

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 23-ICA-165

ICA EFiled: Jun 26 2023
11:20AM EDT
Transaction ID 70257886

ARTHUR P.

PETITIONER,

VS.

Appeal from Final Order of the
Family Court of Nicholas County
(21-D-65) Judge David M. Sanders appointed
by special assignment

PAMELA ANN P.

RESPONDENT

PETITIONER'S BRIEF

Counsel for Petitioner, Arthur P.
Christine B. Stump (W. Va. Bar No.7649)
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Lewisburg West Virginia 24901
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TABLE OF AUTHORITIES

<i>Amanda C. v. Christopher P., No. 22-ICA-2 (Ct. App. Nov. 18, 2022)</i>	Pg. 3
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West Virginia Code

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Case Docket Entries

FC-34-2021-D-65

Court: **Family** County: **34 - Nicholas** Created Date: **4/27/2021** Security Level: **Confidential - Low**
 Judge: **David M. Sanders** Case Type: **Domestic Relations** Case Sub-Type: **Divorce with Children** Status: **Closed**

Related Cases:

Style: In Re: The Marriage of: Arthur Ray Poff and Pamela Ann Poff

	<u>Entered Date</u>	<u>Event</u>	<u>Ref. Code</u>	<u>Description</u>
1	4/27/2021 11:44:45 AM	E-Filed		Petition for Divorce/Annulment/Separation
	1-1 4/27/2021	Civil Case Information Statement		
	1-2 4/27/2021	Petition - Petition for Divorce		
	1-3 4/27/2021	Supporting Document - Motion for Temporary Relief		
	1-4 4/27/2021	Financial Statement - Financial Statement		
	1-5 4/27/2021	Supporting Document - Verification of Pleading		
	1-6 4/27/2021	Supporting Document - Letter to Clerk filing		
	1-7 4/27/2021	Transmittal		
	1-8 4/27/2021	Summons		
2	4/27/2021 11:44:45 AM	Judge Assigned	J-34006	Harley Stollings
3	4/27/2021 11:44:45 AM	Party Added	P-001	Arthur Ray Poff
4	4/27/2021 11:44:45 AM	Party Added	D-001	Pamela Ann Poff
5	4/27/2021 11:44:45 AM	Party Added	C-001	Morgan Alexia Poff
6	4/27/2021 11:44:45 AM	Attorney Listed	P-001	A-10527 - Larry Emerson Harrah, II
7	4/27/2021 11:44:45 AM	Service Requested	D-001	Plaintiff - Private Process Server
8	4/27/2021 12:04:43 PM	E-Filed		Reissue/Additional Summons - Summons
	8-1 4/27/2021	Supporting Document - Summons		
	8-2 4/27/2021	Transmittal		
	8-3 4/27/2021	Summons		
9	4/27/2021 12:04:43 PM	Service Requested	D-001	Plaintiff - Private Process Server
10	5/6/2021 12:01:20 PM	E-Filed		Service Return - Return on Service
	10-1 5/6/2021	Service Return - Return on Service		
	10-2 5/6/2021	Transmittal		
11	5/13/2021 1:50:19 PM	E-Filed		Notice of Case Hearing - Notice of Temporary Hearing June 7, 2021 @ 1:00 p.m.
	11-1 5/13/2021	Notice of Case Hearing - Notice of Temporary Hearing		
	11-2 5/13/2021	Supporting Document - Certificate of Service		
	11-3 5/13/2021	Supporting Document - Letter to Clerk filing Notice & Certificate		
	11-4 5/13/2021	Transmittal		
12	5/13/2021 1:50:19 PM	Case Set for Hearing		Hearing Date - 6/7/2021 12:00 AM
13	5/21/2021 1:23:28 PM	E-Filed		Notice of Appearance - Appearance of Counsel
	13-1 5/21/2021	Notice of Appearance - Appearance of Counsel		
	13-2 5/21/2021	Transmittal		
14	5/21/2021 1:23:28 PM	Attorney Listed	D-001	A-10505 - Jared Scott Frame
15	5/24/2021 3:54:59 PM	E-Filed		Motion - Pendente Lite
	15-1 5/24/2021	Motion - Motion		
	15-2 5/24/2021	Transmittal		
16	5/24/2021 3:56:51 PM	E-Filed		Answer - Complaint Denied
	16-1 5/24/2021	Civil Case Information Statement		
	16-2 5/24/2021	Answer - Answer		
	16-3 5/24/2021	Counterclaim - Counter Petition		
	16-4 5/24/2021	Transmittal		
17	5/25/2021 11:06:48 AM	E-Filed		Order - Case - SCHEDULING ORDER
	17-1 5/25/2021	Order - SCHEDULING ORDER		
	17-2 5/25/2021	Transmittal		



Case Docket Entries

FC-34-2021-D-65

Entered Date	Event	Ref. Code	Description
18 6/7/2021 10:01:56 AM 18-1 6/7/2021 18-2 6/7/2021 18-3 6/7/2021	E-Filed Motion - Motion to Continue Supporting Document - Certificate of Service Transmittal		Motion - Continue
19 6/7/2021 3:51:30 PM 19-1 6/7/2021 19-2 6/7/2021	E-Filed Order - ORDER GRANTING CONTINUANCE AND RESETTING HEARING Transmittal		Order - Case - ORDER GRANTING CONTINUANCE AND RESETTING HEARING
20 6/8/2021 4:13:32 PM 20-1 6/8/2021 20-2 6/8/2021	E-Filed Supporting Document - Financial Statement Transmittal		Supporting Documents - Financial Statement
21 6/29/2021 9:10:39 AM 21-1 6/29/2021 21-2 6/29/2021 21-3 6/29/2021	E-Filed Motion - Motion to Continue Supporting Document - Certificate of Service Transmittal		Motion - Continue
22 6/29/2021 2:15:09 PM 22-1 6/29/2021 22-2 6/29/2021	E-Filed Motion - Objection to Motion to Continue Transmittal		Motion - Other
23 6/30/2021 9:50:07 AM 23-1 6/30/2021 23-2 6/30/2021	E-Filed Order - ORDER GRANTING CONTINUANCE AND RESETTING HEARING Transmittal		Order - Motion - ORDER GRANTING CONTINUANCE AND RESETTING HEARING
24 7/8/2021 4:52:17 PM 24-1 7/8/2021 24-2 7/8/2021	E-Docketed Supporting Document - DISCLOSURE OF PRIOR REPRESENTATION AND KNOWLEDGE Transmittal		Supporting Documents - DISCLOSURE OF PRIOR REPRESENTATION AND KNOWLEDGE
25 7/9/2021 1:23:39 PM 25-1 7/9/2021 25-2 7/9/2021	E-Docketed Supporting Document - Letter requesting recusal Transmittal		Supporting Documents - Request for Recusal
26 7/12/2021 10:38:07 AM	Judge Assigned	J-1002	David M. Sanders
27 7/12/2021 10:38:11 AM 27-1 7/12/2021	E-Filed Transmittal		Notice of Judge Reassignment
28 7/12/2021 2:57:18 PM 28-1 7/12/2021 28-2 7/12/2021	E-Docketed Order - ORDER: APPOINTING JUDGE SANDERS Transmittal		Order - Case - ORDER: APPOINTING JUDGE SANDERS
29 7/13/2021 3:21:54 PM 29-1 7/13/2021 29-2 7/13/2021	E-Filed Order - ORDER SETTING HEARING Transmittal		Order - Case - ORDER SETTING HEARING
30 9/10/2021 3:17:00 PM 30-1 9/10/2021 30-2 9/10/2021	E-Filed Motion - Motion for Expedited Relief Transmittal		Motion - Other
31 9/13/2021 3:57:08 PM 31-1 9/13/2021 31-2 9/13/2021 31-3 9/13/2021	E-Docketed Supporting Document - TEMPORARY DV PETITION Supporting Document - TEMPORARY ORDER Transmittal		Supporting Documents - TEMPORARY DOMESTIC VIOLENCE PETITION AND TEMPORARY ORDER
32 9/14/2021 2:02:12 PM 32-1 9/14/2021 32-2 9/14/2021	E-Docketed Notice of Case Hearing - Notice of Hearing Transmittal		Notice of Case Hearing - Notice of Hearing
33 9/14/2021 2:02:12 PM	Case Set for Hearing		Hearing Date - 10/15/2021 11:00 AM
34 9/14/2021 2:04:46 PM 34-1 9/14/2021 34-2 9/14/2021	E-Filed Order - Order Continuing Hearing and EPO Transmittal		Order - Case - Order Continuing Hearing and EPO

Case Docket Entries

FC-34-2021-D-65

Entered Date	Event	Ref. Code	Description
35 9/15/2021 9:44:43 AM	E-Docketed		Supporting Documents - DVEPO RET ON RESP SERVED BY CRJ
35-1 9/15/2021	Supporting Document - DVEPO RET ON RESP SERVED BY CRJ		
35-2 9/15/2021	Transmittal		
36 10/13/2021 11:06:39 AM	E-Filed		Motion - Continue
36-1 10/13/2021	Motion - Motion to Continue		
36-2 10/13/2021	Supporting Document - Certificate of Service		
36-3 10/13/2021	Transmittal		
37 10/13/2021 3:47:55 PM	E-Filed		Order - Case - Order Continuing Hearing and EPO
37-1 10/13/2021	Order - Order Continuing Hearing and EPO		
37-2 10/13/2021	Transmittal		
38 10/15/2021 3:13:51 PM	E-Filed		Notice of Case Hearing - Notice of Temporary Hearing
38-1 10/15/2021	Notice of Case Hearing - Notice of Temporary Hearing		
38-2 10/15/2021	Supporting Document - Certificate of Service		
38-3 10/15/2021	Transmittal		
39 10/15/2021 3:13:51 PM	Case Set for Hearing		Hearing Date - 1/13/2022 1:00 PM
40 12/8/2021 3:11:01 PM	E-Filed		Motion - Other
40-1 12/8/2021	Motion - Notice of Scheduling Conflict		
40-2 12/8/2021	Transmittal		
41 12/16/2021 3:50:19 PM	E-Filed		Notice of Case Hearing - Notice of Rescheduled Hearing
41-1 12/16/2021	Notice of Case Hearing - Notice of Rescheduled Hearing		
41-2 12/16/2021	Transmittal		
42 12/16/2021 3:50:19 PM	Case Set for Hearing		Hearing Date - 3/22/2022 1:00 PM
43 1/4/2022 3:38:41 PM	E-Filed		Motion - Other
43-1 1/4/2022	Motion - Motion to Extend Emergency Protective Order		
43-2 1/4/2022	Transmittal		
44 1/5/2022 10:02:31 AM	E-Filed		Order - Case - Order of Continuing Hearing and EPO
44-1 1/5/2022	Order - Order of Continuing Hearing and EPO		
44-2 1/5/2022	Transmittal		
45 3/22/2022 2:48:34 PM	E-Filed		Order - Case - Bifurcated Divorce Order
45-1 3/22/2022	Order - Bifurcated Divorce Order		
45-2 3/22/2022	Transmittal		
46 3/22/2022 2:49:15 PM	E-Filed		Order - Case - Temporary Order
46-1 3/22/2022	Order - Temporary Order		
46-2 3/22/2022	Transmittal		
47 3/22/2022 2:50:20 PM	E-Docketed		Letter to Clerk - Certificate of Divorce
47-1 3/22/2022	Letter - Certificate of Divorce		
47-2 3/22/2022	Transmittal		
48 3/22/2022 2:51:52 PM	E-Filed		Order - Case - Final - Order with Regard to Petition to Terminate
48-1 3/22/2022	Final Order - Order with Regard to Petition to Terminate		
48-2 3/22/2022	Transmittal		
49 3/22/2022 2:51:52 PM	Status Assigned		Closed - Disposition - Bench
50 3/22/2022 2:51:52 PM	Docket Removal Date Assigned		Date: 3/22/2022
51 5/2/2022 4:30:35 PM	E-Filed		Notice of Case Hearing - Notice of Hearing
51-1 5/2/2022	Notice of Case Hearing - Notice of Case Hearing		
51-2 5/2/2022	Transmittal		
52 5/2/2022 4:30:35 PM	Case Set for Hearing		Hearing Date - 9/1/2022 1:00 PM
53 5/11/2022 3:10:18 PM	E-Filed		Motion - Withdraw
53-1 5/11/2022	Motion - Motion to Withdraw as Counsel by Larry E. Harrah, II		
53-2 5/11/2022	Transmittal		

Case Docket Entries

FC-34-2021-D-65

Entered Date	Event	Ref. Code	Description
54 5/11/2022 3:12:15 PM	E-Filed		Supporting Documents - Attorney's Written Notification Certificate to accompany Motion to Withdraw as Counsel
54-1 5/11/2022	Supporting Document - Attorney's Written Notification Certificate to accompany Motion to Withdraw as Counsel		
54-2 5/11/2022	Transmittal		
55 5/12/2022 8:23:25 AM	E-Filed		Order - Motion - Order Permitting Withdraw of Counsel
55-1 5/12/2022	Order - Order Permitting Withdraw of Counsel		
55-2 5/12/2022	Transmittal		
56 5/12/2022 9:35:49 AM	Attorney Removed	P-001	A-10527 - Larry Emerson Harrah, II
57 5/24/2022 1:59:18 PM	E-Filed		Motion - Other
57-1 5/24/2022	Motion - Expedited Motion for Interim Relief		
57-2 5/24/2022	Transmittal		
58 5/27/2022 3:01:21 PM	E-Filed		Notice of Case Hearing - Notice of Hearing
58-1 5/27/2022	Notice of Case Hearing - Notice of Hearing		
58-2 5/27/2022	Transmittal		
59 5/27/2022 3:01:21 PM	Case Set for Hearing		Hearing Date - 6/16/2022 3:30 PM
60 6/6/2022 2:12:54 PM	E-Filed		Notice of Appearance - Notice of Appearance
60-1 6/6/2022	Notice of Appearance - Notice of Appearance		
60-2 6/6/2022	Transmittal		
61 6/6/2022 2:12:54 PM	Attorney Listed	P-001	A-7649 - Christine B. Stump
62 6/8/2022 3:42:20 PM	E-Filed		Motion - Motion to Dismiss
62-1 6/8/2022	Motion - Motion to Dismiss		
62-2 6/8/2022	Transmittal		
63 6/16/2022 11:30:27 AM	Document Emailed		Court user emailed chris@cstumplaw.com document 46-1 - Order - Temporary Order
64 6/16/2022 11:33:05 AM	Document Emailed		Court user emailed Katie@cstumplaw.com document 46-1 - Order - Temporary Order
65 8/19/2022 3:31:50 PM	E-Filed		Motion - Continue
65-1 8/19/2022	Motion - Motion for Brief Continuance		
65-2 8/19/2022	Transmittal		
66 8/22/2022 3:04:23 PM	E-Filed		Order - Case - ORDER GRANTING MOTION TO CONTINUE
66-1 8/22/2022	Order - ORDER GRANTING MOTION TO CONTINUE		
66-2 8/22/2022	Transmittal		
67 10/7/2022 9:43:51 AM	E-Filed		Notice of Case Hearing - Notice of Hearing
67-1 10/7/2022	Notice of Case Hearing - Notice of Hearing		
67-2 10/7/2022	Transmittal		
68 10/7/2022 9:43:51 AM	Case Set for Hearing		Hearing Date - 1/26/2023 10:00 AM
69 10/7/2022 11:12:23 AM	E-Filed		Motion - Other
69-1 10/7/2022	Motion - Motion to Compel the Sale of the Marital Residence		
69-2 10/7/2022	Transmittal		
70 10/12/2022 11:44:18 AM	E-Filed		Motion Hearing
70-1 10/7/2022	Motion - Motion to Compel the Sale of the Marital Residence		
70-2 10/7/2022	Transmittal		
71 11/2/2022 10:08:47 AM	E-Filed		Notice of Case Hearing - Notice of Rescheduled Hearing
71-1 11/2/2022	Notice of Case Hearing - Notice of Rescheduled Hearing		
71-2 11/2/2022	Transmittal		
72 11/2/2022 10:08:47 AM	Case Set for Hearing		Hearing Date - 11/9/2022 2:00 PM
73 11/14/2022 1:07:46 PM	Document Emailed		Court user emailed chris@cstumplaw.com document 20-1 - Supporting Document - Financial Statement
74 11/15/2022 9:41:01 AM	E-Filed		Order - Case - Temporary Order
74-1 11/15/2022	Order - Temporary Order		
74-2 11/15/2022	Supporting Document - Certificate of Service		

Case Docket Entries

FC-34-2021-D-65

Entered Date	Event	Ref. Code	Description
74-3 11/15/2022	Transmittal		
75 11/15/2022 2:15:11 PM	E-Filed		Letter to Judge - Letter
75-1 11/15/2022	Letter - Letter		
75-2 11/15/2022	Transmittal		
76 11/16/2022 2:42:47 PM	E-Filed		Supporting Documents - Amended Financial Statement
76-1 11/16/2022	Supporting Document - Amended Financial Statement		
76-2 11/16/2022	Transmittal		
77 11/18/2022 2:01:24 PM	E-Filed		Order - Case - Corrected Temporary Order
77-1 11/18/2022	Order - Corrected Temporary Order		
77-2 11/18/2022	Transmittal		
78 11/22/2022 2:48:01 PM	E-Filed		Motion - Other
78-1 11/22/2022	Motion - Motion to Classify Home as Separate Property		
78-2 11/22/2022	Transmittal		
79 11/28/2022 3:27:34 PM	E-Filed		Notice of Case Hearing - Notice of Hearing
79-1 11/28/2022	Notice of Case Hearing - Notice of Hearing		
79-2 11/28/2022	Transmittal		
80 11/28/2022 3:27:34 PM	Case Set for Hearing		Hearing Date - 12/22/2022 1:30 PM
81 12/22/2022 2:48:56 PM	E-Filed		Supporting Documents - Respondent's Exhibit A from 12/22/22 hearing
81-1 12/22/2022	Exhibit - Respondent's Exhibit A from 12/22/22 hearing		
81-2 12/22/2022	Transmittal		
82 12/29/2022 10:40:44 AM	E-Filed		Notice of Case Hearing - Notice of Hearing
82-1 12/29/2022	Notice of Case Hearing - Notice of Hearing		
82-2 12/29/2022	Transmittal		
83 12/29/2022 10:40:44 AM	Case Set for Hearing		Hearing Date - 1/26/2023 10:00 AM
84 2/27/2023 3:40:45 PM	E-Filed		Supporting Documents - Respondent Argument re Classification of Home
84-1 2/27/2023	Supporting Document - Respondent Argument re Classification of Home		
84-2 2/27/2023	Transmittal		
85 2/27/2023 7:09:09 PM	E-Filed		Letter to Judge - Petitioner's Memorandum in Support of Marital Property
85-1 2/27/2023	Letter - Memorandum in Support of Characterizing the Marital Residence as Marital Property		
85-2 2/27/2023	Transmittal		
86 3/29/2023 10:42:57 AM	E-Filed		Order - Case - Final Order of Equitable Distribution
86-1 3/29/2023	Order - Final Order of Equitable Distribution		
86-2 3/29/2023	Transmittal		
87 3/29/2023 10:42:57 AM	Docket Removal Date Assigned		Date: 3/29/2023
88 4/13/2023 3:19:14 PM	E-Filed		Supporting Documents - Voluntary Disclosure
88-1 4/13/2023	Supporting Document - Voluntary Disclosure		
88-2 4/13/2023	Transmittal		

**A True Copy
ATTEST:**

Jamie Baker

Clerk, Circuit Court
Greenbrier County, WV

By *[Signature]* Deputy

ASSIGNMENTS OF ERROR

1. The Family Court erred in finding that the Petitioner gifted the marital residence to the Respondent.

The Family Court abused its discretion by failing to analyze and apply the relevant law and precedent set forth by the West Virginia Supreme Court of Appeals regarding alleged real property gifts made to a spouse during a marriage.

2. The Family Court erred in failing to find that the former marital residence was being held by the Respondent in a constructive trust as marital property.

The Family Court abused its discretion by failing to apply the facts of the instant case to the prevailing precedent regarding a spouse holding property in a constructive trust as marital property. The Petitioner met all of the elements of a constructive trust as set forth in *Paterson v. Patterson*, 167 W. Va 1 (1981).

3. The Family Court erred in holding, that to overcome the finding that the transfer of the former marital residence to the Respondent was a gift, That the Petitioner had to prove that he “had lost the use of his mental faculties or was an unaware of what he was doing.”

The Family Court failed to acknowledge the existing precedent and case law set forth by the West Virginia Supreme Court of Appeals and failed to apply the facts of the case to the law. Instead the Court made up its own standard and determined that the Petitioner must meet an additional standard of

the loss of his mental faculties. The Court, in determining that the former marital residence had been gifted to the Respondent, stripped the Petitioner of his interest in the primary asset of the 29-year marriage. The Court gave the Petitioner a windfall of \$250,000.00 to \$300,000.00 leaving the Petitioner with no equity in the former marital residence.

STATEMENT OF THE CASE

The Parties in this case were married for 29 years. The parties were divorced by a Bifurcated Divorce Order entered March 22, 2022. The former marital residence was built by Arthur P. who had been a building contractor during the marriage. After the Divorce was granted, the Respondent lived in the former marital residence for 1 ½ years and during that time period failed to cooperate in the home being listed for sale. (App. Vol. I pg. 33-34) The former marital residence was the only real asset of the marriage. There were several vehicles and furnishings that had been divided by agreement. The parties estimated the home to be worth between \$600,000.00 dollars with no debt. (App. Vol II pg. 34 line 6) On November 22, 2022, the Petitioner Arthur P. filed a Motion to Compel the sale of the former marital residence. The matter was set for hearing on November 9, 2022. In the Court's Corrected Temporary Order, the court noted that for the first time since April of 2021 the Respondent was making a claim that the former marital residence was her separate property and therefore not subject to equitable distribution. (App. Vol. I pg. 49-50) The Court set the matter for Final Hearing on December 22, 2022, and then further hearing on January 26, 2023. Despite the

Appellant testifying that he never intended to gift the home to his wife (App Vol I Pg. line) and his ex-wife testifying that the purpose of the deed was to make sure she had the property "in case something happened to him" (App. Vol I pg. 9-10 lines 24-1 and pg. 16 line 4-6) the Court ruled that the former marital residence was a gift to the wife and not subject to equitable distribution.

STANDARD OF REVIEW

In reviewing final orders by a family court, the general rule is that the Intermediate Court shall "review findings of fact by a family court judge under the clearly erroneous standard, and the application of law to facts under an abuse of discretion standard. The Intermediate Court shall review questions of law de novo." Syl. Pt. 1 *May v. May*, 214 W.Va. 394, 589 S.E. 2d 536 (2003); accord *Amanda C. v. Christopher P.*, No. 22-ICA-2 (Ct. App. Nov. 18, 2022)

SUMMARY OF THE AGRUMENT

The Family Court abused its discretion by failing to analyze and apply the relevant law and precedent set forth by the West Virginia Supreme Court of Appeals regarding alleged real property gifts made to a spouse during a marriage. Pamela P. failed to meet her burden of proof as required by West Virginia Code § 48-29-201 and failed to affirmatively prove that the transfer of the marital home was a gift as required by West Virginia Code § 48-29-202

The Family Court abused its discretion by failing to apply the facts of the instant case to the prevailing precedent regarding a spouse holding

property in a constructive trust as marital property. The Petitioner met all of the elements of a constructive trust as set forth in *Paterson v. Patterson*, 167 W. Va1 (1981).

The Family Court failed to acknowledge the existing precedent and case law set forth by the West Virginia Supreme Court of Appeals and failed to apply the facts of the case to the law. Instead, the Court made up its own standard and determined that the Petitioner must meet an additional standard of the loss of his mental faculties. The Court, in determining that the former marital residence had been gifted to the Respondent, stripped the Petitioner of his interest in the primary asset of the 29-year marriage. The Court gave the Petitioner a windfall of \$300,000.00 leaving the Petitioner with no equity in the former marital residence.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure oral argument is requested.

ARGUMENT

This case involves the conveyance of the former marital residence from the husband to the wife, by quit claim deed dated July 1, 2020, nine months before the parties separated and subsequently divorced. West Virginia Code § 48-29-201 clearly states that “ [t]he burden of proof in any proceeding questioning the validity or

lawfulness of any conveyance or transfer of property or any interest in property from one spouse to the other spouse by the spouse making the conveyance or transfer...is on the spouse in whose favor the conveyance or transfer was made.” West Virginia Code § 48-29-202 further clarifies that in the case of a proceeding “wherein the court is required to determine what property of the parties constitutes marital property and equitably divide the same, the presumption created by this section does not apply, and a gift between spouses must be affirmatively proved.”

The family court failed to even mention that the burden of proof was upon the Respondent wife Pamela P. to prove the deed from husband to wife was a gift and appears to switch the burden of proof to the Petitioner husband Arthur P. by stating in paragraph 10. “While the parties and the petitioner’s daughter each testified to the severity of the petitioner’s illness there was no testimony from anyone, including the petitioner, that suggested that the petitioner has lost the use of his mental faculties or was unaware of what he was doing when he executed the deed on July 1, 2020.” Instead, the family court speculates regarding facts not in evidence that Arthur P. had an attorney prepare the deed and he “would have had the opportunity to seek that attorney’s advice regarding the effect of such a deed. “

Arthur P. testified that at the time of the deed in July of 2020 he had been sick for a very long time, he had been in the hospital and both he and Pamela P. thought he was dying. (App. Vol. II pg. 30 line 17-24, pg. 31 line 1-12). Arthur P. testified that the whole point of the quit claim deed was to make sure that if he died that Pamela P. would get the property and she would not have any problems. (App Vol. II pg. 37-19). At no time during the testimony of Pamela P. did she testify that Arthur P. was giving her a gift

of his equity in the property. In fact, when asked directly if it was a gift to her she would not state it was a gift and Pamela P. claimed that she did not know what a gift was.

(App. Vol III pg. 22 lines 11-16)

Arthur P.'s daughter Mary Ann Kaiser testified that that around July 2020 her dad was sick and had been in the hospital and "We thought he was going to die." (App. Vol III pg. 6 lines 21-23).

The Supreme Court of Appeals of West Virginia has stated that "[t]o constitute a valid gift inter vivos, the donor (here Arthur P.) must intend at the time to part with his title to the property and his power over it and to bestow upon the donee a complete and irrevocable title thereto." *Brewer v. Brewer*, 175 W.Va. 750, 752, 338 S.E.2d at 231 (1985). During the hearing Arthur P. testified concerning his intent regarding the quit claim deed was not to give Pamela P. a gift but rather to make sure she had the property if he died. The Respondent Pamela P. confirmed this intent stating "He wanted me to have the house in case anything happened to him." (App. Vol. II pg.9-10 lines 24-1). Pamela P. was fully aware that the conveyance was not intended as a gift which is further confirmed by the fact that in her initial verified financial statement, she characterized the home as marital property. (App. Vol. I pg.21).

The family court did not even address the issue of intent on the part of Arthur P. nor did the family court make any findings of fact regarding his intent except to say he ... "unsurprisingly, maintains that the Quit claim deed was not intended as a gift." Of additional importance is that nothing changed until the divorce was filed. The parties continued to jointly reside in the marital residence.

Additional guidance can be found in *Patterson v. Patterson*, 167 W. Va. 1 (W. Va. 1981). In *Patterson* the West Virginia Supreme Court of Appeals addressed issues of unjust enrichment and the placement of a constructive trust on property that is alleged to be separate property and not marital and therefore not subject to equitable distribution. The *Patterson* Court found that a Court could impress a constructive trust on the property of one spouse for the benefit of the other as set forth in detail the analysis the Court must undertake. First the party must overcome the presumption that there was a gift between the parties, and second show that the party is entitled to constructive trust. To show an entitlement to a constructive trust the Court held "requires (a) a showing that the party transferred to his (or her) spouse money, property, or services, which were actually used to procure property titled in the other spouse's name only and (b) that the transfer was induced by (i) fraud, (ii) duress, (iii) undue influence, (iv) mistake, (v) breach of implicit fiduciary duty, or (vi) that in light of the dissolution of the marriage the other spouse would be unjustly enriched. *Patterson* at 8. The Court's analysis in *Patterson* is precisely the type of detailed analysis that this case commands.

The testimony of Arthur P. was that he never intended for the deed to be a gift to the Respondent. The Respondent Pamela P. claimed she did not know what a gift was. This testimony overcomes any presumption of a gift. Arthur P. most definitely was under duress in that he believed he was going to die. But putting duress aside, Pamela P. would receive a windfall of extreme proportions. Arthur P. would receive nothing from the equity in the marital home while Pamela P. would receive approximately \$600,000.00 which includes \$300,000.00 of Arthur P.'s marital share of the equity.

CONCLUSION

WHEREFORE Arthur P. prays that the Family Court's Order be overruled and that this court find that the former marital residence is subject to equitable distribution.

Respectfully submitted,

**ARTHUR P.
By Counsel**

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CERTIFICATE OF SERVICE

I, Christine B. Stump, Attorney at Law do hereby certify that on the **26st day** of **June, 2023**, I served the forgoing **Document** by e-File to:

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