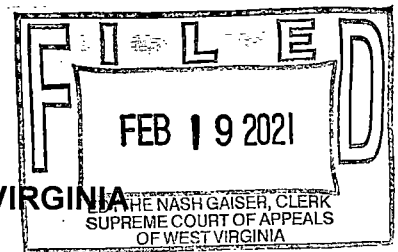


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**HAROLD LEE WEAVER,
Respondent below, Petitioner**

v. No.) 20-0690

BARBARA JO WEAVER,

Petitioner below, Respondent.

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PETITIONER'S BRIEF

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TABLE OF CONTENTS

ASSIGNMENTS OF ERROR	1
STATEMENT OF CASE	2
SUMMARY OF ARGUMENT	12
STATEMENT REGARDING ORAL ARGUMENT	15
ARGUMENT	15
CONCLUSION	29

TABLE OF AUTHORITIES

Cases

Banker v. Banker, 196 W.Va. 535 (1996) 26

Statutes

West Virginia Code §48-7-104 16

Other

Rule 1002 of the West Virginia Rules of Evidence 20

ASSIGNMENTS OF ERROR

1. The Circuit Court erred by upholding the Family's Court's ruling denying the Petitioner's Motion to Continue the final hearing in this action because the Petitioner was served with numerous Respondent's exhibits immediately prior to the Final Hearing.
2. The Circuit Court erred by upholding the Family's Court's ruling arbitrarily assigning values to the real property of the parties without competent evidence provided by either party as to the value of the property as of the date of separation.
3. The Circuit Court erred by upholding the Family's Court's ruling not permitting the Petitioner to testify regarding an appraisal of the real property described herein as "the restaurant."
4. The Circuit Court erred by upholding the Family's Court's ruling arbitrarily determining a date before which monies paid to the Respondent be designated as temporary spousal support and after which be designated as advanced equitable distribution payments. The Petitioner asserts that the date was arbitrarily determined and that payments made by the Petitioner should be considered as advanced equitable distribution payments, with the exception that \$350 should be designated as temporary spousal support.
5. The Circuit Court erred by upholding the Family's Court's ruling arbitrarily determining that an IRA of the Petitioner was entirely marital property instead of partially separate property. Additionally, the Circuit Court erred by upholding the Family's Court's ruling not subtracting monies paid by the Petitioner to the Respondent from the IRA from the marital portion of the IRA.

6. The Circuit Court erred by upholding the Family's Court's ruling awarding the Respondent attorney fees.

STATEMENT OF CASE

A Petition for Divorce was filed on or about 11 August 2017. A.R. p.1. Thereafter, the Petitioner herein filed an Answer and Counterclaim. A.R. p. 121. Based upon the agreement of the parties, an Agreed Temporary Order was entered on or about 29 September 2017. A.R. p. 135. Relevant to this Appeal, the Temporary Order provided that the Family Court would defer ruling on child support and spousal support and that the parties would continue paying recurring expenses as they had prior to and since their separation. The Family Court also ruled that the parties reserved the right to assert "Conrad Credits."

On or about 5 April 2018 a hearing was held. Following said hearing, the Family Court entered an Interim Order. A.R. v.2 p. 280. Relevant to this appeal, the Family Court ordered that the Petitioner continue to pay the Respondent the sum of three thousand five hundred (\$3500.00) dollars per month as that is what the Petitioner had previously been paying. The Family Court ordered that the Petitioner should use the one thousand (\$1,000.00) he began to receive from social security for the children of the parties to pay a portion of the \$3,500.00 so that he could take less money from his retirement account each month. The Family Court continued to defer ruling as to the classification of the money paid each month.

On or about 14 August 2018 the parties participated in mediation. An agreement was reached at mediation regarding all issues. However, at a hearing on 13 September 2018, the Respondent informed the Family Court that she was repudiating the Property

Settlement Agreement that was reached because of new information and because of allegations of undue pressure and lack of specificity. A.R. v.2 p. 284. The Petitioner informed the Family Court that he was willing to abide by the terms of the agreement. The Family Court did not enter the Property Settlement Agreement and set a Final Hearing.

Prior to the commencement of a Final Hearing, on or about 11 October 2018, the Respondent retained new counsel. A.R. v.2 p. 184. Following numerous delays, a Final Hearing occurred on or about 14 January 2019. A.R. v.2 p. 209.

Prior to evidence being presented, the Petitioner made a Motion to Continue the Final Hearing. A.R. v.2 p. 205. The basis of the motion was the late disclosure of approximately sixty pages worth of exhibits by the Respondent. Counsel for the Petitioner asserted that he received approximately sixty pages worth of exhibits from the Respondent at 12:37 a.m. the morning of the Final Hearing. Counsel stated that nineteen of those pages were received the day prior, but that counsel did not have adequate time to review and adequately prepare to respond to the voluminous late disclosure of exhibits. Vid.1 Time10:14.

Counsel for the Respondent argued that the late disclosure was one large demonstrative exhibit and that the Petitioner did not require additional time to review and respond to the same. The Family Court denied the Petitioner's motion to continue and gave leave to the Petitioner to object to the entry of the exhibits into evidence.

Each party testified but no additional witnesses were called. Relevant to the assignments or error alleged in this Appeal, and the issues associated with the same, the Respondent testified as follows¹:

1. Regarding the value of the real property involved in the case, the Respondent testified as to the value of three distinct marital real properties:

- a. Marital Home – The Respondent testified that an appraisal was completed of the marital home in approximately 2007 and that the appraised value was \$205,000. Vid.1 Time10:38. The Respondent further testified that during the marriage she borrowed approximately \$185,000 against the marital home to assist in the construction costs of the restaurant. Vid.1 Time10:37. The Respondent testified that while additions and modifications were done on the marital home during the marriage, they were never complete and thus did not add any value to the home. Vid.1 Time 10:38.
- b. The Restaurant – The Respondent testified that, in addition to the \$185,000 construction loan, she purchased the restaurant for \$25,000. Vid.1 Time10:42. Also, the Respondent testified that an additional \$150,000 loan was taken out to assist in opening the restaurant. Vid.2 Time12:15. Additionally, the Family Court permitted the Respondent to testify regarding the value of numerous pieces of property without having an adequate basis for providing such values. The Family Court permitted such testimony and ruled that it would give weight to the

¹ Some assignments of error are purely legal in nature and thus the testimony of the parties is irrelevant.

testimony as deserved. For example, when asked about the value of car parts at the last marital residence, the Respondent gave a value of \$5,000 but testified that she has no idea how much they are actually worth and just guessed. Vid.2 Time12:52. The Family Court also permitted the Respondent to testify as to the value of many different vehicles, despite not knowing the year, make, model, or mileage of the vehicles. Permitting this testimony is relevant because despite the Family Court allowing this testimony from the Respondent, it did not permit the Petitioner to testify regarding an appraisal of the restaurant.

- c. Additional Real Property – The Respondent testified that she believed the Petitioner purchased real property on or about 21 January 2017. Vid.1 Time10:45. She testified that she believes the Petitioner was residing on the property, and that the assessed value of the property according to tax receipts was \$117,000. Vid.1 Time10:47. However, the Family Court found this to be inaccurate and determined that the value of the property to be \$65,400.00 according to the tax receipts.

A.R. v.2 p. 223.

- 2. Regarding the IRA at issue, the Respondent admitted on cross-examination that she believed that the Petitioner began work with a union in 1984 (this date is relevant as it is asserted by the Petitioner that monies began to be placed in the IRA at issue when he began work for the union). Vid.2 Time12:32. The Respondent also stated that she learned in the courtroom during a previous

hearing that the monies paid to the Respondent by the Petitioner during the case were from the IRA. Vid.2 Time12:39.

3. Regarding the award of attorney fees, the Respondent testified that she believed that the Petitioner did not act in good faith during the proceedings and did not comply with certain discovery requests and disclosure requirements. Vid.1 Time11:44. No testimony was presented as to the factors used by the Family Court in determining whether an award of attorney fees is reasonable.

Following the testimony of the Respondent, the Petitioner presented his case and testified. The Petitioner provided the following relevant testimony regarding the assignments of error²:

1. Regarding the value of the real property involved in the case, the Petitioner testified as to the value of three distinct marital real properties:
 - a. Marital Home – The Petitioner testified that numerous improvements were made to the marital home after the appraisal that was submitted into evidence by the Respondent. Vid.3 Time 2:53; 2:59. The Petitioner testified that the home was improved by adding a twenty-four by thirty-foot extension to the marital home. Vid.3 Time 2:54. The Petitioner testified that the parts and labor cost of the addition was approximately \$25,000. Vid.3 Time2:55.
 - b. The Restaurant –The Petitioner was not permitted to testify regarding and appraisal completed on the restaurant in or about 2005. Vid.3 Time3:05. The Petitioner testified that the appraisal, to the best of his

² Again, some assignments of error are purely legal and thus the testimony of the Respondent is irrelevant to those assignments.

recollection, valued the restaurant at \$450,000. Vid.3Time3:05. The Family Court should have permitted such testimony and given it the weight it deserved, similar to how the Family Court permitted the Respondent to testify regarding values. Additionally, the Respondent's objection to the testimony was based upon the "best evidence rule." The best evidence rule, or Rule 1002 of the West Virginia Rules of Evidence, applies only to the admission of copies of documents in the case that the original is not available. Here, the Petitioner was not attempting the admission of a copy of the appraisal, but only testifying regarding his memory of the appraisal. No other objections were lodged by the Respondent.

- c. Additional Real Property – The Petitioner gave an estimate of \$40,000 for the valuation of the additional property based upon its poor condition as of the date of separation of the parties. Vid.3 Time2:52.
2. Regarding the IRA at issue, the Petitioner testified that he began work for a union in 1979 and that funds were placed in the IRA from that date. Vid.3 Time3:35. Petitioner testified that he was a part of the union for approximately twenty-four years prior to the date of the marriage. Vid.3 Time3:42.
3. Regarding the award of attorney fees, the Petitioner denied that he was uncooperative throughout the process. Additionally, Counsel for the Petitioner, in response to questions by the Respondent, objected to the characterization that the Petitioner did not fully disclose financial information by pointing out that all of the financial information was disclosed to the previous counsel of the

Respondent and that an agreement was reached with previous counsel but was later repudiated by the Respondent. Vid.4 Late 4:28-4:30.

Following the close of the Final Hearing, the Family Court entered a Final Order on 5 March 2020 with the following findings and conclusions relevant to this appeal³:

1. In Section 32, subsection l., the Family Court ruled that there was no evidence presented as to the value added to the marital home by the additions to the home. The Petitioner disagrees with this finding as the Petitioner testified that the addition added value based upon the amount of money spent on the addition, and the fact that the addition complied with required building codes and was thus complete. Vid.3 Time2:53-2:59. The Family Court should have considered this as evidence similarly to how the Family Court used the value of loans taken out for the opening of the restaurant in determining its value.
2. In section 32, subsection m. the Family Court assessed the value of the marital home at \$205,000. This valuation was based on an appraisal of the home made prior to the additions discussed herein. Because the appraisal of the home was made prior to the additions, no competent evidence was presented as to the value of the home at the time of separation. Therefore, the Petitioner disagrees with this finding and asserts that the home should have been sold.
3. In section 33, subsection j., the Family Court assessed the value of the restaurant at \$185,000. This assessment was arbitrary and the Family Court did not provide any specific reasoning for reaching this valuation. Additionally,

³ The findings and conclusions listed hereafter are not an exhaustive list of the findings and conclusions that the Respondent disagrees with, but is a compilation of the most relevant and egregious findings. The Respondent reserves the right at oral argument, or in any future proceeding, to assert additional arguments as to other findings and conclusions.

the Petitioner was prevented from testifying regarding an appraisal conducted of the restaurant. Vid.3Time3:05. The Petitioner disagrees with this finding as no competent evidence was presented regarding the value of the restaurant, and thus the restaurant should have been ordered sold.

4. In section 34, subsection j., the Family Court found that the Petitioner offered no evidence or statement as to the value of the additional real estate. The Petitioner disagrees with this finding as he testified that he believed the value to be \$40,000. Vid.3 Time2:52.
5. In section 34, subsection n., the Family Court valued the additional real estate at \$65,400 based upon the county tax receipts. The Petitioner disagrees with this finding and asserts that property tax receipts are not competent evidence relating to the fair market value of real property. Therefore, the Petitioner asserts that this property should have been sold.
6. In section 36, subsection i., the Family Court found that no evidence was presented that the Petitioner used funds from the IRA to pay his monthly obligation to the Respondent. This finding is incorrect as the Respondent testified that she learned that the Petitioner used the IRA to pay his monthly obligation, and her testimony is considered evidence. Vid.2 Time12:39. Additionally, in a previous order of the Family Court, the Family Court acknowledged that the Petitioner had used funds from the IRA to pay his monthly obligation.
7. In section 36, subsection j., the Family Court stated that West Virginia case law states that a party claiming a separate component to an asset must bring forth

evidence of the same, and that assets are presumed to be marital. The cases cited by the Family Court in this subsection are distinguishable from the instant case, and the summary of the law in this subsection is clearly erroneous. Therefore, the Petitioner disagrees with this conclusion.

8. In section 36, subsection k., the Family Court concluded that the Petitioner had failed to meet his burden of proof that part of the IRA was separate property. The Petitioner asserts that first, the case law providing this burden of proof is inapplicable to the instant case; and second, that even if that burden of proof applies the Petitioner met said burden by testifying that he had began receiving funds in the IRA in 1979. Further, the Respondent testified that she believed the Petitioner began work at a union in 1984 – the union that provided the funds for the IRA. Therefore, the Petitioner disagrees with this conclusion.
9. In section 36, subsection l., the Family Court found that the entirety of the IRA was marital property. The Petitioner disagrees with the finding for the reasons stated above, said reasons will be explained in further detail below.
10. In section 49, subsection a., the Family Court made findings that the Respondent was unable to pay her own attorney fees. The Petitioner disagrees with this finding, and argues that the Family Court was not provided any specific evidence that the Respondent was unable to pay her attorney fees. Additionally, the Petitioner had been paying the Respondent thousands of dollars each month for a period of over two years, and asserts that the claim that the Respondent is unable to pay her attorney fees as disingenuous.

11. In section 49, subsection c., the Family Court made findings the Respondent continually experiencing a monthly deficit. The Petitioner asserts that the Family Court did not have sufficient evidence to make such a determination. Additionally, the Respondent testified that she has a monthly vehicle payment of \$778. The Petitioner finds it disingenuous that an individual able to pay nearly \$800 per month for a vehicle is in a difficult financial situation.
12. In section 49, subsection d., the Family Court found that the Respondent is having difficulty meeting her needs. For the reasons discussed above, the Petitioner disagrees with this finding.
13. In section 49, subsection f., the Family Court found that the attorney fee request by the Respondent was reasonable. For the reasons discussed above (which will be explained in more detail below) the Petitioner disagrees with this finding.
14. In section 51, the Family Court awarded the Respondent attorney fees based upon an incorrect analysis of the relevant factors, and based upon the alleged lack of cooperation by the Petitioner. The Petitioner disagrees with this finding.
15. In section 52, the Family Court awarded the Respondent \$6,440 in attorney fees to be paid by the Respondent. For the reasons discussed herein, the Petitioner disagrees with this finding.
16. In section 53 and 54, the Family Court ruled that the funds paid to the Respondent by the Petitioner throughout the pendency of the case would be designated as temporary spousal support prior to 1 March 2019, and would be designated as advanced payments of equitable distribution after 1 March 2019.

The Petitioner disagrees with these findings as the 1 March 2019 date was arbitrary and the Family Court provided no reasoning for choosing said date.

17. The Petitioner disagrees with order “N.” in the Family Court’s order as the Petitioner disagrees with the way equitable distribution was determined.

18. The Petitioner disagrees with order “R.” in the Family Court’s order as the Petitioner disagrees that any equalization payment should have been required.

19. The Petitioner disagrees with order “W.” in the Family Court’s order relating to the designation of monies paid for the reasons stated herein.

20. The Petitioner disagrees with order “AA.” in the Family Court’s order relating to the designation of monies paid for the reasons stated herein.

On or about 29 May 2020 the Petitioner filed a Petition for Appeal to the Circuit Court of Barbour County, West Virginia (meeting the deadline for appeal because of the Judicial Emergency). A.R. v.2 p. 258. The Respondent filed a Respondent and an Appeal of her own on or about 17 June 2020. The Circuit Court entered an Order Denying the Appeal on or about 11 August 2020. A.R. v.2 p.

SUMMARY OF ARGUMENT

As to each assignment of error, the Petitioner provides the following summaries to clarify the specific issues before the Court.

1. Denial of Motion to Continue

The Circuit Court erred by upholding the Family’s Court’s ruling denying the Petitioner’s Motion to Continue on the date of the Final Hearing. The Petitioner made the motion on the basis that he had received approximately sixty pages worth of exhibits the

day before and on the morning of the Final Hearing. The late disclosure prevented the Petitioner from having the opportunity to fully review the exhibits prior to the Final Hearing. This caused the Petitioner extreme prejudice, and denied the Petitioner the right of a fair Final Hearing.

2. Valuation of Real Property

The Circuit Court erred by upholding the Family's Court's ruling assigning values to three pieces of real property at issue. The three pieces of real property at issue were: the last marital residence, a restaurant that was purchased during the marriage, and additional real property that was purchased during the marriage. Petitioner is not disputing that the three pieces of real property are all marital, but is arguing that the Family Court valued each piece of real property with a different method, that the valuations were not based on the evidence presented, and that no competent evidence was presented by either party to determine value as of the date of separation, so the properties should have been sold.

3. Testimony regarding value of the Restaurant

The Circuit Court erred by upholding the Family's Court's ruling refusing to allow testimony from the Petitioner regarding an appraisal that was completed on the restaurant. The Family Court erred for multiple reasons, including that the objection made by the Respondent, and sustained by the Family Court, was an incorrect interpretation of the law. The Respondent objected to the testimony based on the "best evidence" rule; however, the best evidence rule did not apply to the situation at hand. Additionally, the Family Court permitted the Respondent to testify regarding the values of numerous pieces of property without sufficient knowledge to provide such testimony, but denied the

Petitioner from doing the same. The appraised value of the restaurant would have provided the Family Court with additional information regarding its value, which is especially relevant when considering the Family Court used an appraisal of the last marital residence to determine its value.

4. Designation of Monies Paid

The Circuit Court erred by upholding the Family's Court's ruling determining that all monies paid by the Petitioner to the Respondent prior to 1 March 2019 be designated as temporary spousal support and all monies paid after said date are to be considered advanced equitable distribution payments. The Family Court provided no reasoning behind choosing such a date. Additionally, the Family Court provided no justification for the extreme disparity between the amount of temporary and permanent spousal support.

5. Marital Value of IRA

The Circuit Court erred by upholding the Family's Court's ruling that the entirety of the Petitioner's IRA was marital property despite being presented undisputed evidence that the Petitioner began work with a union in the 1979 or 198' – more than twenty years prior to the marriage of the parties. This evidence was sufficient for the Family Court to determine that part of the value of the IRA should have been considered the Petitioner's separate property. Additionally, the Family Court should have subtracted the payments made to the Respondent by the Petitioner from the marital portion of the IRA.

6. Award of Attorney Fees

The Circuit Court erred by upholding the Family's Court's ruling awarding the Respondent attorney fees. The Family Court erred as the Respondent's request for attorney fees was not reasonable, and the analysis conducted by the Family Court was

flawed. The evidence shows that the Petitioner was cooperative during the proceedings, and that the Respondent was not in need of attorney fees because of the monies she had been provided throughout the case by the Petitioner and because of the large award of spousal support and the large equitable distribution equalization payment ordered by the Family Court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for oral argument under Rules 19 and 20 of the West Virginia Rules of Appellate Procedure.

ARGUMENT

The Petitioner incorporates all other sections of this Memorandum of Law herein.

I. THE CIRCUIT COURT ERRED BY UPHOLDING THE FAMILY'S COURT'S RULING DENYING THE RESPONDENT'S MOTION TO CONTINUE THE FINAL HEARING BECAUSE HE DID NOT HAVE ADEQUATE TIME TO REVIEW THE LATE DISCLOSURE OF EXHIBITS BY THE PETITIONER.

The Circuit Court erred by upholding the Family's Court's ruling denying the Petitioner's Motion to Continue because the Petitioner was taken by surprise by the late disclosure of exhibits by the Respondent and did not have adequate time to review those exhibits prior to the Final Hearing.

In its Order, the Circuit Court cited that all Motions to Continue should be filed at least seven days prior to the hearing. A.R. v.2 p. 274. This reasoning is flawed in that the basis for the Motion to Continue was only known to the Petitioner the night prior to the Final Hearing – when the late exhibits were provided to the Petitioner. It is undisputed and clear from the record that the Respondent sent the Petitioner approximately sixty pages of exhibits the day prior to the hearing and the morning of the hearing

(approximately nineteen pages the day prior and forty-one pages the morning of the hearing). Vid.1 Time10:14. There are few rules in western litigation more fundamental than preventing trial by surprise. Here, clearly that fundamental rule was clearly violated. The late disclosure of exhibits amounted to forcing the Petitioner to participate in a trial by surprise, a substantial violation of his due process rights and his right to a fair trial. The Petitioner did not have adequate time to prepare a response to those exhibits, and was thus prevented from a fair trial. Therefore, the Circuit Court erred by upholding the Family's Court's ruling denying the Petitioner's Motion to Continue.

II. THE CIRCUIT COURT ERRED BY UPHOLDING THE FAMILY'S COURT'S RULING DETERMINING THE VALUES OF THE REAL PROPERTY DESCRIBED HEREIN BECAUSE NO COMPETENT EVIDENCE WAS PRESENTED AS TO THE VALUES OF SAID PROPERTIES.

West Virginia Code §48-7-104(1) provides that when ruling on equitable distribution the Family Court shall: "[d]etermine the net value of all marital property of the parties as of the date of the separation of the parties . . ."

West Virginia Code §48-7-104(1) provides that: "[i]n any order which divides or transfers the title to any property, determines the ownership or value of any property, designates the specific property to which any party is entitled or grants any monetary award, the court shall set out in detail its findings of fact and conclusions of law, and the reasons for dividing the property in the manner adopted."

In the Circuit Court's Final Order, it simply cites one citation from case law and does not address the arguments raised by the Petitioner in his Memorandum of Law. The Circuit Court failed to properly consider the Petitioner's argument for the following reasons:

The Last Marital Residence

The Circuit Court erred by upholding the Family's Court's ruling determining the value of the last marital property as no competent evidence was presented as to its value. In the Final Order, the Family Court determined the value at \$205,000. This value was determined solely based upon an appraisal completed of the property in or about 2007. The Family Court found that there was no evidence presented that the value of the property had diminished or gained since 2007. This determination is clearly erroneous and an abuse of discretion.

First, as to the finding that no evidence was presented that the value of the property increased since the appraisal, this finding is simply incorrect. The Petitioner presented evidence, through testimony, as to the addition that was added to the marital property subsequent to the appraisal. Vid.3 Time2:53-2:59. The Petitioner provided undisputed testimony that a twenty-four by thirty-foot addition was added to the home. Vid.3 Time 2:54. Although the Respondent claims that this addition was not complete, this claim is not supported by the evidence presented. The Respondent does not deny that a loan of approximately \$185,000 was obtained with the home as collateral after the addition. The Petitioner testified that the loan could not have been obtained unless the addition complied with all relevant building codes. Therefore, the evidence does not support the Respondent's assertion that the addition was incomplete and likely provided to value to the home.

Additionally, the Petitioner testified that approximately \$25,000 in parts and labor was necessary to complete the addition. Vid.3 2:54-2:55. The addition to the home appears to have provided additional value based on the evidence presented.

However, importantly, if this Court determines that there was insufficient evidence to prove an increase in value because of the addition, it necessarily follows that there was no competent evidence presented as to the value of the marital home as of *the date of separation*.

The law is clear that for the purposes of equitable distribution, the value of property is determined as of the date of the date of separation. Here, no evidence was presented as to the value of the home as of that date. The only evidence presented was an appraisal completed in 2007, about ten years prior to the parties' date of separation – 11 August 2017. It is difficult to assert that an appraisal from 2007– an appraisal completed prior to a significant addition – is competent evidence as to the value of the home in 2017.

The Family Court's own finding supports this argument. The Family Court found, in section 32, subsection I. of its Final Order, that no evidence was presented as to whether the addition increased or decreased the value of the home. A.R. v.2 p.219. It follows from this finding that it is unknown what the value of the marital home was as of the date of separation. It is clearly erroneous and an abuse of discretion to claim that because we do not know the impact of the addition to the value of the home, that the home must be the same value as it was in 2007. Again, there was no evidence presented as to the value of the home after the addition and as of the date of separation, only the value of the home prior to the addition in 2007.

Therefore, if the Court does not believe competent evidence was presented as to the increase in value because of the addition, the only conclusion is that no competent evidence was presented as to the value of the home as of the date of separation; and, thus, the marital home should have been sold.

The Restaurant

The Family Court erred by determining the value of the restaurant at \$185,000. This valuation is clearly erroneous and an abuse of discretion. The Family Court provided no justification or reasoning as to why it chose this seemingly arbitrary value. It is possible to infer that this value was determined based upon a loan taken out by the parties to assist in opening the restaurant.

However, if this was the chosen method for valuation, the valuation was reached through improper reasoning. The \$185,000 loan was based upon the value of the last marital home because that home was used as collateral for the loan. The amount of the loan is irrelevant to the actual value of the restaurant. Thus, if this was the method used by the Family Court to determine the value of the restaurant, the decision was clearly erroneous and an abuse of discretion.

The only conclusion that can be reached from the evidence presented and from the fact that the Final Order that lacks justification for the value is that no competent evidence was actually presented as to the value of the restaurant. The Final Order does not provide any reasoning as to the \$185,000 valuation, and that lack of reasoning is a clear indication that no competent evidence was presented as to the value of the restaurant as of the date of separation. A.R. v.2 p. 220-221.

Again, the date of separation is key when analyzing this issue. Even if this Court finds that some evidence was presented as to the value of the restaurant, such as the loans taken out to pay for opening the restaurant, and the purchase of the restaurant itself, that evidence only goes to prove the value of the restaurant over a decade ago when the loans were taken out and the restaurant was purchased. Because there was

no competent evidence presented as to the value of the restaurant as of the date of separation, the Family Court Erred in its valuation.

Finally, and as a separate assignment of error, the Family Court erred by refusing to permit the Petitioner to testify regarding an appraisal of the restaurant. The Family Court sustained an objection made by the Respondent on the grounds of the “best evidence” rule. As described above, the “best evidence” rule is actually Rule 1002 of the West Virginia Rules of Evidence. This rule only applies when a party is attempting to enter a copy of a document into evidence and the original of that document is unavailable. Here, that was not the case as the Petitioner was only testifying regarding the value of an appraisal and was not attempting to enter a copy of the appraisal into evidence. The Respondent made no other objection as to the inadmissibility of the restaurant, and thus the Family Court abused its discretion by sustaining an objection that clearly did not apply to the circumstances wherein it was raised.

Additionally, the Family Court had permitted the Respondent to testify to the value of numerous pieces of property without any support for the choosing of the value. For example, the Respondent testified that car parts located at the last marital residence were worth \$5,000 but testified that she just guessed and had no basis for that valuation. If the Family Court permitted such testimony from the Respondent, the Family Court should have permitted testimony from the Petitioner regarding the value of the restaurant.

Therefore, the Family Court erred and should have ordered the property sold.

Additional Marital Property

The Family Court erred by determining that the additional marital property had a value of \$65,400. A.R. v.2 p. 221-223. This valuation was based entirely on property tax

receipts from the county sheriff's office. Property tax receipts are not competent evidence as it relates to the fair market value of real estate. Property tax receipts are only tools used by the county to determine the amount of taxes that are required to be paid. The assessors do not actually go into the home, evaluate the condition of the home or utilities in the home, or conduct any other investigation into the property. Therefore, property tax receipts should not be considered competent evidence as to the fair market value of the additional marital property. Thus, the Family Court erred and should have ordered the property sold.

Finally, in additions to the assignments or error outlined above, the Family Court erred and abused its discretion by using different methods of valuation for each piece of property. As to the last marital residence, the Family Court used an appraisal from ten years prior to the date of separation; as to the restaurant, the Family Court's reasoning behind the valuation is unclear (it is at least clear that no appraisal or tax receipts were used to determine the value of the restaurant); and as to the additional marital property, the Family Court used tax receipts. In addition to the argument that no competent evidence was presented to determine the value of the pieces of property, the Family Court erred and abused its discretion by using different methods for the valuation of each piece of property.

III. THE CIRCUIT COURT ERRED BY UPHOLDING THE FAMILY'S COURT'S RULING NOT PERMITTING THE PETITIONER TO TESTIFY REGARDING AN APPRAISAL CONDUCTED OF THE RESTAURANT.

The Petitioner hereby incorporates the argument related to this assignment of error that was provided in the previous section into this section.

IV. THE CIRCUIT COURT ERRED BY UPHOLDING THE FAMILY'S COURT'S RULING ARBITRARILY DETERMINING A DATE BEFORE

**WHICH MONIES PAID TO THE RESPONDENT BY THE PETITIONER
BE DESIGNATED AS TEMPORARY SPOUSAL SUPPORT AND AFTER
WHICH BE DESIGNATED AS ADVANCED EQUITABLE DISTRIBUTION
PAYMENTS.**

The Family Court erred by designating monies paid to the Respondent by the Petitioner in an arbitrary manner. Such a designation was an abuse of discretion. The Circuit Court failed to provide any reasoning whatsoever in its Order Denying the Appeal. It simply stated in conclusory terms that there was no abuse of discretion.

Throughout the pendency of the Family Court action, the Petitioner paid the Respondent approximately \$3,500 per month. The Family Court deferred ruling on how those monies would be designated until the Final Order. In its Final Order, the Family Court ruled that all monies paid to the Respondent by the Petitioner prior to 1 March 2019 be designated as temporary spousal support, and all monies paid on or after that date be designated as advanced payments of equitable distribution and attorney fees⁴. A.R. v.2 p. 242.

This decision was an abuse of discretion because of the arbitrary nature in the date chosen to differentiate the designation of the monies paid. The Family Court provided no explanation as to why the 1 March 2019 date was chosen. Additionally, it is unclear from the record why a date of 1 March 2019 was chosen as no significant event related to the proceeding occurred on that date. With no justification or reasoning provided as to the date chosen, it appears that the decision was entirely arbitrary and is thus an abuse of discretion.

Further, no evidence was presented at the Final Hearing as to how that monies paid to the Respondent were used. The Respondent did not provide competent evidence

⁴ With the exception that \$350 dollars be designated as permanent spousal support.

as to how the approximately \$3,500 per month was used during the pendency of the action. Vid.4 Time4:10. Finally, the Family Court made a ruling that the Petitioner shall pay the Respondent \$350.00 in permanent spousal support. A.R. v.2 p. 238. Again, the Family Court provided no justification between the significant difference between the amount of temporary spousal support and the amount of permanent spousal support. The difference in amounts appears to also have been an arbitrary decision.

Because of the arbitrary nature of the decision on the designation of monies paid, the Family Court erred.

The Petitioner asserts that all monies paid to the Respondent by the Petitioner during the pendency of the action, besides \$350.00 being designated as temporary spousal support to match the ruling on permanent spousal support, should be designated as advanced equitable distribution payments.

V. THE CIRCUIT COURT ERRED BY UPHOLDING THE FAMILY'S COURT'S RULING ARBITRARILY DETERMINING THAT AN IRA OF THE PETITIONER'S WAS ENTIRELY MARITAL PROPERTY INSTEAD OF PARTIALLY SEPARATE PROPERTY.

The Circuit Court erred by upholding the Family's Court's ruling that the entirety of the Petitioner's IRA should be considered marital property because the Petitioner provided evidence that a portion of the IRA should be considered separate property. Again, the Circuit Court provided no reasoning as to why this ground for appeal was denied. Instead, it simply cited portions of the Family Court's Final Order. The lack of reasoning provided by the Circuit Court is error for the following reasons:

The Petitioner provided testimony, which is considered evidence, that he began work for a union in 1979 and that the union paid into the IRA at issue for the entirety of the time period that the Petitioner worked for the union. Vid.3 Time3:35. Importantly, the

Respondent testified that she believed that the Petitioner began work with the union in 1984. Vid.2 Time12:32. Therefore, it is undisputed that the Petitioner began work for the union that paid into his IRA sometime between 1979 and 1984. The undisputed testimony is sufficient evidence to overcome the presumption and rule that a portion of the IRA should have been considered separate property.

It is simple to calculate what portion of the IRA should be considered separate property. The parties were married on or about 12 April 2003, and were separated on or about 11 August 2017. The Petitioner asserts that the Court should divide the IRA into marital and separate property based upon the ratio of time that the Petitioner was part of the union prior to the date of the marriage and that the Petitioner was married prior to the date of separation.

The Petitioner asserts that the Court should accept the Petitioner's testimony and conclude that monies began being placed into the IRA in 1979. The time period between 1979 and April 2003 is twenty-four years and three months, and the time period between April 2003 and August 2017 is fourteen years and five months, for a total of thirty-eight years and eight months. The total amount of monies in the IRA as of the date of separation was \$259,358.62. After dividing the total amount of the IRA into its respective separate and marital portions, the Petitioner asserts that \$162, 308.30 of the IRA should be considered the Petitioner's separate property, and that \$97,050.32 should be considered marital property.

Alternatively, if the Court determines that the 1984 date provided by the Respondent is the correct date, the Court should rule that \$148,326.01 of the IRA should

be the Petitioner's separate property, and that \$111,032.61 should be considered marital property.

Additionally, as a related assignment of error, the Family Court erred by ruling that the Petitioner did not present any evidence that he used monies from the IRA to pay his obligation to the Respondent throughout the pendency of the action. The Petitioner provided evidence, through his testimony, that he used monies from the IRA to pay his monthly obligation to the Respondent. Vid.4 Time4:11. Additionally, the Family Court acknowledged in an Interim Order from a hearing held on or about 5 April 2018 that the Petitioner was using monies from the IRA to pay his monthly obligation.

Finally, the Petitioner asserts that the burden of proof regarding whether any portion of the IRA was separate property should have shifted to the Respondent during the pendency of the case. The Petitioner provided a full release to the Petitioner so that the Petitioner could obtain the records relating to the IRA. The Petitioner provided this information to the Petitioner's first counsel, and thus the Respondent had a significant amount of time to obtain all documentation related to the IRA. The Respondent asserts that the entire portion of the IRA should be marital because the Petitioner did not provide documentation as to the IRA, but this argument should hold no weight because the Petitioner provided the Respondent, in a timely manner, the means for her to obtain the requested information. The Petitioner argues that in circumstances such as this, where a party provides the other party a release to obtain documentation regarding property that a party claims is separate property, the burden shifts to the party obtaining the release to prove that the property in question is marital. The Petitioner fulfilled his duties in discovery and during the case by providing the release and should not be punished by a lack of

documentary evidence when the same evidence could have been obtained by the Respondent.

Therefore, through evidence, and through the language of the Family Court's own order, it is clear that the Petitioner used monies from the IRA to pay his monthly obligation. Thus, the marital portion of the monies in the IRA should be reduced by the total amount of monies paid to the Respondent by the Petitioner that is considered to be an advanced payment of equitable distribution.

VI. THE CIRCUIT COURT ERRED BY UPHOLDING THE FAMILY'S COURT'S RULING AND AWARDING THE RESPONDENT ATTORNEY FEES BECAUSE THE FACTORS TO BE CONSIDERED IN AWARDING ATTORNEY FEES WERE IN FAVOR OF THE RESPONDENT.

The Family Court erred in awarding the Petitioner attorney fees. The Family Court cited Banker v. Banker, 196 W.Va. 535 (1996) and the factors outlined in that case as the basis for the award of spousal support. An analysis of those factors shows that the Family Court erred. The Circuit Court, in its Order denying the Petitioner's Appeal, again does no real analysis; instead, it simply makes a conclusory statement that the Family Court did not abuse its discretion.

The factors considered by the Family Court, and the Petitioner's analysis as to each factor, is as follows:

a. Each Party's Ability to Pay His/Her Own Attorney Fees

As to this factor, the Family Court made findings that the Respondent is continually experiencing a monthly deficit. The Petitioner asserts that the Family Court did not have sufficient evidence to make such a determination. Additionally, the Respondent testified

that she has a monthly vehicle payment of \$778. Vid.3 Time2:22. The Petitioner finds it disingenuous that an individual able to pay nearly \$800 per month for a vehicle is in a difficult financial situation. Therefore, this factor weighs against an award of attorney fees.

b. Beneficial Results Obtained by the Attorney

As to this factor, the Respondent was awarded permanent spousal support and a large equalizing payment in equitable distribution. Therefore, this factor weighs against an award of attorney fees.

c. The Parties' Respective Financial Conditions

As to this factor, the Respondent is nearly paying \$800 per month toward a car payment. Additionally, the Respondent received approximately \$3500 per month throughout the pendency of the case. The Respondent testified that she experiences a monthly deficit, but presented no evidence to support that claim. From the record, it appears that the Respondent was in a fine financial position as a person in a difficult financial position would not be able to afford an \$800 car payment. Therefore, this factor weighs against an award of attorney fees.

d. The Effect of Attorney Fees on Each Party's Standard of Living

As to this factor, there was no evidence presented that the Respondent's standard of living would be impacted by requiring her to pay her own attorney fees. For the reasons stated above, it appears that the Respondent was in a fine financial position, and there was no evidence presented that she would suffer financial harm if she was required to pay her attorney fees. Therefore, this factor weighs against an award of attorney fees.

e. The Degree of Fault Either Party Making the Action Necessary

As to this factor, it is undisputed that an agreement was reached that would have made additional attorney fees unnecessary, but that the Respondent repudiated that agreement. The Petitioner incurred a significant amount of attorney fees by being forced to participate in two separate mediations and a lengthy final hearing through no fault of his own, but because of the Respondent repudiation of the agreement. It is disingenuous for the Respondent to claim that the Petitioner caused her to incur attorney fees when in fact it was the Respondent's repudiation of the agreement that cause the Petitioner to incur additional attorney fees. Therefore, this factor weighs against an award of attorney fees.

f. The Reasonableness of the Attorney Fees Request

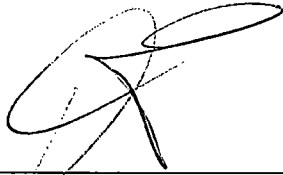
As to this factor, the request for attorney fees was unreasonable. The Respondent was in a fine financial position and was able to pay her own attorney fees. Additionally, the Respondent would not have obtained the \$6,440 in attorney fees if she had not repudiated that agreement. Despite a finding to the contrary, the Petitioner was cooperative during the proceedings, and did not obstruct the Respondent. As stated by the Petitioner during the final hearing, he provided Respondent's previous counsel with all information requested by the Respondent. The Petitioner provided the Respondent releases of information so that the Respondent could obtain any documentation she desired regarding the Petitioner's finances, included the release discussed above regarding the Petitioner's IRA.

Finally, the Petitioner testified that he is on social security disability and has a limited income. It is unreasonable, because of the financial position of the Respondent, and the lack of income of the Petitioner, that attorney fees should have been awarded in this action.

Therefore, the Family Court erred in awarding attorney fees to the Respondent.

CONCLUSION

For the reasons stated herein, the Petitioner respectfully requests that this Honorable Court reverse and/or remand this action.



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v. No.) 20-0690

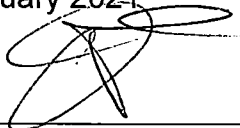
BARBARA JO WEAVER,
Petitioner below, Respondent.

CERTIFICATE OF SERVICE OF

I certify I have duly served the foregoing *Petitioner's Brief* upon the Respondent by sending a true copy of the same by facsimile transmission and U.S. mail as indicated:

Shannon Thomas
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Dated 19 February 2021



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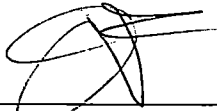
BARBARA JO WEAVER,
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CERTIFICATE OF SERVICE OF

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by sending a true copy of the same by facsimile transmission and U.S. mail as indicated:

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