IN THE INTERMEDIATE APPELLATE COURT OF WEST VIRGINIA

Docket No. 23-ICA-242

CONFIDENTIAL CASE

DENNY HARTON,

Respondent Below, Petitioner,

v.

Appeal from a Final Order of
the Family Court Of Wood County,
West Virginia
(20-D-70)

TERRI HARTON,

Petitioner Below, Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Contrary to Petitioner's assertion, the Respondent did read the Premarital Agreement before she signed it. The Respondent repeatedly testified, on direct examination and on cross-examination, that she read the first version of the agreement that was presented to her by the Petitioner. (Digital recording of 8/12/22 hearing at 0:51:08, 1:33:12, 1:33:04). The Petitioner did **not** dispute Respondent's testimony in this regard.

Respondent also testified that she did not understand the agreement that she read, and that is what she told the Petitioner. *Id.* The Petitioner testified that he made one minor modification to the Premarital Agreement he originally presented to the Respondent to include a provision having to do with the parties' respective non-marital children. (Digital recording of 8/12/22 hearing at 1:45:26). It is undisputed that the original agreement and the revised agreement were the only two (2) versions of the agreement ever presented to the Respondent by the Petitioner. The Respondent did not read the revised Premarital Agreement given to her 4 to 5 hours before her wedding because she read the original version and did not understand it.

Although Petitioner's Statement of Facts sets forth several "...pertinent passages that will impact on equitable distribution..." from the Premarital Agreement, it failed to include Paragraph 8 of the Premarital Agreement, to-wit:

> "8. DISSOLUTION OF MARRIAGE. Both parties to this Agreement understand that the Uniform Premarital Agreement Act and court decisions provide for consideration by the Court of a premarital agreement if a marriage is dissolved. The parties to this Agreement understand that some courts have disregarded
>
> a. Each party shall have an equal interest in the property acquired by the parties during the course of the marriage (and which is not merely the result of increase in value of any of

the property owned by the parties prior to the marriage, as listed on the attached schedules of property.)

b. Terri shall have a proportionate interest in the increase in value during the marriage of the homestead real estate, proportionate to the percentage contribution of the household expenses, if any, and child care/household duties performed by Terri during the course of the marriage.

c. All savings, investments, retirement accounts, and property listed on the attached schedules as property owned by a party prior to the marriage shall remain the property of the person who brought such property into the marriage. Any appreciation, income or other increase to such property shall remain the property of the person who brought such property into the marriage.

d. Any income tax liability, refund or benefit in the year of the separation and/or dissolution of marriage shall be distributed based upon the pro rata income of both parties.

e. Each party shall have joint custody of any children born to the marriage. Such joint custody entitles each party to have equal visitation time, or time which is fair and equitable." (A.R. 012-013).

SUMMARY OF ARGUMENT

It is the Respondent's contention that the Family Court of Wood County, West Virginia, committed no error and did not abuse its discretion in making its findings and conclusions as set forth in the Final Order Regarding the Validity of the Premarital Agreement entered by the Family Court on May 10, 2023. The Family Court correctly resolved the conflicting evidence presented by the parties regarding the procurement of the Premarital Agreement in this case and engaged in a thorough analysis of the facts and the law applicable to this case.

Neither party was represented by legal counsel in the procurement of the Premarital Agreement, therefore, the presumption of validity does not apply to the Agreement. The Family Court's conclusion that the Premarital Agreement is invalid was properly based upon the Respondent not having the requisite knowledge of the content and legal effect of the Premarital Agreement, and not having a reasonable opportunity to seek legal counsel in regards to the Premarital Agreement, as well as that the content and legal effect of the Premarital Agreement would not be understandable to an adult of reasonable intelligence. The Agreement failed to provide the Respondent with a specific explanation of the rights she was waiving, especially those associated with property acquired during the course of the marriage that would be deemed marital property, subject to equitable distribution.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a)(4), the Respondent believes the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

A. Standard of Review

In reviewing the final order of a family court judge, the family court's findings of fact are reviewed under a clearly erroneous standard, the application of the law to the facts is reviewed under an abuse of discretion standard, and questions of law are reviewed de novo. Syllabus, *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004).

B. The Family Court did not abuse its discretion in applying the law to the facts of this case and in concluding that the premarital agreement at issue herein is invalid and unenforceable.

Although "Section B" of Petitioner's Brief is the first argument made by the Petitioner in this Appeal, it is not one of his Assignments of Error, and it is a difficult argument for Respondent to follow. Initially the Petitioner asserts that "...even looking at [the Respondent's] testimony in its best light, the Family Court's subsequent conclusions of law constitute an abuse of discretion." (Petitioner's Brief at p. 15). However, Petitioner's Brief does not make clear how the Family Court abused its discretion.

Thereafter, the Petitioner's Brief cites the six (6) conclusions of law set forth by the Family Court in it's Final Order, and then cites/discusses excepts from the *Gant* and *Ware* cases. Petitioner's Brief then states, in a conclusory fashion, that "...assuming that the *Ware* standard applies here, the Family Court erred in concluding that the presumption of validity did not apply here.". (Petitioner's Brief at p. 18). However, Petitioner does not provide any explanation or argument as to how the Family Court abused its discretion in concluding that the legal presumption of validity does not apply in this case. None of the argument propounded by the Petitioner addresses the issue of whether the

presumption of validity applies in this case or why the standard set forth in *Ware* would not be applicable.

In any event, in 2009, the West Virginia Supreme Court again stressed the importance of both parties having independent legal counsel in the procurement of a premarital agreement, to the point of overruling, to a certain extent, the presumption of validity set forth in *Gant*, and held that **"...for the presumption of validity to apply to a prenuptial agreement, both parties to that agreement must be represented by independent counsel."** *Ware v. Ware*, 224 W.Va. 599, 687 S.E.2d 382 (2009). The Court went on to state that "...not only does the presence of independent counsel help to demonstrate that there 'has been no fraud, duress, or misrepresentation, and that the agreement was entered into knowledgeably and voluntarily,' **such counsel is now a prerequisite to obtaining the presumption of validity that typically applies to prenuptial agreements**." *Ware* citing *Gant*, Syl. Pt. 2, 174 W.Va. at 742, 329 S.E. 2d at 108 (*Emphasis added*).

Although Petitioner's Brief cites similar language from *Ware*, Petitioner's Brief then goes on to briefly address burdens of proof. (Petitioner's Brief at p.17). However, burdens of proof have nothing to do with whether the presumption of validity is applicable to a premarital agreement. Clearly, the Family Court did not abuse its discretion in concluding that Premarital Agreement in this case was not entitled to the presumption of validity given that neither party was represented by legal counsel.

Petitioner's remaining arguments in Section B of Petitioner's Brief are essentially that the Premarital Agreement was signed voluntarily, without duress, with knowledge of its content and legal effect, and that the content and legal effect would be understandable to an adult of reasonable intelligence. These issues are Petitioner's remaining Assignments of Error, and will be addressed by

the Respondent herein below.

C. Duress

After careful consideration and a considerable review of all available case law, the Respondent has chosen not to argue this Assignment of Error.

D. The Family Court properly found that the Respondent did not understand the content and legal effect of the Premarital Agreement.

This Assignment of Error alleges the Family Court erred in finding that the Respondent did not understand the content and legal effect of the Premarital Agreement because: (1) the Respondent did not read the agreement; and, (2) the Respondent knew the Petitioner wanted to protect his pre-marital property. The Petitioner's entire argument is based upon Petitioner's premise that the Respondent did not read the premarital agreement before she signed it. The problem with this is that Petitioner's premise is false, and the Petitioner has ignored the Respondent's testimony before the Family Court, the findings of the Family Court, and even his own testimony before the Family Court.

It was undisputed that the Petitioner presented the Respondent with some form of an agreement at some point in time - although the parties do dispute the content of that agreement and the timing of its presentation to the Respondent from the Petitioner. The Petitioner took the position, and testified before the Family Court, that the agreement originally presented to the Respondent was the same agreement Respondent signed (with one minor modification having to do with non-marital children) on the day of the wedding. (Digital recording of 8/12/22 hearing at 1:45:26). The Petitioner's Statement of Fact in his Brief to this Court also reiterates that this was the position taken by the Petitioner before the Family Court - that the original agreement Petitioner printed off the internet was the agreement he gave to the Respondent. The Petitioner made only one minor

modification to the Premarital Agreement, and that is the Premarital Agreement the parties ultimately signed. (Petitioner's Brief at pp. 5-6).

The Respondent repeatedly testified, on direct examination and on cross-examination, that she read the first version of the agreement that was presented to her by the Petitioner. (Digital recording of 8/12/22 hearing at 0:51:08, 1:33:12, 1:33:04). The Petitioner did **not** dispute Respondent's testimony in this regard.

The Family Court noted in Finding of Fact No. 17 of the Final Order that "According to Petitioner, she was first presented with a copy of some sort of agreement approximately one to two weeks after she moved in with Respondent in mid-May, 2000, ...Petitioner stated that she read the agreement, but did not understand it, and told Respondent she did know what any of it meant...." (A.R. 003). The Family Court also found in Finding of Fact No. 21 of the Final Order:

> "21. The Respondent told the Petitioner where she needed to go and who she needed to see to have the agreement notarized. The Respondent had called around to several banks to find one that was open and had a notary. According to Petitioner, Respondent handed her a sealed manila envelope with the agreement inside to take to the bank, which she did. Because the envelope was sealed, she did not open it. **Her testimony that she did not read this second agreement because she had read the first agreement and did not understood it, that there really was no point in re-reading what she thought was the same agreement, with a minor modification relating to her children, is reasonable and credible.** (*Emphasis added*). (A.R. 004).

It is disingenuous and untenable for the Petitioner to take the position, and testify before the Family Court, that the agreement originally presented to the Respondent was the same agreement Respondent signed (with one minor modification) on the day of the wedding, and then completely ignore Respondent's undisputed testimony that she read the original agreement, ignore the Family Court's findings, and now try to argue before this Court that the Respondent did not read the

agreement.

It is of no surprise that neither party presented any evidence, other than their own testimony, on the issue of the timing and content of the original agreement given that 22 years had passed since the agreement was presented to the Respondent. Memories can become cloudy with the passage of time - indeed, the Petitioner testified, to the effect, that he did not believe the Respondent was lying about her recollection of events, that she believed what she was saying, but her recollection was just wrong. (Digital recording of 8/12/22 hearing at 1:44:54 and 2:15:50).

In any event, it is important to recognize that while the parties did dispute the timing and content of the original agreement presented to the Respondent, ultimately it is not necessary to resolve those disputed issues when looking at the issue of whether Respondent read the Premarital Agreement she signed. Indeed, if the Petitioner's version of these events is accurate - that the Premarital Agreement signed by the Respondent on her wedding day is the same agreement Petitioner originally presented to the Respondent - then the Respondent did, in fact, read the agreement that she signed. She simply did not read it a second time on the day of her wedding. And as far as her reasons for not reading the Premarital Agreement a second time, the Family Court found that the Respondent's testimony in this regard was both reasonable and credible, a finding which Petitioner's Brief does not take exception to or assign error. (A.R. 004 - Finding of Fact No. 21).

On the other hand, if the Respondent's version of these events is accurate - that the Premarital Agreement signed by the Respondent on her wedding day is not the same agreement Petitioner originally presented to her - then the Petitioner had to have placed a completely different agreement in the sealed envelope which he gave to the Respondent on the day of the wedding. And if that is the case, then it would certainly raise the issues of fraud and/or misrepresentation in the procurement

of the premarital agreement, which would not bode well for the Petitioner.

The Petitioner cannot have it both ways - was the agreement he originally presented to the Respondent the same agreement she signed on the day of the wedding or not? The Petitioner's argument that the Respondent cannot claim a lack of knowledge of the content and legal effect of the agreement because she did not read it is without merit because it is undisputed that the Respondent read the original agreement given to her by the Petitioner, and because of the position taken by the Petitioner before the Family Court.

Although the Petitioner's Assignment of Error alleges two (2) reasons why the Family Court's finding was erroneous, the Petitioner's Brief fails to argue the second reason - that is, that the Respondent understood the content and legal effect of the Premarital Agreement because she understood the Petitioner wanted to protect his pre-marital assets. The Petitioner's argument contains one sentence, without further elaboration, to-wit: "She knew the purpose of the agreement was to protect his premarital assets." (*Petitioner's Brief at p. 26*).

Understanding generally that Petitioner wanted to protect his pre-marital assets is not the same thing as understanding the terms and provisions of a written agreement, and the legal effect of those terms and provisions as is required under the law in West Virginia. That is especially true where the premarital agreement goes far beyond simply protecting pre-marital assets, as it does in this case.

The Premarital Agreement herein seeks to classify any and all marital earnings, and any and all property acquired during the marriage with those earnings, as non-marital property and not subject to equitable distribution - rather than just protecting Petitioner's pre-marital assets. (A.R. 010). And the language chosen by the Petitioner to use in the Premarital Agreement is not clear and

unequivocal, further exacerbating Respondent's ability to have requisite knowledge of the content and legal effect of the Premarital Agreement, as is discussed more fully herein below in Section E. This Premarital Agreement goes so far as to provide that upon divorce, the Respondent's share of any marital home would be the "...proportionate...increase in value during the marriage of the homestead real estate, proportionate to the percentage contribution of the household expenses, if any, and child care/household duties performed by [Respondent] during the course of the marriage." (A.R. 012 - Paragraph 8(b)). And the Premarital Agreement is completely silent on the issue of marital debts. (A.R. 9-14).

In *Owen v. Owen*, 233 W.Va. 521, 759 S.E.2d 468 (2014) (per curium opinion), while affirming the rulings of the lower courts that the premarital agreement was invalid due to the wife not having the requisite knowledge of the content and legal effect of the premarital agreement she signed (and apparently did not read), and observing that the wife did not have independent legal counsel, the Supreme Court found that **"There was no specific explanation of the rights she was waiving, especially those associated with property acquired during the course of the marriage that would be deemed marital property, subject to equitable distribution."** *Id.* at 473 *(emphasis added)*.

As in *Owen*, and as properly found by the Family Court, the Premarital Agreement at issue herein simply does not contain a clear and unequivocal waiver of Respondent's marital property rights. (A.R. 006 - Finding of Fact 36). The Family Court correctly found that "It is inconceivable to charge Petitioner with knowledge of the contents of the premarital agreement and the legal effect of those contents when the agreement itself does not clearly define the parties rights or accurately state the marital rights the parties are waiving, especially in light of Respondent's own lack of

accurate knowledge of the content or legal effect of the agreement." (A.R. 006 - Finding of Fact 37).

Petitioner's Brief also asserts that the Respondent "...chose not to seek the advice of counsel at any time after the issue of prenuptial agreement was discussed...". (*Petitioner's Brief at p. 26*). This assertion is contrary to the findings of the Family Court, which findings the Petitioner has not taken exception to or assigned error.

The Family Court found that "The Petitioner [Below] may have had some opportunity to consult with an attorney regarding the premarital agreement, although said opportunity was not reasonable under the circumstances." (A.R. 003 - Finding of Fact 17). Clearly, the opportunity to seek independent legal counsel must be a meaningful opportunity. In this case, the Respondent did not have a meaningful opportunity to seek legal counsel for the reasons set forth by the Family Court, namely, that she did not have the financial resources to obtain legal counsel (Finding of Fact No. 14), that the Petitioner did not advise or even suggest to Respondent that she could or should seek legal counsel (Finding of Fact No. 8), that the Premarital Agreement did not advise the Respondent she should seek legal counsel (Finding of Fact No. 8), that the Petitioner was a savvy, experienced businessman with substantial assets to protect and used to dealing with complex contracts, yet he supposedly believed the parties did not need legal counsel (Finding of Fact Nos. 8, 10, 11); the Petitioner, at his own peril, acted as his own attorney; the Respondent reasonably relied upon Petitioner's experience and knowledge, and trusted that the Petitioner was treating her fairly (Finding of Fact No. 2); the fact that the Petitioner did not have an attorney led the Respondent to reasonably believe she did not need an attorney (Finding of Fact No. 9); that the Respondent immediately returned the copy of the agreement originally presented to her by the Petitioner to the Petitioner, and the Petitioner did not give her the final agreement until hours before the wedding (Finding of Fact

Nos. 17, 18); and even then, the agreement was in a sealed envelope, and the Petitioner told her where to take and who to see to have it notarized, among other things (Finding of Fact No. 21). (A.R. 001-006).

The requirement in West Virginia that both parties to a premarital agreement must be represented by independent legal counsel for the presumption of validity to apply to the agreement underscores the importance of independent legal counsel. As repeatedly stated by the Supreme Court, having independent legal representation is the best evidence that a premarital agreement was entered into voluntarily and knowledgeably, without fraud, duress, or misrepresentation. It is also important to recognize that having independent legal counsel in procuring a premarital agreement can help to level the playing field between the advantaged party and the disadvantaged party. It makes the process more fair. Given the importance of independent legal representation in the context of premarital agreements, it is clear that the opportunity to seek independent legal representation must be a meaningful opportunity to seek such representation.

The bottom line is the Respondent did not have legal counsel and the Premarital Agreement provided no specific explanation of the marital rights she waiving, and the Family Court did not commit error in finding that the Respondent did not have the requisite knowledge of the content and legal effect of the Premarital Agreement, thereby rendering the Agreement invalid.

E. The Family Court properly found that the content and legal effect of the Premarital Agreement would not be understandable to an adult of reasonable intelligence.

The Petitioner chose to draft the Premarital Agreement on his own, without the assistance of legal counsel, based upon his questionable belief that neither party needed an attorney in regards

to the Premarital Agreement." (A.R. 002 - Finding of Fact No. 8). As found by the Family Count, "It is difficult to reconcile how Respondent could reasonably believe that the parties did not need legal counsel in regards to the drafting and/or execution of a premarital agreement given that he was represented by an attorney in his divorce proceedings 5 years earlier, and more importantly, he had in excess of a million dollars in assets he was attempting to protect with the premarital agreement, not to mention that he is clearly a sophisticated businessman with an understanding of the complexity of contracts and the problems that can arise." (A.R. 003 - Finding of Fact No. 16).

One of the most important and relevant provisions in the Premarital Agreement in the underlying divorce proceeding is Paragraph 8 titled "DISSOLUTION OF MARRIAGE", given that this provision would, in large part, determine the parties' respective property rights in the event of a divorce. And even though the Family Court specifically addressed Paragraph 8(a) in Findings of Fact Nos. 34 and 36 of the Final Order, the Petitioner's Brief does mention or address Paragraph 8 of the Premarital Agreement in any respect whatsoever. Paragraph 8 is not even mentioned in Petitioner's Section B - Statement of Facts as one of the "...pertinent passages that will impact equitable distribution...". (*Petitioner's Brief at pp. 10-11*). The Petitioner cites other provisions of the Premarital Agreement in support of his position that the language used in the Premarital Agreement was written in "plain text" and "plain English", however, Petitioner's Brief completely ignores Paragraph 8 of the Premarital Agreement and the Findings of Fact made by the Family Court in regard to that provision, as well as several other findings made by the Family Court.

The Family Court properly found that while some of the language used in the Premarital Agreement may initially appear to be straightforward, in reality, the language used by the Petitioner in the Premarital Agreement was not straightforward or easily understood. (A.R. 006). The Family

Court made the following findings:

> "34. Paragraph 8 of the premarital agreement is titled "DISSOLUTION OF MARRIAGE", and is the section that addresses how property will be distributed upon divorce. The language used appears relatively straightforward on its face. For example, paragraph 8(a) provides as follows:
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> > "a. **Each party shall have an equal interest in the property acquired by the parties during the course of the marriage** (and which is not merely the result of increase in value of any of the property owned by the parties prior to the marriage, as listed on the attached schedules of property.)" (*Emphasis added*).
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> 35. The last sentence of paragraph 9 of the premarital agreement, which is titled "SUPPORT" also appears to be relatively straightforward, and provides, in pertinent part: "...in the event of a marital separation or dissolution of marriage, it is agreed and understood that neither party shall...**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." (*Emphasis added*).
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> 36. Paragraphs 8 and 9 of the premarital agreement both seem to suggest that upon divorce, the parties would be entitled to an equal division of their marital property, as that term is defined under the law, given that both provisions refer to "property interests acquired during the course of the marriage". In order for the Petitioner to make a knowing waiver of her marital rights, the Petitioner - ***or an adult of reasonable intelligence*** - had to understand that by signing the premarital agreement, she was waiving all claims to marital property in the event of divorce. The premarital agreement simply does not contain a clear and unequivocal waiver of Petitioner's marital property rights. Indeed, the language used in paragraphs 8 and 9 would seem to suggest that she is not waiving her right to an equitable distribution of the marital property." (*Emphasis added).* (A.R. 006).

Again, the Petitioner's Brief does not take exception to or argue that these Findings of Fact of the Family Court are clearly erroneous, other than to say Paragraph 9 "...is written in plain English." (*Page 32 of Petitioner's Brief*).

In addition to the above-cited Findings of Fact, the Family Court also found that "In addition

to not advising the Petitioner of her right to seek legal counsel or that she should seek legal counsel, the premarital agreement fails to advise her of any of her marital rights or what marital rights she is waiving. In fact, neither the word "marital" nor the phrase "marital property", appear anywhere in the premarital agreement. (*Final Order - Finding of Fact No. 27*). The Family Court's conclusion that "[t]he content and legal effect of the premarital agreement would not be understandable to an adult of reasonable intelligence" is supported by the above-referenced findings of the Family Court, which Petitioner's Brief fails to address in any meaningful way.

In addition to the above-referenced Findings, the Family Court also concluded that the Petitioner himself "...did not have an understanding of the content or terms used in the premarital agreement." (*Final Order - Conclusion of Law No. 3*). Again, Petitioner's Brief does not take exception to this particular ruling of the Family Court. The Family Court's conclusion is supported by Findings of Fact Nos. 28 and 29, as well, to-wit:

> "28. It is clear from Respondent's own testimony, that at the time he drafted and entered into the premarital agreement, and even at the hearing herein, he did not have an accurate understanding of what is considered marital property for purposes of divorce in West Virginia. Respondent's own counsel stated that "clearly, he does not understand the definition of marital property".
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> 29. Respondent's testimony that "marital property" is defined in the agreement (even though the words "marital property" appear nowhere in the agreement), is apparently based upon his belief the phrase "joint property" is synonymous with "marital property", "...that those words mean the same thing...". This clearly demonstrates the Respondent's own lack of understanding of what the language used in the premarital agreement actually means under West Virginia's domestic relations laws." (Final Order - Findings of Fact 28 and 29).

Again, the Petitioner's Brief does not take exception to the above findings and conclusion of law of the Family Court. And clearly, if the Petitioner himself did not understand the content and

terms of the Premarital Agreement, then it is a complete fallacy to argue 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. Unless, of course, the Petitioner is asserting that he does qualify as an adult of reasonable intelligence, which presumably the Petitioner does not so assert.

As pointed out by the Family Court in Finding of Fact No. 30 "[t]he terms joint property and marital property are not synonymous and do not have the same meaning." (A.R. 005-006). Petitioner's Brief recites Paragraph 2 of the Premarital Agreement pertaining to earnings during the marriage for the proposition that it is written in plain English. (Petitioner's Brief at p. 31). However, the last sentence of Paragraph 2 provides as follows:

> ".... 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." *(Emphasis added).* (A.R. 010).

This provision mis-states the law in West Virginia, and it is the only provision in the entire Premarital Agreement that even attempts to provide an explanation of what marital property rights the Respondent might have or might be waiving. If West Virginia were a community property state, this provision might be a true statement, however, West Virginia is an equitable distribution state. Thus, in West Virginia, the earnings described in Paragraph 2 of the Premarital Agreement would be characterized as marital property in the event of a divorce, not joint property. *W.Va. Code 48-1-233(1).*[1] The Petitioner asserts that the use of the term "joint property" rather than "...'marital

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[1] W.Va Code 48-1-233(1) - ""Marital property" means: (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,*

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 that all property is marital unless it can be classified as 'separate'." *(Petitioner's Brief at p. 32).*

The Petitioner's argument illustrates why an adult of reasonable intelligence, with no specialized legal training, would not understand the content and legal effect of the Premarital Agreement. One would have to understand either that the Petitioner meant "marital property" when he used the words "joint property" in Paragraph 2 or understand there is a legal presumption in West Virginia that all property acquired during a marriage is marital property, that is, unless it "...falls within the definition of separation property...", as asserted in Petitioner's Brief.

And further, because Paragraph 8 of the Premarital Agreement, which deals with the disposition of property in the event of a divorce, and states that "Each party shall have an equal interest in the property acquired by the parties during the course of the marriage...", but fails to use any of the terms marital property, joint property, or separate property, that same adult of reasonable intelligence, with no specialized legal training, would have to somehow knowingly understand that he or she is actually <u>not</u> entitled to most, if any, of the property interests acquired during the course of the marriage.

The Family Court properly found that:

"32. There is no evidence that Petitioner understood "joint property" to mean

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or whether held by the parties to the marriage in some form of coownership such as joint tenancy or tenancy in common, joint tenancy with the right of survivorship, or any other form of shared ownership recognized in other jurisdictions without this state, except that marital property does not include separate property as defined in section 1-238; ..." *(Emphasis added).*

"marital property" in the context of the premarital agreement. It was her testimony that she did not understand the meaning of the entire agreement.

33. If the Respondent intended in the premarital agreement that only jointly-titled property would be considered marital property in the event of divorce, then the language used in the premarital agreement should have clearly stated that, so that the Petitioner - **and a reasonably intelligent adult** - could understand it that way." (*Emphasis added).* (A.R. 006 - Findings of Fact Nos. 32 and 33).

The Family Court also noted an additional justification for why the content and legal effect of the Premarital Agreement would not be understandable to an adult of reasonable intelligence, to-wit:

"38. Another flaw with the premarital agreement is worthy of note. Although there is a provision in the premarital agreement that states each party would be responsible for his or her own premarital debts, the premarital agreement is completely silent as to marital debts, or any debt incurred during the marriage by either or both of the parties. It is highly doubtful that the Petitioner - **or an adult of reasonable intelligence** - would understand that by signing the premarital agreement, she was agreeing that any debts incurred during the marriage would be considered marital debt, so that if the Respondent ran up a substantial credit card debt for example, even if for a legitimate purpose, that upon divorce, the debt would be considered a marital debt subject to equitable distribution." (*Emphasis added*). (A.R. 007).

As a final matter, the Petitioner's complaint that the Respondent was never asked about any of the specific provisions of the Premarital Agreement, is meaningless. The Respondent repeatedly testified that she did not understand the entire Premarital Agreement, and the Petitioner certainly could have inquired into specific provisions with the Respondent if he chose to do so.

CONCLUSION AND PRAYER FOR RELIEF

Based upon the foregoing, the Family Court did not abuse its discretion in applying the law to the facts of this case, and made no error with regard to its findings of fact. The Respondent respectfully requests that this Court enter an Order denying the Petitioner's Appeal from the Family Court of Wood County's Final Order Regarding Validity of Premarital Agreement entered on May 10, 2023, and affirm said Order.

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CERTIFICATE OF SERVICE

The undersigned counsel for the Respondent hereby certifies that on the 25th day of July, 2023, she served the foregoing and hereto annexed RESPONDENT'S BRIEF upon MARK W. KELLEY, counsel for Petitioner, by the West Virginia File and Serve Xpress system.

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