INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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BRADLEY L. BOWE,

Petitioner Below, Petitioner Herein,

v. **No.: 23-ICA-370**

MELISSA A. BOWE,

Respondent Below, Respondent Herein.

Brief of Respondent Melissa A. Bowe

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STATEMENT OF THE CASE

In this action, the Petitioner is Bradley L Bowe, who was the Petitioner in the Family Court case, and the Respondent is Melissa A. Bowe, who was also the Respondent in the Family Court matter. The parties were married on May 23, 2017 and separated on July 26, 2021. (JA 1, ¶¶ 3-4.) The Fayette County Family Court presiding over the parties' divorce entered its Final Divorce Order on July 20, 2023. (Id.) This appeal then ensued.

The most significant property litigated in this divorce case, and the entire subject of this appeal, were monies held in a BB&T (now Truist) Bank checking account, titled solely in Petitioner's name. (JA 4, ¶ 17.) Although this account was opened prior to the marriage, the account was active and used by the parties during the entire course of the marriage for the benefit of the married couple. (Id.) Indeed, as the Court found, "Petitioner's [Petitioner here] Exhibits #4, #6, and #7, [sic.] show the money that was flowing in and out [of] this account for the months of May 2021, June 2021, and July 2021." (JA 7, ¶ 33.) And, as the Family Court ultimately concluded, "[d]uring the marriage, money was flowing in and out [of] this personal checking account." (Id. at ¶ 36.) Further, according to the Family Court, these exhibits "show that, during the marriage, this personal checking account was used for marital expenditures such as shopping, food, household expenses, and utility bills." (Id. at ¶ 34.)

From the date of marriage until approximately one month prior to separation, Petitioner was the sole member/owner of River Valley Remodeling LLC ("River Valley"), a construction company. (JA 4, ¶ 18.) During the marriage, Respondent quit her job to go to work for Petitioner at River Valley. (JA 101.) Petitioner deposited monies made from River Valley during the marriage into this personal checking account. (JA 7, ¶ 35.) As the Family Court found, "[p]etitioner admitted he earned at least $211,000 during the marriage through River

Valley Remodeling LLC[.]" (JA 5, ¶ 25.) Indeed, "[a] review of Petitioner's Exhibit #7 shows that on June 17, 2021, the big deposit of $208,697.95 was made into the personal account from the River Valley business account." (JA 7, ¶ 35.) In other words, "[a]pproximately one month prior to the parties' separation, the Petitioner closed River Valley Remodeling LLC and transferred $208,697.95 from the River Valley Remodeling LLC bank account to his personal account." (JA 5, ¶ 21.)

Petitioner also deposited his VA disability payments into this same personal checking account which the parties used to pay for food and other household expenses and bills and into which Petitioner deposited business earnings, as well as other monies. (JA 6-7, ¶¶ 32; 35-6.) In total, during the marriage, Petitioner received and deposited a total of $164,902.34 in disability payments into the checking account. (JA 88-92.) But, as the Family Court found, **"[t]he disability payments were not isolated from other deposits *and expenditures*. The disability payments were commingled in an account *that was being used for marital expenditures*."** (JA 7, ¶ 36.) (emphasis added). In fact, in addition to the business earnings and disability monies, Petitioner also deposited other marital monies into that account. (JA 7, ¶ 35.) As the Family Court found in determining that monies from multiple known and unknown sources were being deposited into the account, "for the month of June 2021, there were total deposits of $215,737.50 into this account." (Id.) $208,697.95 of that amount was the deposit from Petitioner's business. (Id.) But, as the Family Court found, "[t]he sources of the other $7,039.55 in deposits were redacted by Petitioner." (Id.)

Given all the transactions with monies moving in and out of the personal account from known and unknown sources, the Family Court found that "[a]lthough the Petitioner was able to show the amount of VA disability benefits received during the marriage, the amounts or sources

of all deposits made into this account during the entire course of marriage is unknown." (Id.) (emphasis added). Accordingly, the Family Court found as a matter of fact that "[e]ven if it is proper to use a 'source of funds' doctrine, **there would be insufficient evidence to attempt such an accounting**." (Id.) (emphasis added). As the Family Court noted, "on the date the parties separated, the personal account had a balance of $339,183.52." (JA 5, ¶ 21.)

The Family Court held that the inability to differentiate funds deposited into the personal account "negates Petitioner's argument that disability payments received during marriage retain classification as separate property and should be backed out of consideration for equitable distribution." (JA 8, ¶ 37.) According to the Family Court, quoting Whiting v. Whiting, 183 W. Va. 451, 423, 396 S.E. 2d 413, 461 (1990), "'we conclude that the source of funds doctrine is ordinarily not available to characterize as separate property that property which has been transferred to joint title during the marriage. Tracing the parties' contributions to classify the property as marital or nonmarital ignores the effect of the joint titling of property and is incompatible with the partnership concept of marriage.'" (Id. at ¶ 39.) As the Family Court further asserted, "'[w]hat is designated as nonmarital property, however, still may be presumptively determined to be marital property by the affirmative action of a spouse.' Burnside v. Burnside, 194 W. Va. 263, 267, 460 S.E. 2d 264, 266 (1995)." (Id.)

Petitioner also alleged to the Family Court that "because he was the sole owner of River Valley Remodeling, and because he started and owned that business prior to marriage, any funds transferred from his business account to his personal account was not subject to equitable distribution." (JA 5 ¶ 24.) But the Family Court rejected such an argument, citing West Virginia statutory and common law. (JA 5-6, ¶¶ 27-30.)

During the mediation in this case, as a way of agreeing on the amount in dispute given the uncertainties of what monies were separate versus marital, the parties arrived at a methodology in which the following was used to calculate the monies alleged to be marital property and at issue. (JA 60-65.) Specifically, "by factoring out the money that was in Petitioner's personal account as of the date of marriage with the amount as of the date of separation, she is entitled, pursuant to equitable distribution, to one half of the account balance of $185,250.89, which is $92,625.45." (JA 5, ¶ 26.) On the date of marriage, River Valley's bank account had a balance of $100,306.47 and Petitioner's personal checking account had $53,626.16 in it. (JA 4-5, ¶¶ 19-20.) "The difference between the date of marriage account balance in Petitioner's personal bank account compared to the date of separation is $185,250.89." (Id. at ¶ 23.) Neither party disputed the numbers used in the accounts. (JA 5, ¶ 22.) And the Family Court used those numbers and methodology to discern the amount in dispute and to render its Final Divorce Order, which is at issue in this appeal. (JA 5, ¶ 26.)

SUMMARY OF ARGUMENT

In his one assignment of error set forth in his appellate brief, Petitioner claims the Family Court failed to consider the applicable federal law when determining the treatment of military disability benefits, claiming that the West Virginia law the Family Court cited and employed contravenes the federal law in violation of the Supremacy Clause of the U.S. Constitution. Specifically, Petitioner alleges the VA disability payments are governed by 10 U.S.C. § 1408 and 38 U.S.C. § 5301(a)(1), and the Family Court failed to follow these statutes, placing West Virginia statutory and common law above these federal statutes.

But such an argument fails for two key reasons. First, Petitioner's arguments are irrelevant because the monies the Family Court awarded to Respondent were from Petitioner's

business earnings during the marriage and not from his disability monies. Indeed, as profits from a business entity owned by Petitioner, the monies from which the Family Court awarded roughly half to Respondent were marital property and not separate property. No applicable case law exists to the contrary. Second, even if it were true the monies at issue came from disability payment monies, because Petitioner comingled those funds with other marital funds and treated those funds as marital property, they have lost their federal exclusion status under widely accepted common law throughout the country.

For these reasons, as set forth in greater detail below, the Court should affirm the Family Court's Final Divorce Order awarding, *inter alia*, $92,625.45 to Respondent from Petitioner, and award any other relief the Court may deem just and appropriate.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Given the irrelevancy of Petitioner's arguments since the monies awarded to Respondent come out of business monies that constitute marital property, Respondent does not believe that oral argument is necessary. However, if the Court decides to examine Petitioner's legal arguments, then Respondent believes that oral argument will aid the Court's understanding and respectfully requests it under those circumstances.

ARGUMENT

I. STANDARD OF REVIEW

The matters at issue here involve a three-prong standard of review in which factual findings are reviewed under a clearly erroneous standard, equitable distribution is reviewed under an abuse of discretion standard, and questions of law are subject to a *de novo* review. *See* Stephen L.H. v. Sherry L.H., 195 W. Va. 384, 465 S.E. 2d 841 (1995).

With regard to the findings of fact prong of the inquiry, the West Virginia Supreme Court of Appeals has ruled that '"appellate courts cannot presume to decide factual issues anew[,]'" and, instead, must implement a clearly erroneous standard of review. Stantec Consulting Sen's. v. Thrasher Envtl. Inc., 2013 W.Va. LEXIS 1094 at 8 (W. Va. 2013) (quoting Tennant v. Marion Health Care Foundation, Inc., 459 S.E.2d 374, 383 (W. Va. 1995)). Findings of fact are clearly erroneous "although there is evidence to support the finding, [when] the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Syl. Pt. 1, in part, In re Tiffany Marie S., 470 S.E.2d 177 (W. Va. 1996). As the West Virginia Supreme Court has stated, an appellate court "will disturb only those factual findings that strike us wrong[.]" Stantec Consulting Sen's. v. Thrasher Envtl. Inc., 2013 W.Va. LEXIS 1094 at 9 (quoting Brown v. Gobble, 474 S.E. 2d. 489, 493 (W. Va. 1996).

As to the abuse of discretion prong, the West Virginia Supreme Court has explained that "[u]nder the abuse of discretion standard, we will not disturb a [family] court's decision unless the [family] court makes a clear error of judgment or exceeds the bound of permissible choices in the circumstances." *Wells v. Key Communications, L.L.C.*, 226 W. Va. 547, 551, 703 S.E.2d 518, 522 (2010) (citation omitted). The West Virginia Supreme Court also has articulated that "[i]n general, an abuse of discretion occurs when a material factor deserving significant

weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the [family] court makes a serious mistake in weighing them." *Shafer v. Kings Tire Service, Inc.*, 215 W. Va. 169, 177, 597 S.E.2d 302, 310 (2004) (citation omitted).

Applying these standards to the facts in this case results in the conclusion set forth below.

II. THE FAMILY COURT CORRECTLY AWARDED ROUGHLY HALF THE MONIES TO RESPONDENT FROM THOSE MONIES EARNED BY PETITIONER THROUGH HIS BUSINESS DURING THEIR MARRIAGE.

A. Petitioner's arguments are irrelevant because the monies the Family Court awarded to Respondent were from Petitioner's business and not from his disability benefit monies.

Boiled down, Petitioner proffers the following argument in his allegedly perfected appellate brief: the Family Court erred by awarding $92,625.45 to Respondent from Petitioner's personal bank account because those monies are protected by federal law since they are military disability monies. But that argument is irrelevant because the awarded sum represents Respondent's share of the monies in the account that were earned by Petitioner's business; these monies are not from the monies in the account that were derived from Petitioner's disability payments. Petitioner's bank accounts show this to be true. Approximately one month prior to Petitioner and Respondent separating, Petitioner transferred $208,697.95 from his business bank account into his personal account which also held monies from his disability payments, as well as other monies from other sources which had been deposited into the account through the years of marriage. (JA 7, ¶¶ 33-35.) At the mediation in this case, the parties agreed to these numbers. (JA 60-65.) In fact the Family Court, quoted the mediator's letter at the hearing. (JA 101.) The Family Court then awarded to Respondent part of the monies that were transferred from the business and not any monies from the disability funds. Indeed, as commonsense indicates, $92,625.45 is nearly half of the business monies to which Respondent was entitled. In fact,

Petitioner received the benefit of the bargain as he only has to pay $92,625.45 rather than the true half of $104,348.97 – a savings to Petitioner of almost $8,000.00. Therefore, Petitioner's argument here is irrelevant.

To hold otherwise would be to create a new precedent in which a husband or wife could legally launder marital monies through a personal account holding disability payment monies and magically make the marital money deposited protected disability money. Moreover, under Petitioner's proposed precedent, a husband or wife receiving protected income could spend it all out of the account except for a little and then transfer marital assets into that account thereby transmuting them to protected disability monies as the husband or wife is then able to claim the full amount of disability payments received over the entirety of the marriage. Obviously, such a rule runs afoul of basic notions of justice, fairness, and plain commonsense. Accordingly, this Court should deny Petitioner's appeal as irrelevant and affirm the Final Divorce Order since Respondent is only receiving less than half to which she may actually be entitled.

B. As profits from a business entity owned by Petitioner, the monies from which the Family Court awarded fewer than half to Respondent were marital property and not separate property.

According to West Virginia Code § 48-1-233, "marital property" is defined as:

> (1) All property and earnings acquired by either spouse during a marriage including every valuable right and interest, corporeal or incorporeal, tangible or intangible, real or personal, regardless of the form of ownership, whether legal or beneficial, whether individually held, held in trust by a third party, or whether held by the parties to the marriage in some form of coownership such as joint tenancy with the right of survivorship, or any other form of shared ownership recognized in other jurisdictions without this State.

In interpreting this statute, the West Virginia Supreme Court of Appeals has held, "West Virginia Code [§ 48-1-233], defining all property acquired during the marriage as marital property except

for certain limited categories of property which are considered separate or nonmarital property, expresses a marked preference for characterizing the property of the parties as marital property." Syl. Pt. 3, Whiting v. Whiting, 183 W. Va. 451, 396 S.E. 2d 413 (1990).

Absent certain unique, specific exceptions, marital property under West Virginia law is to be divided equally between the parties. Specifically, West Virginia Code § 48-7-103 provides that in the absence of a valid agreement "the court shall presume that all marital property is to be divided equally between the parties . . . ." Such equitable distribution under West Virginia Code § 48-2-1, *et seq.*, is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets. And the third step is to divide the marital estate between the parties in accordance with the principles contained in W. Va. Code § 48-2-32; *see also* Whiting v. Whiting, 183 W. Va. 451, 396 S.E. 2d 413 (1990).

Here, given the law cited above, it is clear the $208,697.95 in monies, held in the Petitioner's business account and transferred to his personal account, constitute marital property. They are earnings garnered during the marriage. Indeed, Petitioner admitted as much, testifying that he had made roughly $211,000.00 during the marriage. (JA 5, ¶ 25.) Therefore, under West Virginia law, those marital monies are to be split equally between Petitioner and Respondent. Thus, the Family Court awarding Respondent $92,625.45 which is slightly less than half of the $208,697.95 business monies to which she was entitled, follows West Virginia law, and federal law is irrelevant to the matter. Accordingly, for this reason as well, this Court should affirm the Final Divorce Order.

C. Even if it were true, which as explained, *supra*, it is not, that the monies at issue came from disability payment monies, because Petitioner comingled those funds with other marital funds and treated those funds as marital property, they have lost their federal exclusion under the law.

As Petitioner correctly cites, federal law prohibiting attachment serves to preempt state law on division of marital property. *See* Mansell v. Mansell, 490 U.S. 581, 590, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989)2 (citing Hisquierdo v. Hisquierdo, 439 U.S. 572, 584, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979); Wissner v. Wissner, 338 U.S. 655, 658-59, 70 S. Ct. 398, 94 L. Ed. 424 (1950)). Thus, the anti-attachment provision generally prevents dividing VA disability benefits as marital property. *See* Rickman v. Rickman, 124 Ariz.507, 605 P.2d 909, 911 (Ariz. Ct. App. 1980); In re Marriage of Green, 169 P.3d 202, 204 (Colo. App. 2007); In re Marriage of Wojcik, 362 Ill. App. 3d 144, 838 N.E. 2d 282, 295, 297 Ill. Dec. 795 (Ill. App. Ct. 2005); In re Marriage of Howell, 434 N.W.2d 629, 633 (Iowa 1989); West v. West, 736 S.W.2d 31, 32 (Ky. Ct. App. 1987); Stacy, 144 N.E.3d at 904; Strong v. Strong, 2000 MT 178, 300 Mont. 331, 8 P.3d 763, 768 (Mont. 2000); Ex parte Johnson, 591 S.W.2d 453, 456 (Tex. 1979); Pfeil v. Pfeil, 115 Wis. 2d 502, 341 N.W.2d 699, 701-02 (Wis. Ct. App. 1983).

But what Petitioner fails to also mention is that VA benefits lose the protections of the anti-attachment provision and become marital property when "commingled with marital assets." In re Marriage of Green, 169 P.3d at 204; *accord* In re Marriage of Hapaniewski, 107 Ill. App. 3d 848, 438 N.E.2d 466, 471, 63 Ill. Dec. 535 (Ill. App. Ct. 1982); *see also* Hawes v. Stephens, 964 F.3d 412, 417 (5th Cir. 2020) (concluding that the anti-attachment provision did not apply to VA benefits commingled with other funds); cf. Angell v. Angell, 777 N.W.2d 32, 34-35, 40 (Minn. Ct. App. 2009) (holding that death gratuity benefits remained exempt under the anti-attachment provision when not commingled with marital property); Pfeil, 341 N.W.2d at 702 (same, regarding VA benefits); *see also* Eldridge v.

Eldridge, 137 S.W.3d 1, 17 (Tenn. Ct. App. 2002); Ogle v. Duff, No. E2016-01295-COA-R3-CV, 2017 Tenn. App. LEXIS 344, 2017 WL 2275801, at *8 (Tenn. Ct. App. May 24, 2017) (reasoning that an account "may have become marital property . . . [by] commingling if [the husband] contributed marital funds to the account during the marriage").

It is Petitioner's burden to show that the benefits "continued to be segregated" or "could be traced[.]" *See* Eldridge, 137 S.W.3d at 17; *see also* United States v. Griffith, 584 F.3d 1004, 1021 (10th Cir. 2009) (explaining that, "even if VA funds are commingled in an account with other funds, they will retain their VA character as long as they are readily traceable"); In re Dameron, 155 F.3d 718, 723-24 (4th Cir. 1998); First Fed. of Mich. v. Barrow, 878 F.2d 912, 915 (6th Cir. 1989). Hirt v. Hirt, No. E2004-00354-COAR3-CV, 2005 Tenn. App. LEXIS 78, 2005 WL 292414, at *9 (Tenn. Ct. App. Feb. 8, 2005) (finding commingling where "there was absolutely no proof" showing how much of the money in an account was separate or marital); cf. Smith v. Smith, 93 S.W.3d 871, 879 (Tenn. Ct. App. 2002) (no commingling where an accountant "determine[d] the value of the accounts that was attributable to" separate property). "But if the separate property and community property interests have been commingled in such a manner that the respective contributions cannot be traced and identified, the entire commingled fund will be deemed community property pursuant to the general community property presumption[.]" In re Marriage of Ciprari, 32 Cal. App. 5th 83, 91-92, 242 Cal. Rptr. 3d 900 (Cal. Ct. App. 2019) (citing In re Marriage of Braud, 45 Cal. App. 4th 797, 53 Cal.Rptr.2d 179 (Cal. Ct. App. 1996); In re Marriage of Cochran, 87 Cal. App. 4th 1050, 104 Cal.Rptr.2d 920 (Cal. Ct. App. 2001); In re Marriage of Bonvino, 241 Cal. App. 4th 1411, 194 Cal.Rptr.3d 754 (Cal. Ct. App. 2015).

Here, the Family Court found as a matter of fact that Petitioner comingled funds and used them for marital purposes. As the Family Court concluded, "[d]uring the marriage, money was flowing in and out [of] this personal checking account." (Id. at ¶ 36.) The sources of the monies in the account were multiple and not fully known but included disability payments, business income, and other, undisclosed sources of deposits. (JA 7, ¶ 36.) Further, according to the Family Court, "during the marriage, this personal checking account was used for marital expenditures such as shopping, food, household expenses, and utility bills." (Id. at ¶ 34.)

Given all the transactions with monies moving in and out of the personal account from known and unknown sources, the Family Court ultimately found that "[a]lthough the Petitioner was able to show the amount of VA disability benefits received during the marriage, the amounts or sources of all deposits made into this account during the entire course of marriage is unknown." (JA 7-8, ¶ 36.) Accordingly, the Family Court found as a matter of fact that "[e]ven if it is proper to use a 'source of funds' doctrine, **there would be insufficient evidence to attempt such an accounting**." (Id.) (emphasis added). Thus, according to the Family Court's factual findings, the disposition of the disability payments is unintelligible given all the monies moving in and out of the account. Therefore, comingling occurred of the sort which under the law results in the disability monies losing their protected status and being included as marital property. Therefore, under this analysis too, this Court should affirm the Family Court's Final Divorce Order.

1. Petitioner's argument that this award allowed Respondent to "double-dip" makes no sense.

Petitioner's argument that Respondent "double-dipped" because she got the benefit of the disability benefits and then got half of them is incorrect. First, as previously established, the monies of which the Family Court awarded Respondent with roughly half were from Petitioner's

business monies which are marital property under the law and not from the disability bucket of monies. Second, if Respondent benefited from the disability monies, that is an admission by Petitioner that at least some, if not all, of those disability monies were spent. As the Family Court found as a finding of fact, the personal checking account was such that it was impossible to discern what monies exactly went in and out of the account. (Id.) Thus, it is impossible to determine what monies from disability monies earned were even left, if any, in the checking account. Therefore, Petitioner cannot claim as exempt from the account the full amount of disability payments he earned over the course of the marriage as he is doing in this appeal. Lastly, under Petitioner's argument, every divorce settlement theoretically involves "double-dipping." Every couple benefits from each other's income during the marriage and then splits in half the income remaining at the time of separation. Accordingly, for these reasons, the Court should ignore Petitioner's argument in this regard and affirm the Family Court's Final Divorce Order.

2. Petitioner's math as to what he alleges he owes to Respondent does not compute.

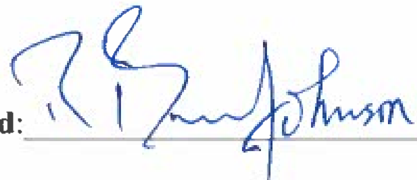
Petitioner's math as to what monies are owed by Petitioner under the law makes no sense. Petitioner contends that he owes half of $21,349.00. This is derived by taking the amount in Petitioner's two bank accounts at the date of marriage and subtracting that amount from the amount in the two accounts at the date of separation which totals $185,250.89. Petitioner then subtracts the total sum of disability payments he received during the course of the marriage, $164,902.34, from that amount and claims he owes Respondent half of that difference of $21,349.00.

But such a calculation just does not add up for multiple reasons. First, it incorrectly presupposes that Petitioner never spent a penny of his disability monies when in fact the Family

Court found that monies from that account were used regularly throughout the marriage for marital expenses, thus obviously shrinking those disability funds. Moreover, Petitioner made $211,000 in business profits – over $208,000 of which he transferred to his personal account during the marriage a month before the date of separation. Therefore, if anything, the monies under the law that should be split equally because they constitute marital property is the $208,697.95 in business earnings that Petitioner transferred to his personal account a month prior to separation. Thus, in actuality, Respondent may be entitled to $104,348.97.

CONCLUSION

For the reasons set forth above, the Court should affirm the Family Court's Final Divorce Order, ordering, *inter alia*, Petitioner to pay to Respondent the sum of $92,625.45, and award any other relief the Court may deem just and appropriate.

Signed: 

R. Brandon Johnson (WVSB# 5581)
Counsel of Record for Respondent Melissa A. Bowe

CERTIFICATE OF SERVICE

I hereby certify that on this 3 day of October, 2023, true and accurate copies of the foregoing **Brief of Respondent Melissa A. Bowe** were deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows and through the court's electronic filing system:

James M. Cagle
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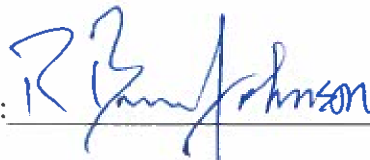
Charleston, WV 25301

Signed: 

R. Brandon Johnson (WVSB# 5581)
Counsel of Record for Respondent
Melissa A. Bowe