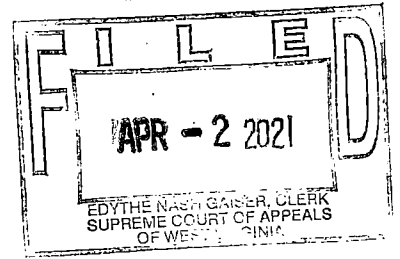


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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

AT CHARLESTON



HAROLD LEE WEAVER,
Respondent Below/Petitioner

v.

Case Action No. 20-0690

BARBARA JO WEAVER
Petitioner Below/Respondent

TO: TO HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BRIEF ON BEHALF OF THE RESPONDENT, BARBARA JO WEAVER

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PROCEDURAL HISTORY

Barbara Jo Weaver, Respondent herein, (hereinafter “Wife”), filed a Petition for Divorce on August 14th, 2017. The Petitioner herein, (hereinafter “Husband”) filed a Response and Counterclaim on or about September 27, 2017. The Respondent filed a Response to the Counterclaim on October 4, 2017. The Court conducted many temporary and interim hearings to address issues of parenting and other temporary matters. The Court entered four scheduling orders attempting to conclude this matter but each time the trial was continued. The matter finally came on for a Final Trial on January 14th and January 16th, 2019. The Court resolved the parenting issues on January 14th, 2019 and heard the remaining issues on January 16th, 2019. The parties submitted Proposed Findings of Fact and Conclusions of Law and the Family Court took the matter under advisement. By Order entered on March 5, 2020, the Family Court entered its 44-page final order. The Petitioner Husband herein appealed the matter to the Circuit Court. The Circuit Court affirmed by the Family Court decision by order entered on August 11, 2020. It is from this order that the Petitioner Husband appeals.

STANDARD OF REVIEW

“ In 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. pt. 1, *Hornbeck v. Caplinger*, 227 W.Va. 611, 712 S.E.2d 779 (2011); syl. pt. 1, *Palmer v. Justice*, 227 W.Va. 424, 710 S.E.2d 526 (2011).

STATEMENT OF FACTS

The parties were married in Barbour County, West Virginia on or about April 12, 2003. (App. 1, 1) The parties last lived together and cohabited as husband and wife in Barbour County on or about August 11, 2017. *Id.* The Wife, Barbara Weaver filed a Petition for Divorce with the Family Court of Barbour County, West Virginia on or about August 11, 2017. *Id.* On or about

September 27, 2017, the Husband, Harold L. Weaver, filed a Response and Counter Petition. (App. 1, 121). A Response to the Counter-Petition for Divorce was filed on or about October 4, 2017. (App. 1, 138). The parties admitted irreconcilable differences as the ground for divorce. (App. 1, 1). Two children were born of this marriage namely, Mercedes Brook Weaver, born February 8, 2003 and Porsche Arianna Weaver, born February 8, 2003. (App. 1, 1).

The Wife filed a financial statement on or about August 11th, 2017 and filed supplements thereafter. (App. 1, 98). The Husband filed a financial statement with the Court on or about September 27, 2017 and the same was not amended or supplemented. (App. 1, 125). Extensive discovery was attempted, with the Wife sending two sets of discovery requests to the Husband. (App. 1, 141; 2, 329). The Husband responded minimally to the first set of discovery, and he provided no responses to the second set of discovery requests. (App. 2, 329). On January 14th, 2019, the parties and the Guardian ad Litem for the minor children, Cheryl LaNasa, came before the Court and resolved the parenting issues. The parties then appeared for a final hearing on all remaining issues in this action on January 16th, 2019, wherein the Court heard the testimony of the parties and received evidence regarding the parties' financial issues. (vid. 1,2,3 & 4).

REAL ESTATE

LAST MARITAL RESIDENCE: The parties testified as to their ownership in real estate including the last marital residence. The Wife owned the home prior to the marriage to the Husband with the deed to the home being solely in her name at the time of her marriage. The home was her family property. (Supp. App. 1). Additionally, her sole ownership of the home had survived a prior divorce action. (Supp. App. 3). On or about August 11, 2005, the parties purchased real estate to start a restaurant called, Barb s Restaurant (Supp. App. 27). The business property was purchased for \$25,000.00 with a credit card. Id. The parties then

borrowed money to purchase the equipment needed to start the business. (Vid. No. 1 -24:25-24:37). A short time later, additional funds were needed to complete the startup, but the assets associated with the business were not sufficient to borrow the additional funds. (Vid. No. 1 -24:25-24:37). The only way for the parties to borrow the necessary funds was to use the last marital residence, which was the separate property of the Wife, as collateral. (Vid. No. 1 -24:40-24:47). As Husband's income was substantially greater than the Wife's income, the bank required that his name be placed on the real estate and the loan. (Vid. No. 1 -24:51-25:05). Therefore, on or about October 5, 2007, a deed was made which conveyed the property known as the last marital residence to both the Wife and the Husband. This asset which had been the separate asset of Wife was valued at the time of the transfer at \$205,000 based on the appraisal performed for Citizens National Bank. (Supp. App. 5). The Wife argued that she contributed a separate asset worth \$205,000.00 to the marital estate to enable the parties to maintain and support of the marital business which should be considered in the equitable distribution pursuant to West Virginia Code 48-7-103.

The Husband offered no appraisal or other support to reflect the value of the real estate. (App. 2, 329). (Vid. No. 4 – 46:15). The Wife offered the last appraisal and testified that although some improvements were started, they were not yet completed. (Vid. No. 1 – 25:50-26:50). Therefore, she believed the value of the home was less than the appraisal due to its current state. (Vid. No. 1 – 27:10-27:30). The Wife requested that the Court reduce the value of the home to \$160,000.00 to reflect the separate monies/assets that she contributed to the marriage as described herein. (Vid. No. 1 – 27:30-28:22). The Court refused and instead used the appraised value as it was the only value supported by the evidence.

RESTAURANT: The parties also owned a restaurant property located at 56

Morgantown Pike, Belington, West Virginia as mentioned above. The property was purchased on or about August 11th, 2005 for \$25,000.00 using a credit card. (Vid. No. 1 -30:36). The evidence was uncontradicted that the bank refused to lend additional funds against business value as the value was not great enough to support the same. (Vid. No. 1 – 24:46-24:47). The debt owed by Barb s restaurant as of the date of separation was \$55,984.44. (Vid. No. 1 – 1:19:10). The Court heard the testimony and reviewed the purchase documents (Supp. App. 27), the lending documents and the testimony and concluded that the value of the restaurant was \$185,000.00.

HUSBAND’S SECRET REAL ESTATE: The Husband testified that he purchased real estate through a liquidation sale on or about January 21st, 2017, the same consisting of 2 lots with a residence thereon. (See Exhibit 3A, 3C). He testified that he purchased the same secretly without the Wife s knowledge and then transferred the same or caused them to be conveyed into the name of his son, Jayden Lee Weaver. (Supp. App. 28). He testified that he paid for these properties. (Vid. No. 4- 30:26). He further testified that he resides on said property and has since the parties’ separation. He testified that his son, Jayden Weaver, resides in Harrison County, West Virginia, not Taylor County, West Virginia, where the property lies. (Vid. No. 4- 50:12). He testified that he did not tell the Wife as it was “none of her business”. (Vid. No. 4- 30:26). He also could not explain why he had failed to list the same in his financial disclosures filed with the Court, even under the section where one lists the assets transferred within the last five years. Id. The Husband testified that he purchased the real estate and then made significant improvements to said real estate. Id. Based on the testimony of the Husband, it is clear he made said improvements using improperly removed funds or secreted funds from the marital estate

during the ongoing litigation in this case. *Id.* The Husband offered no evidence or statement to establish the value of the real estate. (App. 2, 329). The Wife submitted the tax appraisal from the Barbour County Assessor's Office, which reflected that the home and lot had an appraised value of \$117,000.00 (Supp. App. 37). The Husband admitted that he purchased said real estate at a liquidation sale. (Vid. No. 4- 30:17). Accordingly, the purchase price of the real estate does not reflect the fair market value. Furthermore, the Husband did not list any real estate other than the marital home" and listed no assets as conveyed to others in the financial statement filed by him with the Court. (App. 2, 329) (Vid. No. 4-15:12). No supplements or amendments were ever filed with the Court by the Husband. *Id.* The Court found the value of the home was \$65,400.00.

FINANCIAL ACCOUNTS

Many unusual financial occurrences took place in this action around the time the parties were contemplating getting a divorce until the date of the final divorce hearing. However, based on the appeal the only issue before this Court is the IRA. During the marriage, the Husband had several retirement and pension accounts. The evidence showed that on or about August 26th, 2016, the Husband and Wife transferred the sum and amount of \$325,978.21 from the Husband's Transamerica of the IBEW Local Union No. 126 Retirement Plan into an IRA at Freedom Bank (Supp. App. 59). Wife was named the 100% beneficiary on said account. *Id.* This transfer was agreed upon by the parties to avoid any tax consequences in the distribution of the funds. The parties then jointly agreed to withdrawal \$60,000.00 from the account. (Vid. No. 1 – 42:50). Forty Thousand Dollars of the funds were deposited into a Certificate of Deposit located at Freedom Bank which was then used as collateral for a loan (Supp. App. 41). Twenty Thousand Dollars was placed into two different bank accounts: Ten Thousand Dollars into each account

(Supp. App. 41). The Forty Thousand Dollars Certificate of Deposit was cashed in, with the joint agreement of the parties, to satisfy the debt held against it. (Vid. No. 1 – 41:31). Each party was given the funds from the net proceeds to cover the payments made by each party since the loan was obtained (Supp. App. 41). Id. Therefore, this asset has been resolved. The two accounts with Ten Thousand Dollars each were used to purchase various items of personal property and to put siding on the restaurant property. (App. 2, 226). The remaining funds were included in other bank accounts.

Thereafter, the evidence showed that on or about April 12th, 2017, unbeknownst to the Wife, the Husband moved the IRA account to a different bank, namely Citizens Bank of West Virginia (sum and amount of \$259,358.62 taking substantial penalties thereon) and changed the beneficiary to 50% to the Wife and 50% to Jayden Weaver (Supp. App. 69, 93). The Husband then withdrew monies from said account for various purchases including improvements on real estate that he had purchased and placed large sums of money in the son's bank account. (Vid. No. 4- 27:02). When the Respondent was asked about a particular group of withdrawals which total \$139,000.00, he admitted that he had withdrawn the monies and that he used much of the money to remodel the home where he currently resides and spent at least \$20,000.00 on gifts he purchased for the children. Id. The Court also noted that he did pay the Wife a stipend during the course of this case, as child support and spousal support. The Husband claimed that he used the monies from the IRA to pay said amounts to the Wife, but the Husband offered no evidence to support the same. The Wife admitted that he had also stated he was using the money from the IRA in a prior proceeding, but again no proof or documentation was ever provided.

The Husband claims that some portion of the IRA is his separate asset acquired prior to marriage. No evidence was offered by the Respondent regarding the IRA. (App. 2, 329). The

evidence supported that the Wife tried on multiple occasions to obtain documentation regarding Husband's retirement accounts but was unsuccessful. (Vid. No. 4-20:31). During cross examination, the Husband testified that if he had known it was important, he would have obtained documents regarding his retirements. (Vid. No. 4-1:00:39). He later testified that he thought his counsel was working to obtain the documents and that he was present during mediation when efforts had been made to obtain the information. However, no witnesses were subpoenaed to address this issue from the Local Union, no evidence of any kind was offered to support the separate component of the retirement, if any. The monies had been moved, withdrawn, transferred, had taxes and penalties assessed all since they were removed from the original holder. No evidence was offered herein to establish a separate component to the assets. No evidence was shown reflecting the gains and losses on the accounts during the marriage. No evidence was offered by the Husband to reflect as to when or how any contributions were made. Furthermore, the Husband withdrew the funds, placing them in an account and then took action to move them again, finally withdrawing, most if not all the money. Failing to offer any documentation or evidence to support the same, combined with the Husband's actions around the time of separation and during the court action made it impossible for the Court not to conclude that all the financial assets, including annuities and retirements, were marital assets in their entirety.

The Husband again failed to properly disclose the marital and separate financial accounts. In his Financial Statement filed with the court, he listed a checking account containing \$18,000.00 and one savings account containing \$40,000.00, without any specification. (App. 1, 127). The Husband listed an IRA with \$120,000.00 in it and a whole life insurance policy with a value of \$500,000.00. Id. Clearly based on the evidence, these accounts and amounts were not

accurate. He did not list any other retirement accounts, although he admitted to other accounts during his cross examination. When asked whether he sought to obtain information regarding these retirement accounts, he testified that no one asked him to get it, so he did not. The disregard of the Court's order for disclosure and supplement of disclosures, considering this case had been ongoing for 17 months, created problems for the Wife and the Court.

When asked where all the secreted money had been deposited that had been withdrawn from the bank accounts, cashed from his pay checks, and from the IRA, the Husband testified that he had given most of it to his son who was his executor. Clearly the Husband disregarded the constructive trust and his fiduciary responsibilities toward his spouse.

VEHICLES

The Wife offered evidence as to values for the various vehicles owned by the parties (Supp. App. 102-111). The Husband admitted that he did not disclose the vehicles in his Financial Statement nor were they disclosed during discovery. (Vid. No. 14 – 15:38). The Husband offered no evidence at all as to the vehicles or their values. (Vid. No. 4 - 44:51). The testimony showed that the Husband has transferred some of the vehicles to others including his son, without disclosing the same to the Court. He only listed that the parties had an interest in four vehicles at a value of \$54,000.00. (App. 1, 127). Yet when he testified that the parties owned many more vehicles that he had not disclosed. (Vid. No. – 15:38).

In reviewing the financial disclosures of the parties, it is evident that the Wife made every effort to disclose all assets and debts, even to the extent that the Husband used the Wife's exhibits to establish the values of the assets and debts. The Husband failed to provide full disclosure. He testified that although he signed a verified Financial Statement, he did not ensure that the information was true; he admitted that he did not list all the assets and admitted that he

did not make efforts to obtain values of said assets.

ALIMONY

The Wife requested alimony and provided testimony and evidence to support her income, expenses and other criteria for alimony. The Husband did not. The Husband did not present any tax documents including no W-2s or 1099s to show his income. He did testify that he had not filed his income taxes as he claimed to have tax obligations as a result of his improper withdrawal of monies from his IRA during the course of this action. (Vid. No. 4 – 1:04:59). The Husband testified that he had received a lump sum payment for himself from the social security office during this action, which he also had not disclosed and could not recall the amount. (Vid. No. 4 – 1:03:50). The Husband conceded that he may work after the case is concluded as allowed, earning \$1,800.00 per month while he also continues to receive social security benefits. Id. The Husband did not provide any testimony regarding his monthly expenses. (Vid. No. 4 – 24:59). The only Financial Statement he had filed reflected expenses of \$1985.00 per month. (App. 1, 127). It is of importance that he included rent or mortgage in the expenses, but the evidence offered reflected there was no rent or mortgage due on the Husband s residence. Id. The Husband currently is on social security disability and does not have health insurance costs. The Husband testified that he would soon be drawing his pensions. (Vid. No. 4 – 59:57). Therefore, based on his testimony and the Financial Statement he had previously filed, the Husband s monthly expenses were \$925.00. Id. The Husband testified that he received social security income is \$2,296.00, but he also testified of his intent to work earning up to \$1,800.00 per month and receive pension monies. (Vid. No. 4 – 1:03:50, 59:57). The Wife presented evidence of expenses totaling \$5,801.18 with a total money coming in (including the children s

social security payments) of \$2,148.00, leaving a deficit of \$3,656.18 per month (Supp. App. 140). The Court considered all these issues and issued a detailed order regarding the same concluding that alimony was warranted.

ATTORNEY FEES

The Wife requested her attorney's fees and provided testimony in support thereof. The Court heard all the testimony and made a detailed order regarding the same.

After hearing all the evidence and considering the Proposed Findings of Fact submitted by each party, the Family Court entered an order addressing all of the issues by order entered on March 5, 2020. The Husband filed a Petition for Appeal to the Circuit Court. The Circuit Court denied the appeal and affirmed the Family Court Order by Order entered on August 11, 2020. It is from this order that the Husband has filed his appeal.

SUMMARY OF ARGUMENT

The Appeal herein is an appeal from the Order of the Circuit Court entered on August 11, 2020. The Husband failed to provide proper financial disclosure and failed to respond to discovery. The Husband failed to provide evidence to support any claims made in the appeal. The Wife testified, filed financial disclosures and provided the Court with proper evidentiary to support to make findings on all issues in this action. The Husband cannot now complain of errors in the Family Court's decision where the Respondent failed to provide the Court with any evidence to support his claims. As the West Virginia Supreme Court of Appeals has stated, "A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal." *In re Tiffany Marie S.*, 196 W.Va. 223, 233, 470 S.E.2d 177, 187 (1996) ("[W]e regularly turn a deaf ear to error that was invited by the complaining party." (citation omitted)); *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va. 585,

599, 396 S.E.2d 766, 780 (1990) (finding “the appellant cannot benefit from the consequences of error it invited”). *Manor Care, Inc. v. Douglas*, 234 W.Va. 57, 763 S.E.2d 73 (W. Va. 2014).

The failure to provide proper evidence to establishes the values of assets and debts in the estate, a failure to provide incomes and expenses and other relevant matters should not then be grounds for an appeal.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent Wife does not believe oral argument would assist the Court in deciding the issues herein.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY UPHELD THE FAMILY COURT’S DENIAL OF THE PETITIONER HUSBAND’S MOTION TO CONTINUE MADE ON THE MORNING OF THE TRIAL.

The Circuit Court properly found that the Family Court did not err in denying the Petitioner Husband’s Motion to Continue made on the morning of the trial. The Circuit Court, citing Rule 19 of the *West Virginia Rules of Practice and Procedure for Family Court*, found that the decision regarding a motion to continue rests in the sound discretion of the court. (Order). The Husband argues that he received 60 pages of documents the night before, and morning of, trial which created an undue hardship as he was unable to review the same. The divorce action was filed on the 14th day of August, 2017. After two years of exchanging documents, completing discovery and heated litigation, the matter came for a Final Trial on January 14th and January 16th, 2019. The Wife had filed two financial disclosures and provided substantial documentation including discovery responses, pursued discovery herself and filed witness and exhibit lists and pretrial memoranda with the Court, as mandated by the Family Court’s order. The Husband did not file responses to the discovery and filed only a cursory and

inaccurate Financial Statement. The Wife disclosed all her documents long before the trial. The day before the trial on equitable distribution, the Wife provided to the opposing counsel as a courtesy her Final Exhibits in order and labeled. Contrary to Husband's assertion, the documents were first faxed to the Office of Husband's attorney early in the day on January 15th, 2019. After a mistake was found, the documents were then emailed to him at 12:27 p.m. on January 15th, 2019 noting that the earlier fax had contained an error. Although perhaps Husband's attorney did not review them until January 16th, as they were the same documents which were previously provided, some a year before, except organized in an orderly manner to be presented to the court, there is no error.

The cover sheet filed with the collective exhibits was a Demonstrative Exhibit, which admittedly had not been provided previously, but was being attached to reflect the Wife's equitable distribution requests. The morning of the hearing, the Husband moved the Court to again continue the trial as he had just received these documents. The Court properly ruled that the documents had been exchanged previously, and the Demonstrative Exhibit was not being admitted but being offered to illustrate the Wife's requests. The Court permitted the Husband to object as each exhibit was offered and exclude or admit each exhibit based on points of law. It is of note that the Husband does not list any specific exhibit as being improperly admitted, as the Husband did not object to most of the exhibits and used the same in his case in chief. Simply because the Wife had caused the exhibits to be organized in a manner to properly present to the Court was not a ground for a continuance. Furthermore, the action had been continued multiple times contrary to Rule 19 of the *West Virginia Rules for Practice and Procedure for Family Law*. Accordingly, as this was well within the Family Court's discretion, the Family Court did not err

in denying the Motion to Continue.

II. THE CIRCUIT COURT PROPERLY AFFIRMED THE FAMILY COURT IN DETERMINING THE VALUES FOR THE REAL PROPERTY.

The Circuit Court properly affirmed the Family Court's determination regarding the values of the real property. The Wife offered testimony including an appraisal, deeds and the appraised value from the Barbour County Assessor for the last marital residence. The Husband offered no support or value but stated that improvements were made to the property and he performed the work. This testimony was disputed by the Respondent Wife who testified that improvements were started but not completed. (Vid. No. 1 – 24:36). She argued that the value of the home had likely decreased from the last appraisal as the improvements had decreased its value. Id. The Court relied on the documents presented and determined the value of the home was based on the last appraisal.—This is the ONLY actual value presented as the Husband failed to provide any value for the home.

The Wife offered evidence as to the value of the business and the real estate associated there with. The Husband failed to provide any documents to reflect the value of the restaurant. The Husband claimed that years before there was a business appraisal of “Barb’s Restaurant” however the same had not been provided in the litigation, was not filed with the Court and was not present at the time of the hearing. (Vid. No. 3 – 55:16). The Husband desired to quote the appraisal from memory to suggest an alleged value for the business. Id. As the Husband failed to provide the document in advance or even at the trial, the Wife objected. Furthermore, the Wife objected as the claimed memory of the Husband regarding the content of the appraisal violated the best evidence rule. Contrary to the argument of the Husband, the best evidence rule requires that the original document is necessary in order to provide evidence of the content of the

document. The West Virginia Supreme Court recently addressed the issue when an officer attempted to testify about a text message which had since been deleted. The West Virginia Supreme Court noted that “the best evidence rule is found in Rule 1002 of the *West Virginia Rules of Evidence*: ‘An original writing, recording, or photograph is required in order to prove its content unless these rules or a state statute provides otherwise.’” *State v. Keith A. No. 7-0262*(W. Va. 2018). Thus, the best evidence rule does apply, meaning it was improper for the Husband to attempt to quote from memory the content of the appraisal without providing the actual appraisal to the Court. The West Virginia Supreme Court of Appeals has held “Rulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion. *State v. Louk 301 SE2d596, 599* (W.Va. 1983) Additionally, the same would be hearsay as the Husband attempted to use an out of court statement to prove the truth that it asserts. *Rule 801 and 802 of the West Virginia Rules of Evidence*. Clearly, it was improper for the Husband to provide testimony of the alleged contents of an old appraisal that he had not provided nor even had with him in court from memory. The Family Court properly refused to permit the quotation of the appraisal by the Husband.

The Husband further argues that the Wife was permitted to testify about the value of car parts without any basis for the value as support that he should have been allowed to guess about the content of the old appraisal. This ludicrous argument goes to the very heart of this case. The car parts were the hobby of the Husband. The Husband failed to provide or even list the car parts in any disclosure. (App. 125). The Wife had no option but to testify to the best of her ability as to the car parts. No document existed to support the value. This issue is entirely different than attempting to testify about an old appraisal while refusing to provide the document to the court, although both instances show the failure of the Husband to perform even a minimum of diligence in preparing for Court.

Each party has an obligation to put forth the evidence to this Court to reflect the value of the assets. *Murray v Murray*, No.:12-0771, June 7, 2013. The Husband argues that since no “competent evidence” was offered, the home should have been sold. However, the Wife provided evidence as to the value. The Husband should not be awarded for his failure to bring forth evidence by selling the last marital residence, which was the separate property of the Wife before the marriage and is/was the primary residence for the two minor children.

Finally, the Husband argues that the “secret property” he purchased and then transferred into his son’s name was improperly valued. The Husband failed to even disclose the real estate in any form of disclosure filed or provided to the court and the Wife. (App. 125). The Wife uncovered the purchase and brought it to the Court’s attention. (Supp. App. 28). The Wife provided the appraisal for the Barbour County Assessor’s Office for consideration. (Supp. App.

37). After hearing the testimony, the Court established a value for the real estate declaring the same to be marital. The Husband failed to offer any evidence as to the value. Furthermore, based on his failure to provide proper financial disclosure as is required by *Rule 13 of the West Virginia Rules for Practice and Procedure for Family Court*, the failure provide proper financial disclosure permits the Court to refuse to grant relief to the party and/or may accept the financial information of the other party as accurate. Clearly, as no evidence was properly offered by the Husband the Circuit Court did not err affirming the Family Court order.

The parties each have an obligation to present and provide evidence to the Court sufficient for the valuation of the assets. The Wife had filed various disclosures to the Court and then offered testimony as to the value of the assets based on the documentation admitted into

evidence. The Husband had failed answer discovery or file an appropriate Financial Statement which fully and properly disclosed the parties' assets and debts. The Family Court noted in its order on page 8 paragraph 30 of the Court's Final Order of Divorce, that *West Virginia Code* 48-7-206 permits the Court to accept the information filed by the other party in the event that a party does not properly and completely provide the financial disclosure as required by law. Clearly, the Court made Findings which repeatedly reflect that the Husband failed to provide full and complete financial disclosures. (App. 209). (See Final Order of Divorce page 14, paragraph 34g; page 14 paragraph 34j; page 15, paragraph 35 c; page 16 paragraph 36b; page 18 paragraph 36; page 18 paragraph 36j; page 219 paragraph 36m; Page 19 paragraph 37a; page 19 paragraph 37d; page 20 paragraph 20; page 24 paragraph 41 and 42).

The Family Court is not bound to sell all marital assets, but is to consider the provisions of *West Virginia Code* 48-7-104 in determining the method for distribution. In this case, the Wife had brought substantial resources and assets into the marriage, including real estate and operated the marital business as her only income. *West Virginia Code* 48-7-105 allows the Court to consider these factors in determining the distribution of the assets and debts, including but not limited to the business entity. The Family Court entered a 44-page order detailing her methods for determining the values and the outcomes which properly reflect not only her process but also the evidence to support the same. As the Husband had a duty and obligation to bring forth evidence, properly file Financial Disclosures and to fully respond to discovery, the alleged error of which the Husband claims is one created by his own failure to offer follow West Virginia law. The West Virginia Supreme Court has also held that, [t]he burden is on both parties to the litigation to adduce competent evidence on the values to be assigned in equitable distribution cases." Syllabus Point 8, *Wilson v Wilson*, 706 S.E.2d 354 (W.Va. 2010) citing *Mayhew v*

Mayhew, 478 S.E.2d 382 (W.Va. 1996). As the Husband failed to properly offer evidence regarding the values of the assets, he cannot now complain of the values applied by the Court. The Circuit Court did not err in finding that the Family Court had properly determined the value of the real estate.

III. THE CIRCUIT COURT PROPERLY AFFIRMED THE FAMILY COURT RULING REGARDING THE PETITIONER S TESTIMONY OF THE APPRAISAL OF THE RESTAURANT.

The Respondent hereby incorporates the arguments related to this assignment of error that was provided in the previous section into this section.

IV. THE CIRCUIT COURT PROPERLY AFFIRMED THE FAMILY COURT'S RULING DETERMINING A DATE FOR MONIES PAID BY THE PETITIONER TO THE RESPONDENT TO BE DESIGNATED AS TEMPORARY SPOUSAL SUPPORT AND THEREAFTER DESIGNATED AS ADVANCE EQUITABLE DISTRIBUTION PAYMENTS.

The Circuit Court properly held that the Court was unable to find the Family Court's order clearly erroneous or an abuse of discretion in the Family Court's application of law as it relates to the allocation of the parties' funds paid. The Husband failed to identify any error but simply states that there was no justification or reasoning for the date. The final hearings concluded in January of 2019 and the parties submitted their Proposed Final Orders in February of 2019. The Court's designation of payments is effective the month following that date or March 1st, 2019. The Court has the authority to establish a date. No error is alleged in the establishing of the date. The payments of \$3,500.00 per month, which were later reduced by the Respondent's actual payments were court ordered. The Court with the agreement of the parties, held in abeyance the classification of the monies. No evidence was required as to how the monies were spent, but no questions or evidence was adduced by the Husband to establish this

fact. Therefore again, if the evidence was necessary, one must ask why the Husband failed to provide or present any evidence in this regard. The Petitioner's Wife argued and requested that the monies be declared as alimony and child support in their entirety. The Court denied the request and instead established amounts and dates setting forth the matter clearly in its order. The Family Court made substantial findings regarding its consideration of alimony, none of which are contested in the appeal. (App. 209). As no actual error is even identified from the extensive findings in the Family Court's order, the Circuit Court clearly made no error in affirming the Family Court's decision regarding spousal support and the equitable distribution payments.

V. THE CIRCUIT COURT PROPERLY UPHELD AND AFFIRMED THE FAMILY COURT'S ORDER DETERMINING THAT THE ENTIRETY OF THE IRA WAS MARITAL PROPERTY.

The Circuit Court properly affirmed the Family Court Order determining that the entirety of the IRA was marital property. The Wife offered evidence as to the amounts, various transfers and some withdrawals from the Husband's IRA. The Husband's account was initially rolled over into an IRA with the agreement of the parties. (Supp. App. 59). Around the time of the parties' separation, the Husband began to "secret" monies, and moved the same into a new IRA at a different bank, causing substantial penalties and taxation. (Supp. App. 67). The Husband then withdrew substantial amounts, which he testified went to acquire property, make improvements to property he claims was owned by his son, put money into his son's bank account, and give his son money as his "executor". (Vid No. 4 – 58:26). Considering the various transfers and withdrawals, it is impossible to simply calculate any marital versus separate nature of any monies in the account. The Husband had the obligation of providing the Court h

exact information regarding the account. He failed to even provide a statement of the account. In fact, there were multiple retirement accounts which were never disclosed by the Husband and were only finally disclosed during his cross examination. (Vid No. 4 – 31:41-35:41). The Family Court and the Circuit Court both properly cited case law, specifically stating:

“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 25 (1995). No evidence was offered by the respondent Harold Lee Weaver regarding the IRA.” (App. 1, 276).

The Husband had the burden to show the separate nature of the IRA, not by simply stating that it is partially separate, but to show the Court the actual value of the claimed separate property. The Husband appears to now argue that the Court should have “simply used the math” looking at the total amounts in the account and consider the marital component. No one testified to this claimed method. Furthermore, the claimed method presupposes that the exact same amount of interest and contributions occurred every year the Husband was employed and thereafter. Again, no evidence was offered of this allegation. The claimed method also fails to address all the penalties associated with the Husband’s actions in secreting the account and whether those fees were “marital” or “separate”. The Husband further claims the Court should have somehow considered the total amount of monies paid by the Husband allegedly from the IRA. Yet NO documentation was offered that the IRA was used to satisfy any payments to the

Wife. Furthermore, the Husband did not provide any evidence, including testimony, regarding the total amounts paid to the Wife. The Husband failed to offer any helpful or necessary evidence regarding this issue. He admitted that he did not obtain information about the retirements because he did not know he needed to. He did provide a release, which was not honored by the company. However, he called no witnesses to establish any value, payments, or any fact regarding his new claims. The Husband had the burden of proof. He failed to meet even a minimal standard. As such, the Circuit Court did not err in affirming the order of the Family Court regarding the IRA.

VI. THE CIRCUIT COURT PROPERLY AFFIRMED THE FAMILY COURT'S AWARD OF ATTORNEY FEES.

The Circuit Court reviewed the recordings of the trial and the Order of the Family Court and determined that the Court properly reviewed each of the criteria set forth by the West Virginia Supreme Court in *Banker v Banker*, 196 W.Va. 535 (W.Va. 1996). The Family Court properly used and considered the factors as follows:

1. Each party's ability to pay his/her own attorney fees. The Wife offered evidence of her expenses and current obligations. (Supp. App. 140). The Husband offered no evidence as to his current expenses or his obligations. Although the Husband argues her expenses are "disingenuous", there is no claim that any of the evidence was inaccurate. The Husband cross examined the Wife's regarding her expenses and had opportunity to show if there were inaccuracies. The Court heard and considered all the evidence and made the specific finding in the order which is supported by the evidence.

2. Beneficial Results Obtained. As to the argument of the Husband, the Wife was awarded permanent spousal support and large equalizing payment in equitable distribution which weighs FOR an award of attorney fees as it is a beneficial result.

3. The Parties' Respective Financial Conditions. In response to this, the Wife restates the argument in paragraph V.1. herein.

4. The Effect of attorney Fees on Each Party's Standard of Living. The evidence offered was that the Husband has historically had a higher income and had sufficient funds to "give away" money during the pendency of the action, while the Wife was suffering a deficit each month. This was not contested.

5. The Court noted that no fault was presented by either party.

6. The Reasonableness of the Attorney Fee Request. The Court reviewed the attorney fees and held that this was a lengthy proceeding including a domestic violence section. No errors are presented by the Husband in his argument, only that he desired the Court to look at his alleged claims and evidence differently. As all the factors required for an award of attorney fees were contemplated by the Court and no error has been alleged to have occurred in the same. The Circuit Court properly upheld Family Court Order regarding attorney fees.

CONCLUSION

The Circuit Court reviewed the final order, the court file and the recording of the final Family Court hearing. The Circuit Court entered a clear order addressing each of the issues presented in the appeal from the Family Court, referencing the legal support for each. The Family Court entered a 44-page order specifically addressing each issue. No error has been alleged that in any way shows a clear error or an abuse of discretion by Family Court. No error of law has even been alleged. As such, the Respondent Wife respectfully requests that this Court affirm the Order of the Circuit Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 2021, I forwarded a copy of the attached Brief on Behalf of Respondent, Barbara Jo Weaver by U.S. Mail first class postage prepaid addressed as follows:

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David Fuelhart
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A handwritten signature in black ink, appearing to read 'Shannon R. Thomas', is written over a horizontal line.

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