which are marital property; (3) the effect of the marriage on the income-earning abilities of the parties, such as contributions by either party to the education or training of the other party, or foregoing by either party of employment or education; or (4) conduct by either party that lessened the value of marital property. W.Va.Code § 48-2-32(c) (1986).”*

This Court is unable to find the Family Court’s order clearly erroneous or that there was any abuse of discretion in the Family Court’s application of law as it deals with the Valuation of Real Property.

Ground three of Respondent’s appeal states “Refusing to Permit Testimony Regarding Value of Property.” This Court has listened and reviewed the Family Court hearings conducted on January 14 and January 16, 2019, as well as the Memorandum of Law attached to the Petition for Appeal in the matter.

This Court is unable to find the Family Court’s order clearly erroneous or that there was any abuse of discretion in the Family Court’s application of law as it deals with permitting testimony regarding the value of property.

Ground four of Respondent’s appeal states “Improper Designation of Funds Paid.” This Court has listened and reviewed the Family Court hearings conducted on January 14 and January 16, 2019, as well as the Memorandum of Law attached to the Petition for Appeal in the matter.

This Court is unable to find the Family Court's order clearly erroneous or that there was any abuse of discretion in the Family Court's application of law as it deals with allocation to the parties of funds paid.

Ground five of Respondent's appeal states "Improper Designation of Account as Entirely Marital." This Court has listened and reviewed the Family Court hearings conducted on January 14 and January 16, 2019, as well as the Memorandum of Law attached to the Petition for Appeal in the matter.

The Family Court's order on page 18 of the Final Order of Divorce entered March 5, 2020, states:

"j. The Respondent, Harold Lee Weaver, claims that some portion of the IRA is his separate asset acquired prior to the marriage. The West Virginia Supreme Court has held that the party claiming a separate component to an asset in a divorce must bring forth evidence to support the same, and that the assets in a divorce are presumed to be marital absent evidence meeting specific evidentiary requirements by the party attempting to have the asset declared as a separate asset. *See Murray v. Murray*, 2013 WL 2462175, No 12-0771, *citing Burnside v. Burnside*, 194 W.Va. 263, 460 S.E. 2d 26 (1995). *No evidence was offered by the respondent, Harold Lee Weaver regarding the IRA.*

k. That the Respondent, Harold Lee Weaver, has failed to meet his burden of proof as to the IRA or any portion thereof being his separate property.

l. That the Court hereby finds the IRA account in its entirety as a marital property subject to equitable distribution."

This Court is unable to find the Family Court's order clearly erroneous or that there was any abuse of discretion in the Family Court's application of law as it deals with the marital value of the IRA in question.

Ground six of Respondent's appeal states "Improper Award of Attorney Fees." This Court has listened and reviewed the Family Court hearings conducted on January 14 and January 16, 2019, as well as the Memorandum of Law attached to the Petition for Appeal in the matter. The Supreme Court of Appeals of West Virginia has stated in *Banker v. Banker*, 196 W.Va. 535, 474 S.E. 2d 465 (1996), "*In divorce actions, an award of attorney's fees rests initially within the sound discretion of the family law master and should not be disturbed on appeal absent an abuse of discretion. In determining whether to award attorney's fees, the family law master should consider a wide array of factors including the party's ability to pay his or her own fee, the beneficial results obtained by the attorney, the parties' respective financial conditions, the effect of the attorney's fees on each party's standard of living, the degree of fault of either party making the divorce action necessary, and the reasonableness of the attorney's fee request.*" Syllabus point 4, *Banker v. Banker*.

The Family Court did a complete analysis in its *Final Order of Divorce* going through all the factors in the decision to award attorney's fees. This Court is unable to find the Family Court's order clearly erroneous or that there was any abuse of discretion in the Family Court's application of law as it deals with the Awarding of Attorney Fees.

The Court, having reviewed the file in the matter as well as the recording from Family Court, determines the record is complete and there is no need for Oral Argument as the issues presented for Appeal can be decided on the record as presented.

Having reviewed the file in this matter and the Petition for Appeal and Memorandum of Law in Support of Petition for Appeal, the Court can discern no abuse of discretion in the Family Court's application of law. Additionally, this Court is obligated to give deference to all findings of fact in the lower order and may not simply substitute its judgement for that of the lower court, nor may it accept

new evidence which was not presented at the family court level. As a result, the Court is unable to determine that the findings of fact by the lower court were clearly erroneous.

Therefore, finding neither clearly erroneous factual errors, nor abuse of discretion in the application of law, the Court **ORDERS** that the *Petition for Appeal* should be, and is, hereby **REFUSED/DENIED**.

The Clerk is directed to send certified copies of this order to the parties or their counsel of record, and to the Honorable Karen Hill Johnson, Family Court Judge.

ENTER: 08-11-2020

Shawn D. Nines  
JUDGE

A TRUE COPY  
ATTEST: GERALD M. FOGG  
BARBOUR COUNTY CIRCUIT CLERK  
BY: E. Boley  
DEPUTY CLERK

