IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA



DOCKET NO. 23-ICA-165

**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.**

# RESPONDENT'S RESPONSE BRIEF

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July 11, 2023

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## RESPONDENT'S RESPONSE BRIEF

Comes now the Respondent, **PAMELA ANN P.**, by her counsel, Jared S. Frame, pursuant to Rule 10 of the Rules of Appellate Procedure, and in and for her Response Brief, does aver, depose and say, as follows:

## RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

The Respondent would point out the following inaccuracies or misstatements contained in the Petitioner's Statement of the Case:

1.) The family court's finding that the Respondent went from April of 2021 until November of 2022 without raising the issue of the home being separate can be attributed solely to the Petitioner. The argument of whether the home was separate or marital was discussed with the Petitioner's first attorney at the initial hearing, which was the April 2021 hearing. Thereafter the Petitioner fired his first attorney, and began acting as his own counsel for a number of months. Finally, the Petitioner brought in his current attorney and the case finally moved forward. Any delay in this case is attributable to the Petitioner, and not bringing up the classification of the home was due to the lengthy delays posed by the Petitioner's need to change

counsel.

2.) The Petitioner did state during the hearings below that he did not gift the home to the Respondent. It was clear that he knew not to state the home transfer was a gift. What the Petitioner refuses to mention is all the times below that he either insinuated the transfer was a gift, defined gifting the property to the Petitioner (without actually saying the word "gift"), and the numerous times he contradicted his own testimony.

The Petitioner does not deny deeding the property to the Respondent. He states that he was not threatened to transfer the property, and was not under duress when he signed the deed. (App. Vol. II, p 39) In one instance he states he was pressured into signing the deed, but then turns right around and testifies that the parties never fought. (App. Vol. II, p. 39-40) He goes on to testify that his "daughter bragged to her friends the fact that her parents never argued." (App. Vol. II, p. 45)

The Petitioner continually states that he knew what he was doing when he gifted the property to the Respondent. (App. Vol. II, p. 46-47) He testified that he set up the appointment with the attorney that drafted the deed, and that the Respondent had nothing to do with scheduling the same. (App. Vol. II, p. 49) In fact, the Respondent was not even present in the attorney's office when the Petitioner gifted the property via deed, and then recorded the deed on the same day. (App. Vol. II, p. 49)

As far as contradictory testimony, which goes to credibility, the Petitioner's testimony below was riddled with inconsistent statements. In one part of his testimony the Petitioner states that the Respondent has been having an affair for years (App. Vol. II, p. 43-44) and then almost immediately states that he did not say that. (App. Vol. II, p. 45) The Petitioner also states that his daughter bragged about how everyone got along (App. Vol. II, p. 45), but then

mentions throughout his testimony that the Respondent was afraid the kids would try to take the home and that the kids were "causing trouble." (App. Vol. II, p. .52)

## SUMMARY OF ARGUMENT

1) The Family Court did not abuse its discretion in finding that the Petitioner gifted the home to the Respondent during the marriage. The Family Court properly applied the relevant statutory law, and the Respondent affirmatively proved that the transfer of property was a gift.

2) The Family Court did not abuse its discretion in failing to find that the Parties' home was to be held in a constructive trust. This issue was not argued below, and the ***Patterson*** case is only being mentioned now for the first time. ***Patterson v. Patterson, 167 W.Va. 1 (1981)***. Even if ***Patterson*** was applied, the facts below do not satisfy the elements set forth by the Court as to a constructive trust.

3) The Family Court properly applied the relevant statutory law and the precedent set forth by this Court in finding that the Petitioner gifted the home to the Respondent, and that the same was the separate property of the Respondent. The Family Court only reviewed the mental status of the Petitioner in its broad examination of the facts of whether the quit claim deed was an irrevocable gift pursuant to the ***Roig*** case. ***Roig v. Roig, 364 S.E.2d 794 (W.Va. 1987).*** Once the Family Court found that the deed transfer was an irrevocable gift, the only result that could be reached was that the home was the Respondent's separate property. ***Roig***

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent does not believe oral argument is necessary for this Court to decide the issues herein.

## RESPONSE TO PETITIONER'S ARGUMENT

This Court has held that "it was obviously the intent of the legislature to allow one spouse to transfer property to the other spouse by irrevocable gift and thereby remove the assets so transferred from inclusion in the martial estate." ***Roig v. Roig, 364 S.E.2d 794 (W.Va. 1987).*** The Court in ***Roig*** found that in order for the property transferred from one spouse to another to be excluded from the marital estate, "there must be proof that the property was intended as an irrevocable gift." ***Id. at 798.*** Furthermore, the spouse claiming a gift has the burden of proof in showing the same. ***Id. at 798.***

West Virginia **Code** §48-1-237 defines separate property. Subsection (4) of the previously mentioned statute defines separate property as "[p]roperty acquired by a party during marriage by gift, bequest, devise, descent or distribution. West Virginia **Code** §48-1-237(4). The ***Roig*** case extended the above statute by including gifts between spouses as separate property, if the gift can be proven to be irrevocable, with the burden of proof being on the party receiving the gift. ***Roig.***

The Family Court was aware of the ***Roig*** case, and that the burden of proof was upon the Respondent to prove that the gift of the home to her by quit claim deed was an irrevocable gift. In fact, Petitioner's counsel objected to a line of questioning regarding the Parties' business activities, and counsel for the Respondent responded by citing to the ***Roig*** case and setting forth that it was the Respondent's burden to prove the gift was irrevocable. (App. Vol. II. p. 12-13). The Family Court agreed and allowed the Respondent to continue testifying about the Parties' business interests. Therefore, any question of whether the Family Court considered the burden being on the Respondent can be answered by the plain language of the transcript. (App. Vol. II. p. 12-13).

There was no speculation on the part of the Family Court in its findings. The Petitioner's argument that the burden of proof was somehow switched to the Petitioner does not comport with the hearings and evidence presented below. At no point did the Family Court jump to any conclusions with regard to how the deed was prepared and executed. The Petitioner continually stated that he was of sound mind at the time the deed was executed (App. Vol. II, p. 46-47), was not threatened or coerced into signing the deed (App. Vol. II, p 39), and that he knew what the deed was for, which was the transfer of the home property to the Respondent only.

The Respondent testified that she was surprised when the Petitioner had the quit claim deed drafted, as they had never discussed the same. (App. Vol. II, p. 15) The Petitioner informed the Respondent that he wanted to ensure that she would have the marital home, and that he was giving or gifting the same to her. (App. Vol. II, p. 16) At no point did the Petitioner treat the execution of the quit claim deed as anything other than an irrevocable gift. The Petitioner did not include any language in the deed that was meant to maintain the marital nature of the home, nor any language that contradicted the transaction being a gift to the Respondent. (App. Vol. I, p. 56-58)

The Petitioner contends that he thought he was dying and that he only signed the deed because he was sure he was going to die. Even if that is true, why did the Petitioner feel it necessary to deed the property to the Respondent when she was already included in the deed and had survivorship rights? If the quit claim deed is not an irrevocable gift, then what is it? There was no consideration that traded hands between the Parties, the deed itself under "Declaration of Consideration or Value" states that no withholding is necessary for the "reason that it is a conveyance between husband and wife without further consideration" (App. Vol. I, p. 58), and the Petitioner admits freely that he was not pressured and was in the right state of mind when he

had the quit claim deed prepared. (App. Vol. II, p. 46-47) The Respondent would argue that the only conclusion that can be reached in this matter is that the quit claim deed from the Petitioner to the Respondent was an irrevocable gift.

The argument that the Respondent "did not even know what a gift was", is nothing more than a misstatement of the Respondent's testimony. During cross examination the Respondent was asked if the quit claim deed was a gift to her, she initially answered that "it was a quit claim from him", but then went on to say she did "not know what that is." (App. Vol. II, p. 22) Taken in context, it is clear that the Respondent was stating that she did not know what a quit claim deed was, not a gift. (App. Vol. III, p. 22)

The cited testimony in the Petitioner's brief that his daughter "thought he was going to die" at the time the deed was prepared is also misleading. During the daughter's cross, it came to light that she rarely visited the Petitioner during this time period and admitted she was not close with him. (App. Vol. III, p. 6-7) Furthermore, the Petitioner's daughter stated that she never spoke to the Petitioner's doctor or the Petitioner while he was in the hospital. (App. Vol. III, p.8-9) It appears that Petitioner and his daughter formed the opinion of the Petitioner's health themselves, and not by hearing the same from the Petitioner's medical providers.

The fact that the Respondent initially set forth that the home was marital property in her financial statement does not prove anything. When divorce cases are first filed, the initial financial documents are amended as the evidence bears itself out. The Respondent filed an amended financial statement claiming that the home was her separate property once she understood the difference between separate and marital property. (App. Vol. I, p. 37-47)

The ***Patterson*** case cited by the Petitioner should have no bearing on the Court's analysis. As stated above, any discussion of constructive trusts is just now being raised, and

should not be considered. At no time during the hearing was any evidence provided by either Party with regard to a constructive trust.

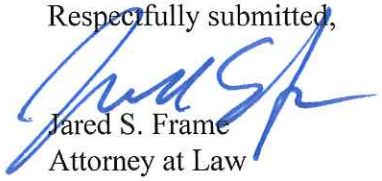
On the other hand, the ***Roig*** case fully cited hereinabove closely mirrors the situation presented herein. ***Roig.*** All of the testimony of the Parties evidences that the Petitioner knew what he was doing, was not forced to enter into the deed, and understood that by signing the same he would be giving (gifting) the property fully to the Respondent. There was no consideration provided for in the deed, and no language to otherwise show that the transfer was anything other than a gift to the Respondent. By his own actions, the Petitioner has proven that the deed was intended to be an irrevocable gift. Any argument regarding the value of the gift is nothing more than a "red herring", as the value of a gift does not go into the analysis of whether the same was irrevocable or not.

Lastly, there is long standing precedent that a reviewing court "must give due deference to the family court's findings of fact and conclusions of law, or the application of the facts to the law, if the family court has not violated one of the established standards of review." ***Stephen L.H. v. Sherry L.H., 195 W.Va. 384, 465 S.E.2d 841 (1995).*** The Family Court heard all of the testimony of the Parties and witnesses, reviewed the file and record, and has been the sitting judge from day one in the litigation below. Deference should be made to the Family Court when there has not been a clear error or an abuse of discretion, which is what the Respondent would argue is the case herein.

## CONCLUSION

**WHEREFORE**, upon the authority cited and for the reasons given, the Respondent prays that this Court enter an Order **AFFIRMING** the Family Court's final order in its entirety.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, JARED S. FRAME, the undersigned attorney do hereby certify that a true copy of the foregoing Respondent's Response Brief was deposited in the regular United States mail in an envelope properly stamped and addressed to Christine B. Stump, 230 W Randolph Street, Lewisburg, West Virginia 24901, on this **11th** day of **July, 2023**.

JARED S. FRAME