IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DENNY HARTON,

Respondent Below, Petitioner

v. No. 23-ICA-242

TERRI HARTON,

Petitioner Below, Respondent.

PETITIONER'S BRIEF

ON APPEAL FROM THE FAMILY COURT OF WOOD COUNTY, WEST VIRGINIA

(Civil Action No. 20-D-70)

Submitted by:

Mark W. Kelley, Esq.
(W. Va. Bar No. 5768)
RAY, WINTON & KELLEY, PLLC
109 Capitol Street, Suite 700
Charleston, West Virginia 25301
Telephone: (304) 342-1141
Fax: (304) 342-0691
markkelley@rwk-law.com
Counsel for Petitioner

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

West Virginia Supreme Court

West Virginia Intermediate Court of Appeals

Statutes

II. ASSIGNMENTS OF ERROR

The Family Court erred in finding that the parties' *Premarital Agreement* was invalid and unenforceable. More specifically:

A. The Family Court erred in finding that the Husband procured the *Premarital Agreement* from the Wife under circumstances of duress.

B. The Family Court erred in finding that the Wife did not have an understanding of the content and legal effect of the *Premarital Agreement* when the Wife testified that she understood that the purpose of the agreement was to protect the Husband's premarital assets and that she did not read the agreement prior to signing it.

C. The Family Court erred in finding that the content and legal effect of the *Premarital Agreement* would not be understandable to an adult of reasonable intelligence.

III. STATEMENT OF THE CASE

A. Procedural History

The parties were married on June 17, 2000 in Wood County, West Virginia and separated on October 26, 2019 after a little more than nineteen years of marriage.

On February 19, 2020, Respondent Terri[1] Harton filed a *Petition for Divorce* in the Family Court of Wood County, West Virginia. In due course, Petitioner Denny Harton filed an *Answer and Counter-Petition*, and among other things sought enforcement of a document titled "Premarital Agreement" that the parties signed the morning of their wedding.

The Family Court convened a "Preliminary Hearing" on September 18, 2020 at which time the *Premarital Agreement* was discussed. At that hearing Ms. Harton's counsel laid out a virtual "kitchen sink" of objections challenging the validity of the agreement. Counsel and the Court agreed that the issue of the validity of the agreement should be adjudicated first, as a ruling on that issue would impact issues of equitable distribution and spousal support. *See, generally,* DVD of

---

[1]The undersigned mis-spelled Respondent's name as "Terry" on the *Notice of Appeal* and in some documents filed in the family court.

09/18/2020 hearing.

The Family Court convened an evidentiary hearing on August 12, 2022 on the sole issue of the validity of the *Premarital Agreement*. At the conclusion of that hearing, the Family Court directed counsel for parties to each submit proposed findings of fact and conclusions of law to the Court.

After both parties submitted their proposed findings, the Family Court convened a hearing on December 5, 2022, to announce its rulings on the issue. The Family Court orally adopted most of Ms. Harton's proposed order, *see, generally,* DVD of 12/05/2022 hearing, with the exception being ruling on whether Ms. Harton had the opportunity to consult with counsel. The Court verbally noted that Ms. Harton had at least a "limited" opportunity to consult with counsel. *Id.*, at 7:30. At the conclusion of the hearing, the Court directed Ms. Harton's counsel to prepare an order finding that the *Premarital Agreement* was invalid. The Court further directed that it be submitted as a final order for appeal purposes. *Id.*, at 9:59.

After that hearing, Ms. Harton's counsel filed a proposed order, and Mr. Harton's counsel filed objections pertaining to the lack of language regarding Ms. Harton's opportunity to consult with counsel. The Family Court resolved those objections by issuing a letter ruling on May 9, 2023, which directed what language was to be included in the order. Appx., p.

054. With those changes, the *Final Order Regarding Validity of Premarital Agreement* ("Final Order") was entered on May 10, 2023. It is from this Order that Mr. Harton appeals.

B. Statement of Facts

A few of the facts surrounding the procurement and execution of the *Premarital Agreement* are not contested. It is undisputed that Mr. Harton drafted the agreement from a form prenuptial agreement that he located on the internet. It is undisputed that neither hired or consulted with counsel regarding the agreement. It is undisputed that Ms. Harton did not read the *Premarital Agreement* before she signed it.

Beyond these few undisputed facts, the parties' testimony regarding the events leading up to the execution of the *Premarital Agreement* could not be more starkly different.

According to Mr. Harton, the parties first began discussing marriage in 1999. Mr. Harton had been married before and had two children from that marriage. Ms. Harton had two children from a prior relationship. Mr. Harton owned a successful business at the time the parties contemplated marriage, and he testified that he wanted a prenuptial agreement to protect his premarital assets. *See*, DVD of 08/12/2022 hearing, at 16:44.

Sometime in 1999, Mr. Harton located a form prenuptial agreement on the internet. According to him, the website required

him to answer a number of questions and provide information, and then the website produced an initial draft of the document. *See*, DVD of 08/12/2022 hearing, at 1:43:50 to 1:46:07. The printed document has the year "19___" printed as a date at the beginning of the document and on the signature page on page 7, both of which are stricken through by pen and changed to 2000. Appx., pp. 009 & 015. The number 2000 is also written over the typed documents on the notary's acknowledgment on page 8. Appx., p. 016.

According to Mr. Harton, he gave a copy of the document to Ms. Harton and they discussed it. Mr. Harton testified that at some point, Ms. Harton requested language be included in the agreement regarding the custody of the parties' children from their prior marriages. *See*, DVD of 08/12/2022 hearing, at 1:46:21 to 1:46:43.

Mr. Harton testified that in response to Ms. Harton's concern, he prepared language to satisfy those concerns, and in order to have that language inserted into the agreement, he eventually had to speak to someone in customer support for the website, and they were able to insert the language and send him an updated agreement with that language included. *See*, DVD of 08/12/2022 hearing, at 1:46:49 to 1:47:10.

Mr. Harton testified that on the morning of their wedding, he called his bank to see if there was a notary there.

When told there was not, he called around to another branch of the bank and the parties went together to the bank and they signed duplicate originals of the agreement in the presence of the notary.

The *Premarital Agreement* entered into evidence is signed by both parties on page 7, and is signed by both parties on both the attached Exhibit A ("Denny Harton Financial Information") and Exhibit B ("Terri Lee Gentry Financial Information"). Appx., pp. 017 to 020.

Below the parties' signatures on page 8 of the document is the signature and seal of notary Jenny L. Jones, above which appears the following language: "This instrument was acknowledged before me on this 17th day of June 2000 by Denny Harton and Terri Lee Gentry." The day, month, and year are handwritten. Appx., p. 016.

Mr. Harton testified that the parties executed two originals of the *Premarital Agreement*, gave one of the originals to Ms. Harton, kept one for himself, and thereafter placed his original of the agreement in his safe deposit box, where it remained until this divorce proceeding arose.[2]

For her part, Ms. Harton's position and testimony regarding the *Premarital Agreement* literally run the gamut of

---

[2]During the pendency of this case, Mr. Harton produced his original document to Ms. Harton's counsel for inspection. The document introduced at the hearing is a copy of that original.

nearly every defense that can be raised to attack the validity of a prenuptial agreement.

At the preliminary hearing on September 18, 2020, Ms. Harton's counsel cited the following litany of objections to enforcement of the agreement: (a) that she was not represented by counsel; (b) that the *Premarital Agreement* presented by Mr. Harton was not authentic; (c) that the *Premarital Agreement* presented by Mr Harton was not the agreement she signed; (d) that the disclosure of assets was not complete; (e) that (with prompting from the Court) the timing of the execution of the agreement was "pressurized;" and, (f) that the content of the agreement was misrepresented to her.

At the August 12, 2022 hearing, Ms. Harton testified that the issue of a prenuptial agreement first came up in mid-May 2000. She testified that two weeks later Mr. Harton presented her with a two (or three) page document that was on Gas Search letterhead.[3] She testified that she read it and did not understand it, and that Mr. Harton told her he needed it to protect his interest in the company because he had a partner and "it wouldn't be fair me [Ms. Harton] sitting across the table from him [the partner] making decisions about an oil and gas company I [Ms. Harton] knew nothing about." *See*, DVD of

[3]Gas Search is the name of the company that Mr. Harton owned before and at the time of the parties' marriage.

08/12/2022 hearing, beginning at 51:07.

Ms. Harton testified that she understood the agreement to be premarital or prenuptial and she knew that it was something that had to be signed before the parties married. She further testified that she understood that Mr. Harton wanted to have a prenuptial agreement to protect the assets he owned prior to their intended marriage. She acknowledged that he went through a prior divorce and "was very bitter about it." *Id.*, at 54:10.

Ms. Harton denied that she requested the insertion of language regarding custody of their children and said that language was done at Mr. Harton's suggestion. *Id.*, at 58:30.

Ms. Harton denied seeing any other drafts of the agreement until the morning of the wedding. She claims that on that day, Mr. Harton presented her with a sealed envelope, that she was in a hurry and Mr. Harton was not ready to leave the house, that Mr. Harton told her where to go to sign the agreement and that he would sign it later. She testified that she went to the bank, that the notary opened the sealed envelope and instructed her where to sign. Importantly, *Ms. Harton admitted that she did not read the document*. She denied signing two originals. She further testified that after she signed the document, she took it home and put it on the kitchen table, that Mr. Harton was not home at that time, and that she never saw the agreement again, and that they never thereafter discussed it

during the marriage. *Id.*, beginning at 1:02.

The signed and notarized *Premarital Agreement* contains the following pertinent passages that will impact equitable distribution and Ms. Harton's claim for spousal support.

Paragraph 1 of the agreement reads as follows:

> SEPARATE PROPERTY. Except as otherwise provided in this Agreement, the following property owned or subsequently acquired by either party shall remain and be their separate property:
>
> - All property, including real or personal property, the income from such property, and the investments and re-investments of such property.
>
> - All property acquired by either party by gift, devise, bequest or inheritance.
>
> The property currently owned by each party is described in Exhibit A and Exhibit B to this Agreement, which by this reference are incorporated into this Agreement. Such separate property of each party shall be subject entirely to their own individual use, control, benefit and disposition. Neither of the parties shall before or after the contemplated marriage acquire for themselves individually, assigns or creditors, any interest in the separate property of the other party nor any right to the use, control, benefit or disposition of such property.

Appx., pp. 009 to 010.

Paragraph 2 of the agreement reads:

> EARNINGS DURING MARRIAGE. Each party agrees that all the earnings and accumulations resulting from the other spouse's personal services, skill, efforts and work, together with all property acquired or income derived therefrom, shall be the separate property of the party to whom the earnings and income are attributable, subject to other provisions of this Agreement. Each of the parties understands that except for this Agreement, the earnings and accumulations from the personal services, skill, effort and work of the other throughout the marriage would be joint property, and that by this Agreement such earnings and income during the marriage

are made the separate property of the person to whom the earnings and accumulations are attributable.

Appx., p. 010.

And Paragraph 9 of the agreement reads:

SUPPORT. Each of the parties has income from property interest sufficient to provide for his or her respective support. Each has been self-supporting for a period of time prior to the contemplated marriage. Both parties feel that they are capable of future self-support and of maintaining themselves on a self-supporting basis. Therefore, in the event of a marital separation or dissolution of marriage, it is agreed and understood that neither party shall seek or obtain any form of alimony or support from the other, or seek any relief other than a distribution of their joint property interests or those property interests acquired during the course of their marriage, in any manner other than as provided by this Agreement.

Appx., p. 013.

Additional facts relevant to Petitioner's assignments of error are set forth below.

IV. SUMMARY OF ARGUMENT

This appeal arises from a ruling from the Family Court of Wood County, West Virginia that the parties' *Premarital Agreement* is invalid.

The parties were married on June 17, 2000. The morning of their wedding, the parties signed the *Premarital Agreement*. The parties' recollections of the events leading up to the signing of the agreement differ starkly. Mr. Harton testified that the parties discussed a prenuptial agreement months before the wedding and Ms. Harton claims they discussed it first just a few weeks before the wedding.

Mr. Harton prepared the document from an internet website, and that he did so in 1999. This is evidenced by the fact that the document, in three different places, has "19___" type-written, over which someone hand wrote "2000." Mr. Harton claims that the document was later altered, at Ms. Harton's request, to include language regarding custody of his children from a prior marriage and Ms. Harton's children from a prior relationship. Ms. Harton claims this was Mr. Harton's idea.

Mr. Harton claims that the parties went to a bank the morning of the wedding and they signed two originals which were notarized.

Ms. Harton claims that when the parties first discussed a prenuptial agreement, it was two or three pages long, on letterhead from Mr. Harton's company, that she read the document but did not understand it, and told Mr. Harton so. Mr. Harton denied there was ever a two or three page agreement.

Ms. Harton claims she did not see the document again until the morning of the wedding when Mr. Harton handed her a sealed envelope and told her to go to the bank to sign the document. She claims she went there alone, that the notary opened the envelope, showed her where to sign and she signed it. She did not read it, although she later testified that she did not understand it. The *Premarital Agreement* signed the day of the wedding is twelve pages long (including financial disclosures).

Neither of the parties consulted with counsel, although Ms. Harton was not prevented from doing so. However, Ms. Harton testified that she knew the purpose of the agreement was to protect Mr. Harton's premarital assets.

After an evidentiary hearing, the Family Court found the *Premarital Agreement* to be invalid, citing the parties' failure to consult counsel, Ms. Harton's "limited" ability to consult with counsel, and the fact that it was signed the day of the wedding. The Family Court further found that the *Premarital Agreement* was signed by Ms. Harton under duress, that she did not understand the content and legal effect of the agreement, and that the agreement is not written in language that is understandable to an adult of reasonable intelligence.

Petitioner asserts that the Family Court erred in its rulings. The evidence showed that Ms. Harton voluntarily signed the agreement. There was no clear and convincing evidence of duress introduced at the hearing. The agreement is written in plain language that any reasonably intelligent individual can understand, and Ms. Harton has a college degree.

Importantly, Ms. Harton did not read the *Premarital Agreement* prior to signing it, and no one prevented her from doing so. Under settled West Virginia law, a party who signs a contract without reading it does so at his or her peril. This rule should apply to prenuptial agreements in the same manner as

any other contract. It is manifestly unjust for a party to a prenuptial agreement to voluntary choose not to read the document, and then later attack its validity claiming that he or she did not understand the legal effect of the agreement.

The Family Court's ruling should be reversed and the *Premarital Agreement* should be enforced.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issue of whether a party may attempt to avoid the consequences of a prenuptial agreement when that party voluntarily failed to read it may be amenable to a Rule 20 argument. Otherwise, Petitioner believes this matter should be scheduled for oral argument under Rule 19.

VI. ARGUMENT

A. 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., *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004); *see also Amanda C. v. Christopher P.*, No. 22-ICA-2, ____ W. Va. ____, ____ S.E.2d ____, 2022 WL 17098574 (Ct. App. 2022).

B. The Family Court erred in finding that the parties' *Premarital Agreement* was invalid and unenforceable. Even if the Court found Ms. Harton's testimony more credible than Mr. Harton's, the Court abused its discretion in applying law to the facts.

As noted above, the parties' testimony regarding the events leading up to the execution of the *Premarital Agreement* differ starkly. In its *Final Order Regarding Validity of Premarital Agreement*, the Family Court laid out the differences in the parties' testimony and made findings of fact in which it essentially accepted Ms. Harton's version of events.[4] However, even looking at Ms. Harton's testimony in its best light, the Family Court's subsequent conclusions of law constitute an abuse of discretion.

In its *Final Order*, the Court concluded that:

> 1. There is no legal presumption that the premarital agreement at issue in these proceedings is valid and enforceable given that the parties did not have legal counsel.
>
> 2. The Respondent (Mr. Harton) procured the premarital agreement from the Petitioner (Ms. Harton) under circumstances of duress.
>
> 3. The Petitioner (Ms. Harton) did not have an understanding of the content and legal effect of the premarital agreement. The Respondent (Mr. Harton) did not have an understanding of the content or terms used in the premarital agreement.
>
> 4. The content and legal effect of the premarital agreement would not be understandable to an adult of reasonable intelligence.

---

[4]At the December 5, 2022 hearing where the Family Court orally announced its rulings, it found Ms. Harton's testimony about the day the document was signed "extremely credible" because of the details Ms. Harton recalled of that day. *See*, DVD of 12/05/2022 hearing at 5:37. While it is true that Ms. Harton testified in detail to her version of the events that morning, she could not recall the time of the parties' wedding. *See*, DVD of 08/12/2022 hearing, at 1:21:00.

5. As in Owen [Owen v. Owen, 233 W. Va. 521, 759 S.E.2d 468 (2014)], the premarital agreement fails to provide a specific explanation of the rights Petitioner was waiving, especially those associated with property acquired during the course of the marriage that would be deemed marital property, subject to equitable distribution.

6. The premarital marital agreement of the parties dated June 17, 2000, is invalid and unenforceable.

Appx., p. 007.

At the time the prenuptial agreement was executed, the standard for enforcing prenuptial agreements was the following:

> Prenuptial agreements that establish property settlements and support obligations at the time of divorce are presumptively valid in West Virginia; the burden of proving the invalidity of such an agreement is upon the person who would have the agreement held invalid.

Syl. pt. 1, *Gant v. Gant*, 174 W. Va. 740, 329 S.E.2d 106 (1985).

Moreover:

> The validity of a prenuptial agreement is dependent upon its valid procurement, which requires its having been executed voluntarily, with knowledge of its content and legal effect, under circumstances free of fraud, duress, or misrepresentation; *however, although advice of independent counsel at the time parties enter into a prenuptial agreement helps demonstrate that there has been no fraud, duress or misrepresentation, and that the agreement was entered into knowledgeably and voluntarily, such independent advice of counsel is not a prerequisite to enforceability when the terms of the agreement are understandable to a reasonably intelligent adult and both parties have had the opportunity to consult with independent counsel.*

Syl. pt. 2, *Gant* [Emphasis added].

Here, it is undisputed that neither of the parties consulted with counsel or were represented by counsel in connection with the execution of the prenuptial agreement.

In 2009 (nine years after the parties' prenuptial agreement was signed), the West Virginia Supreme Court decided the case of *Ware v. Ware*, 224 W. Va. 599, 687 S.E.2d 382 (2009).

The *Ware* case overruled syllabus point 1 of *Gant* and replaced it with the following:

> For the presumption of validity to apply to a prenuptial agreement, both parties to that agreement must be represented by independent counsel. Moreover, where one party to a prenuptial agreement is represented by counsel while the other is not, the burden of establishing the validity of that agreement is on the party seeking its enforcement. To the extent that *Gant v. Gant*, 329 S.E.2d 106, 174 W. Va. 740 (1985), and its progeny hold otherwise, they are overruled.

Syl. pt. 5, *Ware*.

While the *Ware* case specifically holds that where only one party to a prenuptial agreement has counsel, that party has the burden of proving the validity of the agreement, it is silent as to situations where *neither* party is represented by counsel. The *Ware* decision also provides no guidance or discussion as to what level of proof is necessary for a party to meet the burden of establishing the validity of an agreement.

The *Ware* case has been cited in nine subsequent decisions of the West Virginia Supreme Court, and of those nine cases only one involved parties to an agreement who were unrepresented, *see*, *Amber J. v. Shannon J.*, No. 16-0289, 2017 W. Va. LEXIS 357 (Memorandum Decision, May 22, 2017), and three of the cases did not involve a prenuptial (or postnuptial)

agreement.

However, assuming that the *Ware* standard applies here, the Family Court erred in concluding that the presumption of validity did not apply here.

Aside from syllabus point 1, the *Gant* case remains good law and has been cited in other decisions subsequent to *Ware*. "With regard to prenuptial agreements, we have held that '[t]he validity of a prenuptial agreement is dependent upon its valid procurement, which requires its having been executed voluntarily, with knowledge of its content and legal effect, under circumstances free of fraud, duress, or misrepresentation[.]' Syl. pt. 2, in part, *Gant v. Gant*, 174 W. Va. 740, 329 S.E.2d 106 (1985), overruled on other grounds by *Ware v. Ware*, 224 W. Va. 599, 687 S.E.2d 382 (2009)." *Truman-Gilmore v. Gilmore*, No. 14-0194, 2015 W. Va. LEXIS 616 (Memorandum Decision, May 13, 2015).

Although the parties' recollections of the events leading up to the signing of the *Premarital Agreement* are in conflict, there is no question that Ms. Harton voluntarily signed the agreement. She testified as such. *See*, DVD of 08/12/2022 hearing, at 1:03:30.

As far as having knowledge of its content and legal effect, Ms. Harton acknowledged that she understood that Mr. Harton wanted to protect his premarital assets in the event of a

divorce. *See*, DVD of 08/12/2023 hearing, at 52:12. She testified that she knew the document was something that needed to be signed before they got married. *Id.*, at 53:47.

Although Mr. Harton denied there was ever a two page agreement and Ms. Harton claimed she didn't understand the two page agreement, that was not the agreement that was signed, if it ever existed.

The twelve page *Premarital Agreement* that the parties ultimately signed is written in plain language understandable to a reasonably intelligent person. Ms. Harton has a college degree. *Id.*, at 41:10. The parties disclosed their assets, albeit Ms. Harton claims her disclosure (which again, she signed off on), is inaccurate. *Id.*, at 1:37:18. The *Final Order* contains findings that set forth perceived ambiguities or lapses in the *Premarital Agreement*, *see, e.g.*, appx., pp. 005 to 006, ¶¶ 28, 30, 32, 33, 34, 35, and 38. However, these criticisms would go ultimately to the interpretation of the agreement (if such ambiguities actually exist) and not whether the agreement is enforceable.

The three salient purposes of the *Premarital Agreement* are to protect Mr. Harton's premarital assets and to effect a waiver of spousal support, two issues which are common to almost all prenuptial agreements. There is no case law that requires a prenuptial agreement to contain any "magic words" to support enforcement. Rather, Petitioner submits that if a reasonably

intelligent person would understand the words of an agreement, such words should suffice. As discussed below, it is inconsistent for Ms. Harton to assert that she did not understand the words in a document that she voluntarily chose not to read.

The fact that Ms. Harton did not read the agreement should not afford her a basis for attacking its validity. It is well-settled law in West Virginia that "in the absence of extraordinary circumstances, the failure to read a contract before signing it does not excuse a person from being bound by its terms." *Reddy v. Cmty. Health Found. of Man*, 171 W. Va. 368, 298 S.E.2d 906 (1982). *See*, further discussion, *infra*. Moreover, there was no evidence that Mr. Harton did anything to prevent Ms. Harton from reading the document before she signed it.

The fact that this occurred on the day of the parties' wedding does not excuse her failure to read the document. There are no West Virginia cases that have invalidated a prenuptial agreement solely because it was signed the same day of the marriage. Rather, there is case law to the contrary.

In *Teed v. Teed*, No. 12-0421, 2013 W. Va. LEXIS 491 (Memorandum Decision, May 17, 2013), the West Virginia Supreme Court upheld the validity of a prenuptial agreement where the wife signed it the day of the wedding and the wife was seven months pregnant. Quoting syllabus point 3 of *Gant v. Gant*, 174 W. Va. 740, 329 S.E.2d 106 (1985), the *Teed* Court stated:

> [a]t the time a prenuptial agreement is presented to a court for enforcement a court may consider whether the agreement's terms are ostensibly fair. Unless, however, the agreement is unconscionable, as that term has been defined in the general law of contracts, a court's review of the agreement's ostensible "fairness" is limited to an inquiry into whether circumstances have changed to such an extent from what the parties foresaw at the time they entered into the agreement that enforcement would be inequitable.

Teed, at *8-9.

In the *Teed* case, the Court noted that the Family Court found that there was:

> nothing unreasonable about [Mrs. Teed's] waiver of any interests in separate estates. . . . Both parties were middle-aged, both had been married before, both were represented by independent counsel, [Mrs. Teed] was pregnant at the time of the signing of the agreement and no other children were born of the parties; and that the divorce occurred sufficiently close in time (fourteen years) to the signing of the antenuptial agreement that this divorce was an event that was contemplated and foreseen at the time [the] agreement was entered into.

Teed, *10.

Here, Mr. Harton had been previously married, had children from his prior marriage, and Ms. Harton had children from a prior relationship. Both were middle-aged or close thereto, and Ms. Harton knew that Mr. Harton wished to protect his premarital assets.

Moreover, there is no evidence that the *Premarital Agreement* was executed "under circumstances free of fraud, duress, or misrepresentation." No evidence of fraud was introduced. If the Court takes all of Ms. Harton's testimony as true, she cannot now claim there was any sort of

"misrepresentation" involved in a document she chose not to read. The *Teed* Court rejected the notion that signing an agreement on the day of the wedding constitutes "duress."

Finally, the parties' different accounts of how the document was signed, whether together or separately, cannot serve to invalidate the agreement. "The certificate of acknowledgment of a notary public or other duly authorized officer cannot be impeached except for fraud or collusion and the proof thereof must be clear, cogent, satisfactory and controlling beyond a reasonable doubt." Syl. pt. 1, *Evans v. Bottomlee*, 150 W. Va. 609, 148 S.E.2d 712 (1966).[5] No such evidence was introduced by Ms. Harton.

In sum, Petitioner asserts that the evidence in this case does not support the Family Court's decision that the *Premarital Agreement* is invalid, and this Court should reverse the Family Court's decision and hold that the *Premarital Agreement* is enforceable.

C. The Family Court erred in finding that the Husband procured the *Premarital Agreement* from the Wife under circumstances of duress.

---

[5]The acknowledgment reads: "This instrument was acknowledged before me on this 17[th] day of June, 2000, by Denny Harton and Terri Lee Gentry." The notary who signed the acknowledgment is apparently retired. Petitioner's counsel could not locate her, but under an inquiry from the Family Court as to why the notary was not called as a witness, Ms. Harton stated that "She lives in the same house. I pass her every day." *See*, DVD of 08/12/2022 hearing, at 2:14:19.

The Family Court abused its discretion in both finding and concluding that Mr. Harton procured the *Premarital Agreement* under circumstances of duress. The record in the case is simply devoid of any evidence that would substantiate a finding of duress.

Under West Virginia law, "[d]uress is defined as that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness . . . . The requirements of common-law 'duress' have been enlarged to include any wrongful acts that compel a person, such as a grantor of a deed, to manifest apparent assent to a transaction without volition or cause such fear as to preclude him from exercising free will and judgment in entering into a transaction." *Warner v. Warner*, 183 W. Va. 90, 94, 394 S.E.2d 74, 78 (1990); *see also*, *Fridley v. Plum*, No. 15-1140, 2016 W. Va. LEXIS 839 (Memorandum Decision, Nov. 14, 2016). Furthermore, "[t]he individual claiming duress has the burden of demonstrating such allegations of duress by clear and convincing evidence." *Id.*

Here, there is absolutely no evidence that Ms. Harton entered into the *Premarital Agreement* under duress. At the Preliminary Hearing held on September 18, 2020, among the panoply of objections Ms. Harton's counsel raised against the *Premarital*

Agreement, the issue of duress was not raised. The only discussion remotely related to duress was when the Family Court asked counsel "is one of your arguments also that it was on the eve of the wedding and that pressurized," to which her counsel replied that "[the] timing issue certainly is one."

At the August 12, 2022 hearing, Ms. Harton testified that she entered into the agreement voluntarily. Mr. Harton did not threaten to not go forward with the wedding if she failed to sign it. *See*, DVD of 08/12/2023 hearing, at 1:23:20. She also testified that when asked if any other family members knew about the agreement, she replied that "I was embarrassed about this." *Id.*, at 2:20:30. Importantly, at no time did Ms. Harton testify that she signed the *Premarital Agreement* under duress.

The sum total of any evidence of duress appears to be that the document was signed the day of the marriage and that Ms. Harton was embarrassed about the agreement. That "evidence" certainly cannot constitute clear and convincing evidence that Ms. Harton signed the agreement under circumstances "sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness," or which caused her "such fear as to preclude [her] from exercising free will and judgment in entering into a transaction." *See*, *Warner*, *supra*.

There are no cases in West Virginia that have invalidated a prenuptial agreement simply because it was signed

the day of the parties' marriage. Indeed, in *Teed v. Teed*, No. 12-0421, 2013 W. Va. LEXIS 491 (Memorandum Decision, May 17, 2013), the West Virginia Supreme Court upheld the validity of a prenuptial agreement where the wife signed it the day of the wedding and the wife was seven months pregnant. At the hearing on December 5, 2022, where the Family Court orally announced its rulings, it mentioned the *Teed* case and distinguished it because both parties were represented by counsel.

Furthermore, there are no cases in West Virginia finding that "embarrassment" is sufficient to invoke "duress." Other jurisdictions which have addressed this issue have specifically rejected it. *See, e.g., People ex rel. Marcoline v. Ragen*, 132 Ill. App. 2d 523, 526, 270 N.E.2d 643, 645 (1971) (personal embarrassment or the threat of it does not constitute duress); *Retail Clerks Health & Welfare Tr. Funds v. Shopland Supermarket*, 96 Wash. 2d 939, 944, 640 P.2d 1051, 1054 (1982) ("The mere fact that a contract is entered into under stress or pecuniary necessity is insufficient.") (citations omitted).

Here, the *Final Order* contains no specific findings that would support the Court's conclusion that Mr. Harton procured the *Premarital* Agreement under duress. Accordingly, this Court should reverse the Family Court's ruling in that regard.

D. The Family Court erred in finding that the Wife did not have an understanding of the content and legal effect of the *Premarital Agreement* when the Wife testified that she understood that the purpose of the agreement was to protect the Husband's premarital assets and that she did not read the agreement prior to signing it.

The Family Court's findings and conclusions regarding Ms. Harton's lack of understanding of the content and legal effect cannot be sustained in light of the fact that Ms. Harton admitted that she did not read the *Premarital Agreement*.

The Family Court noted Ms. Harton's testimony that she read a supposed 2 or 3 page agreement sometime in mid-May 2000 and that she didn't understand it.[6] Appx., p. 003, ¶ 17. However, the *Premarital Agreement* that she ultimately signed is twelve pages long (including the financial disclosures). There was no testimony that Mr. Harton prevented her from reading the agreement. Mr. Harton did not threaten to not go forward with the wedding if she failed to sign it. *See,* DVD of 08/12/2022 hearing, at 1:23:20. She knew the purpose of the agreement was to protect his premarital assets. *See,* DVD of 08/12/2022 hearing, at 1:33:30. Ms. Harton, a college graduate, *chose* not to seek the advice of counsel at any time after the issue of prenuptial agreement was discussed (mid-May 2000 according to her and several months before according to Mr. Harton, *See,* DVD of

---

[6]Mr. Harton denied that there was ever a 2 or 3 page agreement. *See,* DVD of 08/12/2022 hearing at 1:45:30.

08/12/2022 hearing, at 1:06:23. Her reasons for not doing include (a) not knowing how to obtain an attorney, (b) not having the money to pay for an attorney,[7] and (c) believing she did not need an attorney because Mr. Harton did not have one, *see*, DVD of 08/12/2022 hearing, at 1:06:27, 1:06:34, and 1:07:02, and (d) because had she sought an attorney, "it would have sent a message that she did not trust [Mr. Harton][.]" Appx. p. 003, ¶ 13.

The simple fact of the matter is that Ms. Harton did not read the *Premarital Agreement* before she signed it, and no person who voluntarily chooses to not read a prenuptial agreement should later be permitted to attack the validity of the document.

Under West Virginia law, "'A court can assume that a party to a contract has read and assented to its terms, and absent fraud, misrepresentation, duress, or the like, the court can assume that the parties intended to enforce the contract as drafted.' *Adkins v. Labor Ready, Inc.*, 185 F. Supp.2d 628, 638 (S.D.W.Va. 2001)" *New v. GameStop, Inc.*, 232 W. Va. 564, 578, 753 S.E.2d 62, 76 (2013).

The West Virginia Supreme Court observed in *Reddy v. Cmty. Health Found. of Man*, 171 W. Va. 368, 373, 298 S.E.2d 906, 910 (1982):

---

[7]Moreover, she testified that Mr. Harton would have had to pay if she sought the advice of an attorney, *see*, DVD of 08/12/2022 hearing at 1:07:00, but there was no testimony that she asked for any money to pay for an attorney or that Mr. Harton refused a request by her for money to pay for an attorney.

> [In] the absence of extraordinary circumstances, the failure to read a contract before signing it does not excuse a person from being bound by its terms. Contracts are reduced to writing so that there can be no subsequent argument concerning the terms of an agreement. A person who fails to read a document to which he places his signature does so at his peril.

This principle has been repeatedly reinforced in cases coming before the West Virginia Supreme Court. *See*, *Kruse v. Farid*, 242 W. Va. 299, 835 S.E.2d 163 (2019) (signing document leaving hospital against medical advice terminates physician-patient relationship and physician's duties to patient); *Appalachian Leasing, Inc. v. Mack Trucks, Inc.*, 234 W. Va. 334, 765 S.E.2d 223 (2014) (relating to disclaimers of implied warranties); *Hooshyar v. Afshari*, No. 12-0578, 2013 W. Va. LEXIS 687 (Memorandum Decision June 7, 2013) (hand-written purchase agreement enforced where there was no fraud and seller did not read agreement).

No majority opinion in West Virginia has specifically addressed a party's failure to read a prenuptial agreement before signing it, although Justice Ketchum addressed the failure to read in his dissent in *Owen v. Owen*, 233 W. Va. 521, 759 S.E.2d 468 (2014), in which he would have upheld the validity of a prenuptial agreement which the wife voluntarily chose not to read.

However, other states have addressed this issue. "It is a rule of general application that one is bound to know the

content of a document one signs, and if the signer has had the opportunity to read it before she signs it, she cannot escape the obligations imposed by the documents by merely stating that it was signed without reading it." *Banks v. Evans*, 347 Ark. 383, 391, 64 S.W.3d 746, 751 (2002) (rejecting wife's claim that she did not understand prenuptial agreement).

In *Lizzio V. Lizzio*, No. 203018, 1999 Mich. App. LEXIS 2188 (Ct. App. Dec. 14, 1999), the plaintiff testified that he had never met defendant's lawyer before the prenuptial agreement was signed and that he signed the agreement without reading it or being told by defendant's lawyer what was contained in the agreement. The plaintiff said that he did not know what assets or property defendant owned at the time of the marriage. In denying the husband's challenge to the enforceability of the prenuptial agreement, the Court of Appeals of Michigan stated: "Plaintiff had the opportunity to read the agreement and consult with his divorce attorneys from his first marriage, but chose not to do so. Plaintiff's alleged failure to read the antenuptial agreement will not permit rescission because the failure was due to his own carelessness." *Id.*, at *17; *see also*, *In re Marriage of Woodrum*, 2018 IL App. (3d) 170369, ¶ 91, 426 Ill. Dec. 99, 128, 115 N.E.3d 1021, 1050 (finding that a party who did not read a prenuptial agreement cannot claim a lack of understanding of the agreement or that the agreement misled her).

Here, it would be a miscarriage of justice for the courts to reward Ms. Harton for her voluntary failure to read the *Premarital Agreement* by later allowing her to disavow that same agreement.

E. The Family Court erred in finding that the content and legal effect of the *Premarital Agreement* would not be understandable to an adult of reasonable intelligence.

The Family Court's findings and conclusions that the *Premarital Agreement* would not be understandable to an adult of reasonable intelligence simply cannot stand.

The West Virginia Supreme Court has never defined the parameters of what it means to be "an adult of reasonable intelligence." However, looking at the plain text of the language used, it is hard to fathom how the Family Court reached its conclusions, both that *Premarital Agreement* is not understandable, and that it fails to provide specific explanations of the rights the parties were waiving.

Paragraph 1 of the agreement reads as follows:

> SEPARATE PROPERTY. Except as otherwise provided in this Agreement, the following property owned or subsequently acquired by either party shall remain and be their separate property:
>
> - All property, including real or personal property, the income from such property, and the investments and re-investments of such property.
>
> - All property acquired by either party by gift, devise, bequest or inheritance.
>
> The property currently owned by each party is described in

> Exhibit A and Exhibit B to this Agreement, which by this reference are incorporated into this Agreement. Such separate property of each party shall be subject entirely to their own individual use, control, benefit and disposition. Neither of the parties shall before or after the contemplated marriage acquire for themselves individually, assigns or creditors, any interest in the separate property of the other party nor any right to the use, control, benefit or disposition of such property.

Appx., pp. 009 to 010.

This paragraph is written in plain English and does not contain legalese that would only be understandable to a lawyer. Even though Ms. Harton did not read the agreement, she understood that the purpose of the agreement was to protect Mr. Harton's premarital assets, and that is precisely what the language of this paragraph does. It even includes language as to gifts and inheritances which are already deemed separate property under West Virginia law. *See*, W. Va. Code § 48-1-237(4).[8]

Paragraph 2 of the agreement reads:

> EARNINGS DURING MARRIAGE. Each party agrees that all the earnings and accumulations resulting from the other spouse's personal services, skill, efforts and work, together with all property acquired or income derived therefrom, shall be the separate property of the party to whom the earnings and income are attributable, subject to other provisions of this Agreement. Each of the parties understands that except for this Agreement, the earnings and accumulations from the personal services, skill, effort and work of the other throughout the marriage would be joint property, and that by this Agreement such earnings and income during the marriage are made the separate property of the person to whom the earnings and accumulations are attributable.

---

[8]This statute reads, in pertinent part: "'Separate property' means: . . . . Property acquired by a party during marriage by gift, bequest, devise, descent or distribution[.]"

Appx., p. 010.

Again, this paragraph states the intent that a party's earnings remain his or her separate property, which is common in prenuptial agreements. Petitioner asserts that the fact that this paragraph uses the term "joint property" instead of "marital property" is of no moment, since the purpose of defining earnings as separate property would necessarily mean that any property not falling within the definition of separate property would be deemed to be marital property under the presumption in West Virginia law that all property is marital unless it can be classified as "separate." W. Va. Code § 48-7-103.[9]

And Paragraph 9 of the agreement reads:

> SUPPORT. Each of the parties has income from property interest sufficient to provide for his or her respective support. Each has been self-supporting for a period of time prior to the contemplated marriage. Both parties feel that they are capable of future self-support and of maintaining themselves on a self-supporting basis. Therefore, in the event of a marital separation or dissolution of marriage, it is agreed and understood that neither party shall seek or obtain any form of alimony or support from the other, or seek any relief other than a distribution of their joint property interests or those property interests acquired during the course of their marriage, in any manner other than as provided by this Agreement.

Appx., p. 013.

Again, this provision is written in plain English. While Mr. Harton certainly had assets far in excess of Ms. Harton

---

[9]This statute reads, in pertinent part: "In the absence of a valid agreement, the court shall presume that all marital property is to be divided equally between the parties[.]"

(and thus the motivation for the *Premarital Agreement*), she was in her mid-30s when the *Premarital Agreement* was signed, *see* DVD of 08/12/2022 hearing, at 1:20:32, so she obviously had been able to provide for herself prior to entering into a relationship with Mr. Harton. Moreover, waivers of spousal support are common to prenuptial agreements. Had Ms. Harton read the agreement prior to signing it, she certainly could have objected to this provision. Her voluntary failure to read it should not now inure to her benefit.

Finally, Ms. Harton was never asked about any of these provisions or any other specific provisions of the *Premarital Agreement* (other than acknowledging that she understood the purpose of the agreement was to protect Mr. Harton's premarital assets), so the "evidence" that she did not understand the agreement (that she did not read) is limited to the argument of her counsel and the findings of the Family Court.

There is simply no basis for the Family Court's conclusion that the *Premarital Agreement*, as written, would not be understandable to an adult of reasonable intelligence.

VII. CONCLUSION

It is evident from the Family Court's comments at the hearing on December 5, 2022 (where it orally announced its rulings) that its primary concern was that the *Premarital Agreement* was signed without the parties consulting counsel and

that it was signed the day of their wedding. As discussed above, neither of these concerns are fatal to the enforceability of a prenuptial agreement.

It is manifestly unfair to Petitioner to permit Respondent to *now* disavow a document that she voluntarily failed to read, especially when she admits that she understood that the purpose of the agreement was to protect Petitioner's premarital assets.

Petitioner respectfully requests that this Court reverse the Family Court's ruling that the parties' *Premarital Agreement* is invalid and unenforceable. Petitioner requests such other and further relief as this Court deems just and proper.

DENNY HARTON,

By Counsel

/s/ Mark w. Kelley
Mark W. Kelley, Esq.
(W. Va. Bar No. 5768)
RAY, WINTON & KELLEY, PLLC
109 Capitol Street, Suite 700
Charleston, West Virginia 25301
Telephone: (304) 342-1141
Fax: (304) 342-0691
markkelley@rwk-law.com
2023-07-10_Petitioner's Brief.wpd

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DENNY HARTON,

Respondent Below, Petitioner

v. No. 23-ICA-242

TERRI HARTON,

Petitioner Below, Respondent.

CERTIFICATE OF SERVICE

I, Mark W. Kelley, an attorney for Respondent DENNY P. HARTON, hereby certify that on July 10, 2023, I served a true and correct copy of the foregoing **"PETITIONER'S BRIEF"** on the parties via West Virginia File & Serve Xpress, addressed as follows:

Katherine L. Davitian, Esq.
420 Market Street
Parkersburg, WV 26101
Counsel for Petitioner

/s/ Mark W. Kelley
Mark W. Kelley
(WV Bar No. 5768)