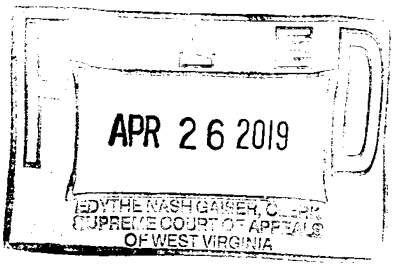
IN THE SUPREME COURT OF APPEALS WEST VIRGINIA

DOCKET NO. 19-0058

CONFIDENTIAL CASE
CONTAINS CONFIDENTIAL MATERIALS



HEATHER H.,

Respondent Below, Petitioner.

vs.

W. SHANE H.,

Petitioner Below, Respondent

Appeal from final order of Circuit Court of Kanawha County (12-D-714)

PETITIONER'S BRIEF

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STATEMENT OF THE CASE

1. Procedural History

The parties were married on June 26, 1993. They have two children: E.H. who was born September 23, 2009, and K.H. who was born February 27, 2012.

The parties separated on March 19, 2012, and Respondent filed this action on April 24, 2012—about 60 days after K.H. was born. An Agreed Temporary Order was entered on July 3, 2012. An Agreed Bifurcated Divorce Order was entered on February 1, 2013. The parties settled their case immediately before a final hearing which was to have occurred in June of 2013. A Final Order of Divorce was entered on July 18, 2013, and that Order incorporated a Property Settlement Agreement dated June 21, 2013.

On November 21, 2013, Respondent filed a Motion to Reconsider Equitable Distribution because of an alleged mistake regarding the value of business real estate. The contention was that Respondent had overlooked a mortgage when he settled. Petitioner's response was that the alleged mistake was not mutual, *i.e.* because Petitioner knew there were two loans, and considered both when she settled. Petitioner represented that the Settlement Agreement was a package which, from her perspective integrated child support, alimony and equitable distribution. Her position on the 2013 Motion to Reconsider was: if the equitable distribution settlement was reduced by several hundred thousand dollars, the only fair and reasonable course would be to undo the entire settlement agreement and start over.

The Family Court granted the Motion to Reconsider by Order entered December 17, 2013, subsequently corrected by a further Order entered March 21, 2014. The net effect of the two Orders granting reconsideration was to give Respondent the do-over he desired. The Orders again granting reconsideration provided that support and parenting would be as originally provided in the 2012 Temporary Order.

A final hearing on parenting was held, and the Family Court entered its Final Order regarding parenting on March 24, 2016. Respondent appealed that Order to the Supreme Court of Appeals of West Virginia, and the Supreme Court denied his appeal in Docket No. 16-0729.

A series of Final Hearings were held regarding all financial issues, including child support, equitable distribution and alimony. The Family Court entered its Final Order Regarding Equitable Distribution, Alimony and Child Support on November 13, 2017. This Final Order awarded Petitioner $15,000.00 a month in alimony, and required Respondent to assume sole responsibility for his student loans by extracting them from the marital estate—consistent with extracting his personal goodwill, *i.e.*, including, without limitation, his education and training. The alimony Final Order required the Petitioner to set aside $5,000.00 of the $15,000.00 in alimony paid each month into two education accounts for the children ($2,500.00 per month per child). Respondent filed Motions to Reconsider on December 12, 2017 and on February 26, 2018. The Family Court denied those motions on July 30, 2018.

Respondent petitioned for appeal to the Kanawha County Circuit Court on August 1, 2018. Petitioner replied and filed a conditional cross-appeal. The Circuit Court entered a Final Order on Respondent's Petition for Appeal and Respondent's Conditional Cross-

Appeal on December 3, 2018. The Circuit Court reduced alimony from $15,000.00 a month to $0.00 a month, and required Petitioner to pay half of Respondent's student loans. The Circuit Court based its alimony decision on conclusions that Petitioner did not "need" alimony, and to award her any at all would be a "windfall." A.R. 489.

Petitioner filed her appeal from the Circuit Court Final Order on January 18, 2019. The Supreme Court of Appeals granted Petitioner's Motion to Enlarge the time within which she could file her appeal by a Scheduling Order entered February 6, 2019.

2. Basic Facts Relevant to the Assignments of Error

The Petitioner argued that the *May*[1] decision anticipated a future case in which a party would offer proof that all the goodwill of a small business (both enterprise and personal) was marketable and, as such, should be included in the marital estate for equitable distribution. Petitioner offered that proof, and Petitioner's expert opined, based on actual offers to purchase the business in question, that its market value was $2,000,000.00. However, the Family Court held that the *May* case determined that personal goodwill was not marketable as a matter of law, and was to be excluded from the marital estate and not subject to equitable distribution.

Consistent with its view that it was required to extract personal goodwill, the Family Court valued the $2,000,000.00 business in the marital estate at $368,594.00. This pulled $1.62 million dollars out of the marital estate, and roughly $800,000.00 out of Petitioner's one-half of the net value of the marital estate when distributed. The proof she offered that her share of the family business should be $1,000,000.00 necessarily tempered her request for alimony. Petitioner always recognized that the reasonableness (amount) of

[1] *May v. May*, 214 W.Va. 394, 589 S.E.2d 536 (2003).

her alimony claim was directly related to the amount of her equitable distribution. Everyone, including the Family Court, knew this. In footnote 11 at A.R. 267, the Family Court reports that Respondent claimed if the Court adopted Petitioner's view of *May*, no alimony would be payable. Petitioner sought an alimony number at trial consistent with her anticipated equitable distribution. If she got $1,000,000.00 as her share of the business, she was not looking for $15,000.00 or $20,000.00 a month in alimony. If she did not receive the value she believed *May* allowed, she left it to the Court to make an appropriate determination, which the Family Court did when it rejected her view of how the *May* case should be applied, and made a reasonable alimony award in that context.[2]

The Family Court devoted five full pages to the alimony issue. A.R. 266 to 271. *W.Va. Code* § 48-6-301(b) lists 20 factors for consideration. *W.Va. Code* § 48-8-104 says that the court shall also consider the effect of fault or misconduct "as a contributing factor to the deterioration of the marital relationship." The Family Court addressed and considered all relevant factors as the mandatory language of these *W.Va. Code* provisions require ("shall"). Its findings of fact and its conclusions relevant to alimony are as follows:

- Long term marriage of more than 18 years;
- The parties lived together as husband and wife for 18 years and 8 months;
- Respondent averages nearly $1.4 million a year in income from the orthodontic practice the parties purchased for $289,000.00 with marital funds in 2001;

[2] *W.Va. Code* § 48-6-301(b)(5) says the court shall consider the distribution of marital property insofar as it affects the need to receive spousal support.

- Petitioner was a stay at home mom with two young children, one of whom was a child of tender years;
- There is an enormous disparity in earning capacity. Respondent is an orthodontist, and Petitioner is unemployed with a young child at home and a marketing degree;
- Petitioner worked to support the parties while Respondent obtained his dental schooling;
- She worked full time in the family business/practice from 2001 to 2012 as office manager and administrator; before children, she worked in the office; after children, she worked both from home and in the office;
- Petitioner was out of her chosen career from 2001 to 2012, working in the family business where she could ensure that it flourished and grew;
- The Court made the analysis necessary to estimate the exclusions from income to avoid "double dipping" rental income and practice income when considering the amount available to fund an alimony payment; approximately $975,000 a year after adjustments;
- Both parties were in good health and capable of working; neither was disabled in any respect;
- Respondent is an orthodontist; Petitioner has a degree in marketing;
- Petitioner worked at her chosen career until the parties purchased the family business; she was the primary breadwinner while Respondent obtained his dental training;
- By agreement, Petitioner left her chosen field and worked in the practice to manage and market the practice; she personally cultivated relationships with

dentists and their personnel to generate referrals to the practice; she worked hard to establish Respondent as a known and referable orthodontist; she worked alongside Respondent at the office in various positions over the years as needed;

- Petitioner's contributions to the growth/marketing of the family practice were professional, substantial and significant;
- The Court determined her contributions "went above and beyond what a reasonable wife would do to assist the Respondent in growing his orthodontic practice (i.e. gift baskets, office visits, follow ups, etc.);
- The parties enjoyed a high standard of living. They lived in a million-dollar house, drove fancy cars, had both a house boat and a luxury cruiser, took expensive vacations, etc.;
- The parties led a comfortable lifestyle during the marriage which afforded many luxuries many people are not able to enjoy; Respondent's income would adequately support the maintenance of the current lifestyle enjoyed by each party;
- After the parties' first child was born, Petitioner was able to manage her work schedule and worked from home to engage as the primary caretaker;
- Petitioner's age (45) and education and the ages of her children do not make it likely that she can dramatically increase her earning capacity. Her years out of the general work force because of her employment in the family business do not improve her prospects;
- Further education is not required;
- The children are in public school;
- Respondent is required to provide health coverage for the children;

- Given the entry of the Final Order before the latest tax reform act, alimony paid is deductible and received is taxable;
- One of the two boys was not in full-time school;
- Petitioner testified at trial that her reasonable budget was $8,241.57 per month. She does have a need for alimony as the Family Court found and observed as well that child support is to be used to benefit the minor children. Furthermore, she will owe income taxes on the alimony she receives, and will be required to set aside $5,000.00 a month (after tax) of her alimony for the children's future education.
- Child support is payable for the benefit of the children;
- Both parties are obliged to support themselves and their children, who do not have special needs;
- Respondent engaged in marital misconduct ("his admitted contact with another woman that was not his wife during the marriage contributed to the dissolution of the parties' marriage").

SUMMARY OF ARGUMENT

The Circuit Court, contrary to the law and the facts, determined as a matter of law that no reasonable family court judge would award this Petitioner any amount of alimony for any period. Conversely stated, the Circuit Court determined that awarding this Petitioner one penny of alimony for even one month would be an indefensible order/award. The Circuit Court found the only reasonable outcome was zero.

The Family Court's decision to require Respondent to pay his outstanding student loans in the context of the valuation of the practice following *May* was absolutely reasonable. Respondent was exiting the marriage with his skill set, produced by his

education and training. How is it unfair or inequitable to require him to pay off the loans that, along with his wife's employment while he was in school, paid for his education and training?

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The dispositive issue or issues have been authoritatively decided. The facts and legal arguments are adequately presented in the briefs and/or record on appeal. The decisional process would not be significantly aided by oral argument.

ARGUMENT

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, the West Virginia Supreme Court of Appeals reviews the findings of fact made by the family court judge under the clearly erroneous standard, the application of law to the facts under an abuse of discretion standard and questions of law *de novo*. *See W.Va. Code* § 51-2A-15(b)(2001). *See also Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803, 2004 W. Va. LEXIS 204 (2004).

1. THE CIRCUIT COURT ERRED WHEN IT REDUCED ALIMONY FROM $15,000.00 A MONTH TO $0.00 A MONTH.

A. Clearly, the Circuit Court would have made a different decision if it had been the trial court, but that is most definitely not the way our appellate system works.

The Circuit Court was sitting as an appellate court when it heard and determined Respondent's Petition for Appeal. As such, it was required to review the findings of fact made by the family court judge under the same standard set forth above. *See W.Va. Code* § 51-2A-15(b) 2001. See also *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803, 2004 W. Va. LEXIS 204 (2004).

> This Court has determined that a finding is clearly erroneous if the court "is left with the definite and firm conviction that a mistake has been committed.

In Interest of *Tiffany Marie S.*, 196 W. Va. 223, 231, 470 S.E.2d 177, 185 (W. Va. 1996). This Court cannot overturn a finding "simply because it would have decided the case differently, and it must affirm if the circuit [or family] court's account of the evidence is plausible in light of the record viewed in its entirety." Id.

Furthermore, "[u]nder the clearly erroneous standard, if the findings of fact and the inferences drawn by a family law master are supported by substantial evidence, such findings and inferences may not be overturned even if a [reviewing] court may be inclined to make different findings or draw contrary inferences." *Botkin v. White*, 202 W. Va. 184, 503 S.E.2d 273, 1998 W. Va. LEXIS 35 (1998) citing *Stephen L.H. v. Sherry L.H.*, 195 W. Va. 384, 465 S.E.2d 841, 1995 W. Va. LEXIS 39 (1995).

"[A] [reviewing] court may not substitute its own findings of fact for those of a family law master merely because it disagrees with those findings." *Botkin, supra.*

The Family Court worked on this case for years. It listened to hours and hours of testimony, and it considered thousands of pages of exhibits and depositions. Although the parties submitted detailed proposed findings of fact, conclusions of law and final orders, the Family Court carefully prepared a 26-page Final Order from scratch. In addition, the Family Court prepared the 17 pages of supporting exhibits attached to its Order. In contrast, it looks like the Circuit Court probably spent an hour or two looking at the file, and had a hearing of roughly an hour, during which it became clear to everyone in the room that the Court had decided the Motion before it got to the courtroom. The Circuit Court signed an order prepared by counsel for Respondent which was entered verbatim, but for the correction of a typo at page 23, which at least suggests that the Circuit Court read the proposed order before it signed it.

Factor (17) of *W.Va. Code* § 48-6-301(b) says consider "[t]he financial need of each party." During the hearing when the Circuit Court said Petitioner did not need alimony, counsel for Petitioner replied, "the Respondent doesn't need $130,000.00 a

month." Obviously, this fell on deaf ears in the Circuit Court, but the Family Court was paying attention. The Family Court specifically looked at life style, factor (9), and found: The Respondent's income would adequately support the maintenance of the current lifestyle enjoyed by each party.

The most troubling thing that ultimately happened was that the Circuit Court decided: (i.) Petitioner really did not really "need" alimony and (ii.) that trumped everything.

There is no trump card in *W.Va. Code* § 48-6-301. In practice, experienced counsel and Family Courts tend to look at a payee's need as a minimum, not a maximum. On the payor's side, the payor's need—(and available monthly income)—can be a limiting factor. But most importantly, Family Courts look at the 21 relevant factors and weigh them all. This Circuit Court's opinion about who "needs" what does not trump this Family Court's careful analysis and consideration of all the relevant factors that go into a reasoned decision, as opposed to a knee-jerk reaction.

Regrettably, this is a case of "I would have decided the case differently", but that is not how appeals work.

B. To Allow This Decision To Stand Sends A Chilling Message To Trial Courts, Both Family And Circuit.

There is no need to argue this point at length. Here, we have a Family Court that invested the substantial time and energy to decide a case and hand-craft a detailed order from scratch, which is simply swept aside as: this is a windfall, she doesn't need it, no reasonable judge would give her a penny. There is no way to spin this outcome as appropriate under our cases on the respective roles of trial courts and appellate courts, and the deference that is to be accorded well-reasoned decisions supported by

substantial evidence.

Yes, allowing this decision to stand injures this litigant, but it also undermines our judicial system and the respective roles that trial and appellate courts play in this system.

2. THE CIRCUIT COURT ERRED WHEN IT REQUIRED THE PETITIONER TO PAY 50% OF RESPONDENT'S UNPAID STUDENT LOANS.

As Respondent's counsel conceded during the argument in the Circuit Court, none of us were able to find case law on the issue.

It is important to note that the Family Court Final Order on Equitable Distribution says at A.R. 256 and 257:

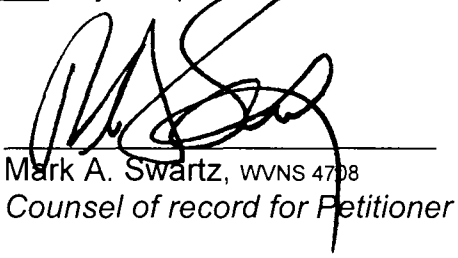
> In addition, the parties agreed at trial to the following values and allocation of personal property and debts:
>
> 5. Navient/Sallie Mae: ($135,985.00) Petitioner [W. Shane H.] [FN 6]
>
> [FN 6] Petitioner's Trial Exhibit no. 30-Petitioner's separate debt not subject to equitable distribution.

If we ignore the agreement that the Navient/Sallie Mae are Respondent's separate debt student loans, which we of course should not, the argument then boils down to whether it seems more reasonable than not, under the circumstances, to require Respondent to assume the going forward cost of his student loans. There is no question that they funded the bulk of the personal goodwill that he takes with him as he exits this marriage and that, under *May*, is not subject to equitable distribution as a marital asset.

CONCLUSION

The Circuit Court's Order should be reversed regarding alimony and student loan repayment.

Dated at Charleston, West Virginia, this 26th day of April 2019.



Mark A. Swartz, WVNS 4708
Counsel of record for Petitioner

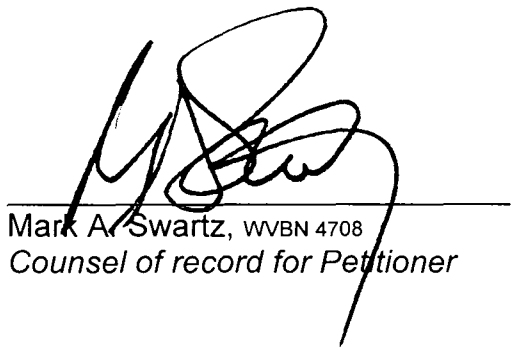
CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April 2019, true and accurate copies of the foregoing Petitioner's Brief were hand-delivered to counsel for all other parties to this appeal as follows:

Ms. Lyne Ranson
1528 Kanawha Blvd. East
Charleston, WV 25311

Mr. Tim Carrico
105 Capitol Street, Ste. 300
Charleston, WV 25301

this 26th day of April 2019.



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