THE WEST VIRGINIA STATE BAR FAMILY LAW COMMITTEE
FUNDIMENTALS OF FAMILY LAW
FEBRUARY 9, 2017

AGENDA

- Alimony and Equitable Distribution - Part 1
  Speaker: Lyne Ranson

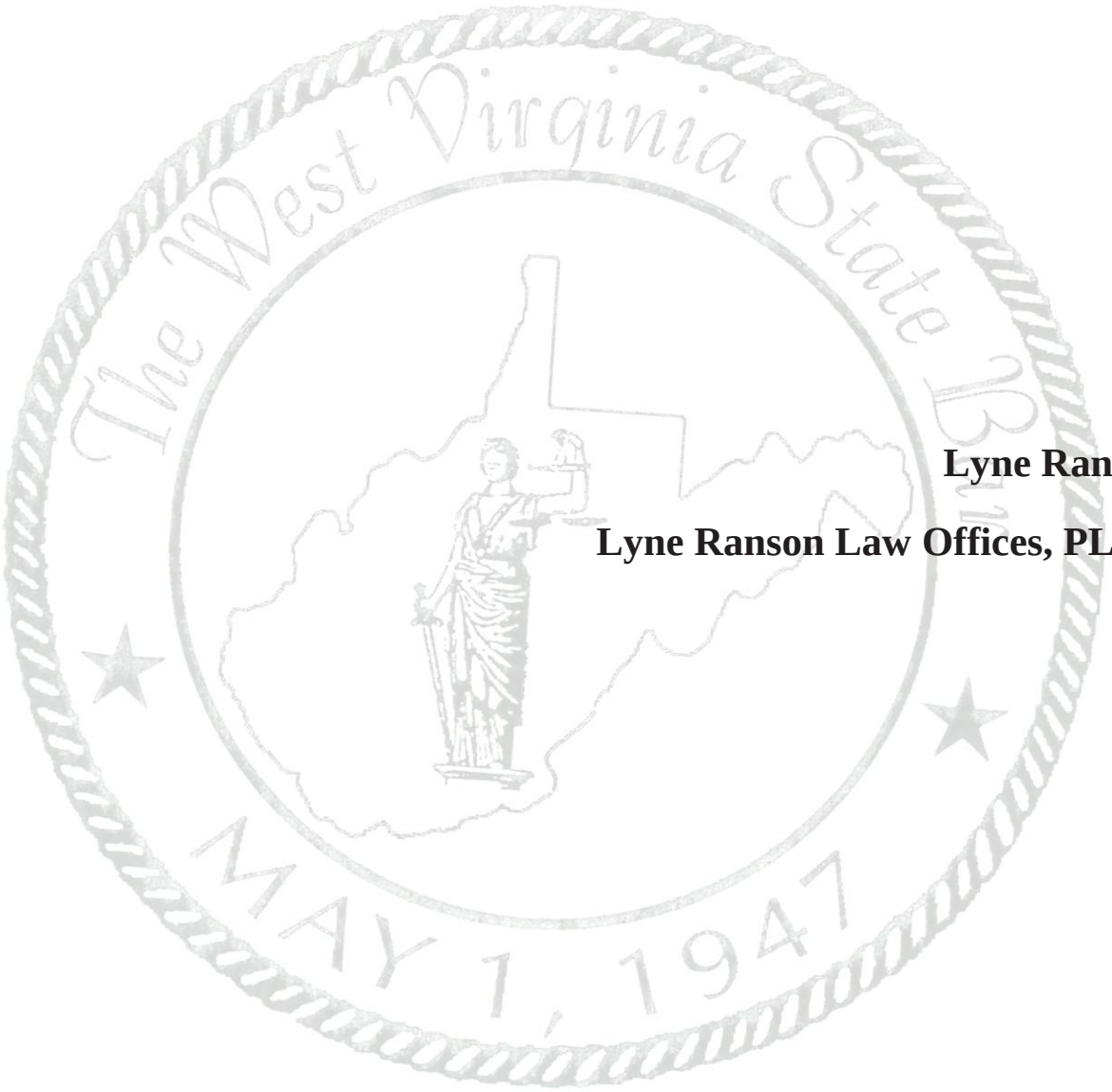
- Equitable Distribution - Part 2
  Speaker: Andy Nason

- Children's Issues
  Speaker: Brittany Ranson Stonestreet

- Military issues in a divorce
  Speaker: Major Scott Applegate

- Handling Domestic Violence
  Speaker: Maureen Conley

Alimony and Equitable Distribution - Part 1



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Alimony: The Basics

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What is alimony?

§48-1-242. Spousal support defined.
"Spousal support" means an allowance that a person may be ordered to pay for the support and maintenance of a spouse or a former spouse, while they are **living separate and apart** or after an order for divorce, annulment or separate maintenance.

§48-8-101(a) general provisions regarding spousal support.

* **financial obligation from one spouse (or former spouse) to pay support to another spouse *pursuant to:***
  * **Court order**
  * **Premarital agreement**
  * **Separation agreement**

* **IRS § 26 U.S.C. 71 - has to be in writing to be tax deductible**

Classes of Alimony §48-8-101(b)

* 1. **Temporary** – until further order (band aid)
* **2. Rehabilitative** – funds to allow spouse to be self supporting (education, training, on her feet)
* 3. **Alimony in Gross –** definite sum
* **4. Permanent** - until remarriage or death
    * ---------
* 5. **Reimbursement** – to pay back spouse for her financial contribution to his career.

Temporary Support

* **§48-5-510(a) Financial considerations:**
  * Financial **needs** of parties,
  * Present **income** of party from any source,
  * **Earning abilities**
  * Legal **obligations** of support
* **(b)** payments made from party's income **not separate estate** and **not disproportionate** to ability to pay

Temporary support

* Payment either in lump sum, installments or both
* Tax deductible to payor and **included** in payee's income;

* **Temporary Order Not appealable** (Rule 15 of RPPFC)
* However, see Arneault 2004 W.Va. Lexis 167 (petition for writ of mandamus)

Temporary Payments to Third Parties §48-5-501 et. al.

* §48-5-504 pay attorney's fees and costs
* §48-5-505 pay medical insurance
* §48-5-506 occupy Home –pay mortgage, insurance, rent, Utilities
* §48-5-507 use vehicle- auto loan, insurance

§48-5-506(c) Payments classified later

* **§48-5-506(c)** If court **does not set forth in order** that this payment is to be child support **then considered alimony.**

* The court **can reserve decision to classify** may consider the extent to which such payments made to third parties have affected the rights of the parties in marital property
* **may treat such payments as partial distribution of marital debt**, although such payment was identified as spousal support, child support or neither.

Rehabilitative alimony §48-8-105(a)

* The court may award rehabilitative spousal support for a **limited period of time** to allow the recipient spouse, through reasonable **efforts**, to **become gainfully employed.**
* When awarding rehabilitative spousal support, the court shall make ***specific findings of fact*** to explain the basis for the award.
*
* An award of rehabilitative spousal support is appropriate when the dependent spouse **evidences** a potential for **self-support** that could be developed through **rehabilitation, training** or **academic study.**

Burden of proof - Rehabilitative alimony

* **Costs $$ of degree**
  * Tuition, lab fees,
  * Books,
  * Parking, gasoline
  * Transcript how many more hours/years (cost per hour)
  * Daycare while attending classes
  * Or…
  * Reinstate license (nursing, teaching)
  * Take Boards, etc.
  * Start Business

Factors to consider in award of Rehabilitative Support

* *Stewart v. Stewart*, 550 S.E. 2d 86 (W.Va. 2001)
* 1. potential work skills of spouse
* 2. availability of work of spouse
* 3. age and health of spouse

* *Gooch v. Gooch* 575 S.E.2d 628 (W.Va. 2002) consider length of marriage, age, health, and skills of dependent spouse;

Rehabilitative vs. Permanent

* A court should not relieve a spouse from the duty to maintain the dependent spouse and children by providing only rehabilitative alimony simply because the dependent spouse may have the skills necessary to facilitate a return to the job market.
* Instead, the court should consider the following factors before opting for rehabilitative alimony over permanent alimony: (1) the dependent **spouse's position in the home** at the time of the divorce; (2) the **age** of the children; (3) the parties' **income at the time** of the divorce and their **potential income** in the future; and (4) the **benefit**, where economics permit, of the dependent spouse remaining in the **home to care for the children**.
* *Mayhew v. Mayhew* 1996 W.Va. Lexis 83 (1996)

Modify Rehabilitative Support §48-8-105(b)

* If *substantial change in the circumstances* warrants: terminating, extending, modifying the award or replacing with permanent spousal support.
* *reassessment* of the dependent spouse's potential **work skills** and the **availability of a relevant job market**, the dependent spouse's **age, health and skills**, the dependent spouse's **ability or inability to meet the terms of the rehabilitative plan** and other relevant factors.
* Spouse must prove made reasonable efforts to be gainfully employed. *Ward v. Ward* 2014 W.Va. Lexis 128

Alimony in Gross

* **§48-1-243. Spousal support in gross defined.** "Spousal support in gross" means spousal support payable either in a lump sum, or in periodic payments of a **definite amount** over a ***specific period of time***.
* *For ex:* $500 per month for 40 months = $20,000
* *For ex:* $10,000 on Jan. 1, 2017 and for next 5 years = $50,000

* A spousal support award is "spousal support in gross" only if the award grants spousal support in such terms that a **determination can be made of the total amount** to be paid as well as the time such payments will cease.

Why Spousal Support in Gross?

* *Estate of Weller*, 374 S.E. 2d 712 (W.Va. 1988)

* The right to receive spousal "support in gross" vests on the date it is ordered and in the event of the payor's death, that amount becomes **charged against the payor's estate.**

Spousal support beyond death §48-6-202

* Some Support **Continues Beyond** death of payor:

* 1. rehabilitative spousal support;
* 2. spousal support in gross;

* 3. Permanent spousal support- **ceases** upon death of payor or payee;

* 4. Rehabilitative – **ceases** upon death of **payee;**

* **See §48-6-203 Continues Beyond remarriage**

Alimony Factors Considered §48-6-301

* 1. prohibition (pre or post nuptial agreement or statute)

* 2. length of marriage (5 years vs. 25)
* 3. financial ability to pay support
* 4. financial need of payee
* 5. ability to work(health, age, education, work record)
* 6. lifestyle (*"I'm used to the good life"*)
* 7. foregone opportunities (*"look what I gave up"*)
* 8. contribution of spouse ("you owe me…") (Reimbursement)
* 9. fault or "catch all"

* 10… and then, there's always modification!

3. Financial *ability* to pay support

* - work from net
* - include all income or benefits available
* - Challenge expenses (renting from sister, round numbers = red flag)

Need Documents – show Income:

* Pay stubs,
* Commission checks, reimbursement of expenses
* Deferred compensation or refund/overpayment tax
* Over claiming dependents to reduce net
* Loan applications, bonding companies,
* Business: collectibles down

3. Exhibits to show *ability to pay*

* Exh. 1 - Historical annual income
  - Comparison of H and W's income
  - Social Security earnings statement

* Exh. 2 – Income Capacity Charts

4. Financial "*Need*"

* Include and deduct all other sources of income: rents, investment income, dividends or royalties will receive
* Child support included to reduce need
* Consider other supplemental income: How soon until social security received or 59 ½ ?

4. Documents - financial "*need*"

* Quicken/ Quickbooks review
* Credit card/debit statement – YTD summaries
* Checking and other financial account statements
* Utility averages exact from company
* Travel: Frequent flyer miles to show travel and costs and passport stamps,
* Credit reports – show debts to pay (clueless spouse)
* Personal property and R/E tax amounts- public record
* Mortgage balloons or ARM (amts. Change)
* Beware of double dip in cc payment and categories

4. Exhibits –Financial "*Need*"

* Exh. 2 – Income Capacity Chart
* Exh. 2A – partial year of net income

* Exh. 3 – Budget – Several properties
  * Charts
* Exh 3A –specific vehicle expenses (see Cars.com)

Forgotten Categories of Need

* **Children** - (activities, school tuition, fees, uniforms, tutoring, sports, travel teams, equipment and uniforms, birthday parties for friends)

* **Hobbies** - gym, cooking, golf, tennis, concerts
* **Food** - work & child's school lunch,, parties
* **Vehicle** - registration, tires, maintenance, fees
* **Medical** - prescriptions, deductibles, co-pays

* **TAXES**- gross up *need* to cover income taxes

5. Earning Capacity

* **Ability to work after the divorce**
* Can the requesting spouse increase her income?
* Limited by health, education or experience
* Vocational/Rehabilitative expert helpful

Documents:

Health:- medical records, letters from doctors, prognosis
- pharmacy print outs (costs and frequency)
- EOBs for non-covered costs

Education: transcripts, requirements for degree and salary range

Work: Social Security earnings and Expert; job applications and
- rejection letters

5. Exhibits -Earning Capacity

* Exh. 7 Salary.com and Pay-stubs.com
* Exh. 8 – Vocational expert report
* Exh. 8A – Rehabilitative plan summary
* Exh. 8B- Cost /Benefit analysis
* Exh. 9 - Social Security stmt. Earnings
* Exh. 10 – Medical Records
* Exh. 11 – Medical History chart of Wife's surgeries, etc.

6. Lifestyle- Std. of living

* ***Financial need v. lifestyle "balancing" test –***

  * *Wide disagreement which controls*
  * *Over extended on credit cards is not maintainable*
  * *Standard of living at end of marriage*
  * *Spa appointment calendar, $25k birthday party,*

Exh. 12 - pictures of past trips and lavish holidays
Exh. 13 - list of trips taken, dates and estimated cost $
Exh. 14 - birthday or holiday gifts (cars/minks/jewelry)

7. Foregone Opportunities

* ***"look what I gave up for him"…***
* Relocating with spouse (military, med school, sales, management jobs)
* Stopped college or career to raise children or support her spouse;

* Spouse worked 14 hours a day or required travel;
* Stayed home to raise family by mutual agreement;

7. Exhibits Foregone Opportunities

* Exh. 15 - Homemaker services value
* Exh. 16- lost earnings determined forensic acct.
* Exh. 17- comparison chart re: retirement if worked
* Exh. 18– resignation letter (leaving to support H)
* Exh. 19– chart for all the moves (timeline)
* Exh. 20 - chart US Dept of Labor –what a similar person would have made if full time employment.

8. Contribution of Spouse

"where would you be without me?"

* **Reimbursement alimony** for contributing to spouse's successful career or training;
* Professional degree is not an asset to be divided .

* Exh. 21- Showing student loans **only paid tuition** costs and not living expenses- working spouse
* Exh 22- comparison of H and W working during this time

Tax Returns for those years

Reimbursement Spousal support §48-6-301(b)4 and 11

* Hoak v. Hoak 370 S.E. 2d 473 (W.Va. 1988), Lambert v. Lambert 376 S.E.2d 338 (W.Va. 1988) and Chamberlain v. Chamberlain 383 S.E. 2d 100 (W.Va. 1989)

* Purpose is "to repay or reimburse the supporting spouse for her **financial contributions** to the professional education of the other spouse" and
* "an adjustment aimed at **repaying** the supporting spouse for financial contributions that **enhanced the other spouse's income-earning ability**".

* "based on the **actual amount** of contributions"

Effect of Fault on Alimony §48-8-104

* Court "shall" consider and compare the fault or misconduct of parties and the effect this had on the deterioration of the marriage.

9. Catch-all Provision

"You have to pay somehow for your bad behavior"…

* 1. adultery – cell phone records, credit card and bank statements for trips, gifts

  Exh. 23 - phone records

* 2. physical abuse to spouse or children – photos, medical records, 911 calls, family and neighbors;

* 3. habitual drunkeness/drugs

  Exh. 24- credit card receipts for daily liquor and ATM withdrawals to buy drugs twice per day.

* 4. dissipation of assets (gambled, strip clubs)

  Exh. 25 – strip clubs/online dating chart

  Exh. 26 – gambling chart

Modification §48-8-105(b)

"substantial change in circumstances"

* Unemployment or reduction in **income**
* **Retirement** from employment
* **Illness or disability** after divorce
* **Actions** by former spouse (remarriage, defacto marriage, refuses to rehabilitate)
* **Rehabilitative:** *continued* if specific reason why plan was not reached, illness, job market down, caring for elderly parent or child, failed business plan.

Defacto Marriage
48-5-707

* **Reduction or termination of spousal support if:**
* Lived together
* Held out to be married
* Pooled assets, supported, performed valuable services for other or business;
* Jointly contributed to purchase of property
* Implicit agreement sharing support or property

* Attorney fees may be awarded if fail to prove - B/P on payor
* Rehabilitative alimony not affected 707(5)
* nor spousal support in gross 707(6)

* See Wachter v. Wachter 607 S.E. 2d 818 (2004) and Lucas v. Lucas 592 S.E. 2d 646 (2003)

Alimony

* *The last frontier….*

Equitable Distribution - Part 2

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ASSET AND LIABILITY DIVISION AND

PRE-MARITAL AGREEMENTS

A. DRAFTING AND INTERPRETING PREMARITAL AGREEMENTS TO YOUR CLIENT'S ADVANTAGE (WEST VIRGINIA)

1. W. Va. Code, §48-1-203 reads as follows:

"(b) 'Antenuptial agreement' or 'prenuptial agreement' means an agreement between a man and woman before marriage, but in contemplation and generally in consideration of marriage, whereby the property rights and interests of the prospective husband and wife, or both of them, are determined, or where property is secured to either or both of them, to their separate estate, or to their children or other persons. An antenuptial agreement may include provisions which define the respective property rights if the parties during the marriage, or in the event of the death of either or both of the parties, and may provide for the disposition of marital property upon an annulment of the marriage or a divorce or separation of the parties. A prenuptial agreement is void if at the time it is made either of the parties is a minor." (Same as old W.Va. Code § 48-2-1)

a. The statutory scheme is vague.

b. The significant cases are as follows:

1. Gant v. Gant, 174 W.Va. 740, 329 S.E.2d 106 (1985), holds that the only statutory authority to declare prenuptial agreements invalid are either if one of the parties is a minor or if the wife is pregnant. The burden of proving their invalidity is on the party attacking the agreement. The validity is dependent upon its valid procurement which requires the following:

a. Executed voluntarily;

b. Knowledge of its content;

c. Knowledge of its legal effect;

d. Under circumstances free of fraud, duress, or misrepresentation, or undue influence. See Warner v. Warner, 394 S.E.2d 74 (W.Va. 1990) and Harper v. Rogers, 182 W.Va. 311, 387 S.E.2d 541 (1989);

e. The court may also consider its fairness; i.e., if it is unconscionable under contract law, it is unfair.

2. Gant also holds that advice of counsel before entering into an agreement is not a pre-requisite to an agreement being enforceable.

   a. Note: A lawyer may be wary in attempting to advise both the husband and wife on a premarital agreement. See Walden v. Hoke, 429 S.E.2d 504 (W.Va. 1993) wherein the Supreme Court ruled that one lawyer representing both sides in a divorce created an image or impropriety.

3. Pajak v. Pajak, 182 W.Va. 28, 385 S.E.2d 384 (1989), which held that a prenuptial agreement does not have to be accompanied by a detailed written financial statement such as required by a bank for a loan. She did have a general idea that her husband-to-be was a successful businessman with a number of businesses and holdings. The Court perceived no specter of fraud or secretive behavior nor any attempt to mislead his bride-to-be prior to entering into the agreement. Further, the evidence reflected she signed the agreement without reading the same. This case was a contrast between a widow and her step-children (late husband's children).

   a. This case distinguishes Gieseler v. Remke, 117 W.Va. 430, 185 S.E. 847 (1936) which invalidated a pre-nuptial agreement wherein the court found

an egregious attempt to withhold financial information and to cause her to misunderstand the financial situation. Note this case arose out of a divorce proceeding.

4. Bridgeman v. Bridgeman, 182 W.Va. 677, 391 S.E.2d 367 (1990) held that a formal pre-nuptial agreement may survive the marriage if entered into with full disclosure and full deliberation and if substantially fair. However this case held that promises in love letters could not be bootstrapped to be construed the same as a prenuptial agreement. The Court noted (see 391 S.E.2d 370), "Contracts between fiancées conditioning in any way their impending marriage are generally disfavored in this state as a matter of public policy." Therefore, a formal agreement written, not oral, appears to be necessary.

5. See also, Kaminsky v. Kaminsky, 364 S.E.2d 799 (W.Va. 1987) which held that a separation agreement executed in anticipation of a divorce may be enforceable in part after a reconciliation as to those portions of the agreement where the parties actually transferred ownership of property pursuant to that agreement.

6. Practice Pointers.

   a. Each party should have separate counsel or at least an opportunity for separate counsel.

   b. The agreement should identify whose counsel prepared the agreement.

   c. The agreement should indicate the importance and significance of the agreement.

d. The agreement should indicate the age of each party and that the woman believes she is not in a "family way".

e. The agreement should reference the financial disclosures which have been made. A good idea is to attach some kind of a financial disclosure initialed by the parties.

f. Any considerations given to children of prior marriages or obligations should be mentioned.

g. Any physical or mental disabilities should be disclosed.

h. Videotape the execution ceremony (?).

i. See the statute of frauds - West Virginia Code, § 55-1-1, which requires agreements to be in writing, signed by the party against whom enforcement is sought.

    1. No consideration need be set forth under this statute although generally the consideration is the agreement to marry.

    2. Necessary if contract is to be performed outside of a one year period.

    3. See also W.Va. Code, § 48-29-30, which requires contracts between husband and wife to be in writing and to be signed by the party against whom enforcement is sought.

EQUITABLE DISTRIBUTION

A. EVOLUTION OF THE DOCTRINE OF EQUITABLE DISTRIBUTION

Prior to the enactment of West Virginia Code 48-2-32 by the Legislature in 1984, West Virginia was considered a title state when it came to division of marital property. That meant that in a divorce property that was titled in a husband's name or in wife's name would be granted to that party. In old cases such as Reynolds v. Reynolds, 68 W.Va. 15, 69 S.E. 381 (West Virginia 1912), Burdette v. Burdette, 109 W.Va. 95, 153 S.E. 150, stated that the court could not transfer title of husband's property to wife for payment of her alimony.

That doctrine began to be chipped away. For example in Travis v. Travis, 172 W.Va. 372, 305 S.E.2d 329 (1983), the Supreme Court ruled that a trial court may award the exclusive use of a jointly owned home to a spouse incident to obtaining custody of the children, or in appropriate cases as incident to an alimony award, however two years later the court ruled in McKinney v. McKinney, 175 W.Va. 643, 337 S.E. 2nd 9 (1985) that the right to occupy the marital home incident to a custody award ended when the custodial parent no longer was caring for minor children. In 1978 the Supreme Court ruled in McKinney v. Kingdon, 162 W.Va. 319, 251 S.E. 2nd 216 (1978), that the court had the jurisdiction and power to award possession and use of a vehicle to the wife for

the purpose of making effectual that part of the final order granting her custody of the children and to give her proper transportation to take care of the children.

One big change in state case law occurred in a divorce case out of Huntington involving an attorney. In that case the court created the doctrine of an equitable trust in determining that the husband held title to the property in equitable trust for the marriage and utilizing that concept divided up those assets on a more equitable basis. A second case which moved our distribution scheme ahead was Patterson v. Patterson, 167 W.Va. 277 S.E.2d 709 (1981) and LaRue v. LaRue, 172 W.Va. 158, 304 S.E.2d 312 (1983) where equitable distribution was based on economic contribution, including but not limited to, valuing homemaker services. Getting our state law more in line with that of the rest of the nation, the Legislature in 1984 passed an equitable distribution statute. That statute created the concepts of marital property and the presumption that assets earned or obtained during the marriage were presumptively to be divided equally at the time of the divorce.

WEST VIRGINIA CODE

48-5-504	Attorney Fees And Court Costs	(Temp.)
48-5-611	Attorney Fees And Court Costs	(Final)
48-5-505	Cost Of Health Care And Hospitalization	(Temp.)
48-5-606	Cost Of Health Care And Hospitalization	(Final)
48-5-506	Use And Occupancy Of The Marital Home	(Temp.)
48-5-604	Use And Occupancy Of The Marital Home	(Final)
48-5-507	Use And Possession Of Motor Vehicles	(Temp.)
48-5-605	Use And Possession of Motor Vehicles	(Final)
48-5-508	Preservation Of Property	
48-5-511	Disclosure Of Assets	
48-5-607	Transfer Of Utility Accounts	
48-5-609	Order The Restoration To The Parties Of Non-Marital Property	
48-5-612	Order Delivery Of Separate Property	
48-5-610	Equitable Distribution	
48-5-706	Revision Of Order Concerning Distribution Of Marital Property	
48-6-101	Property Settlement/Separation Agreement Defined	

§ 48-5-501. Relief that may be included in temporary order of divorce

At the time of the filing of the complaint or at any time after the commencement of an action for divorce under the provisions of this article and upon motion for temporary relief, notice of hearing and hearing, the court may order all or any portion of the following temporary relief described in this part 5, to govern the marital rights and obligations of the parties during the pendency of the action.

§ 48-5-502. Temporary spousal support

The court may require either party to pay temporary spousal support in the form of periodic installments, or a lump sum, or both, for the maintenance of the other party.

48-5-503. Temporary parenting order; child support

(a) The court shall enter a temporary parenting order in accordance with the provisions of sections 9-203 and 9-204 of this chapter that incorporates a temporary parenting plan.

(b) When the action involves a minor child or children, the court shall require either party to pay temporary child support in the form of periodic installments for the maintenance of the minor children of the parties.

(c) When the action involves a minor child or children, the court shall provide for medical support for any minor children.

§ 48-5-504. Attorney's fees and court costs

(a) The court may compel either party to pay attorney's fees and court costs reasonably necessary to enable the other party to prosecute or defend the action. The question of whether or not a party is entitled to temporary spousal support is not decisive of that party's right to a reasonable allowance of attorney's fees and court costs.

(b) An order for temporary relief awarding attorney fees and court costs may be modified at any time during the pendency of the action, as the exigencies of the case or equity and justice may require, including, but not limited to, a modification which would require full or partial repayment of fees and costs by a party to the action to whom or on whose behalf payment of fees and costs was previously ordered. If an appeal is taken or an intention to appeal is stated, the court may further order either party to pay attorney fees and costs on appeal.

(c) If it appears to the court that a party has incurred attorney fees and costs unnecessarily because the opposing party has asserted unfounded claims or defenses for vexatious, wanton or oppressive purposes, thereby delaying or diverting attention from valid claims or defenses asserted in good faith, the court may order the offending party, or his or her attorney, or both, to pay reasonable attorney fees and costs to the other party.

§ 48-5-505. Costs of health care and hospitalization

As an incident to requiring the payment of temporary spousal support, the court may order either party to continue in

effect existing policies of insurance covering the costs of health care and hospitalization of the other party. If there is no such existing policy or policies, the court may order that such health care insurance coverage be paid for by a party if the court determines that such health care coverage is available to that party at a reasonable cost. Payments made to an insurer pursuant to this subdivision, either directly or by a deduction from wages, may be deemed to be temporary spousal support.

§ 48-5-506. Use and occupancy of the marital home

(a) The court may grant the exclusive use and occupancy of the marital home to one of the parties during the pendency of the action, together with all or a portion of the household goods, furniture and furnishings, reasonably necessary for such use and occupancy.

(b) The court may require payments to third parties in the form of home loan installments, land contract payments, rent, payments for utility services, property taxes and insurance coverage. If these third party payments are ordered, the court may specify whether such payments or portions of payments are temporary spousal support, temporary child support, a partial distribution of marital property or an allocation of marital debt.

(c) If the court does not set forth in the temporary order that all or a portion of payments made to third parties pursuant to this section are to be deemed temporary child support, then all the payments made pursuant to this section are deemed to be temporary spousal support. The court may order third party payments to be made without denominating them as either temporary spousal support or temporary child support, reserving such decision until the court determines the interests of the parties in marital property and equitably divides the same. At the time the court determines the interests of the parties in marital property and equitably divides the same, the court may consider the extent to which payments made to third parties under the provisions of this subdivision have affected the rights of the parties in marital property and may treat these payments as a partial distribution of marital property notwithstanding the fact that these payments were denominated temporary spousal support or temporary child support or not so denominated under the provisions of this section.

(d) If the payments are not designated in an order and the parties have waived any right to receive spousal support, the court may designate the payments upon motion by any party.

(e) Nothing contained in this section shall abrogate an existing contract between either of the parties and a third party, or affect the rights and liabilities of either party or a third party under the terms of a contract.

48-5-507. Use and possession of motor vehicles

(a) As an incident to requiring the payment of temporary alimony, the court may grant the exclusive use and possession of one or more motor vehicles to either of the parties during the pendency of the action.

(b) The court may require payments to third parties in the form of automobile loan installments or insurance coverage, and payments made to third parties pursuant to this section are deemed to be temporary spousal support, subject to any reservation provided for in subsection (c) of this section.

(c) The court may order that third party payments made pursuant to this section be made without denominating them as temporary spousal support, reserving that decision until the court determines the interests of the parties in marital

property and equitably divides the same. At the time the court determines the interests of the parties in marital property and equitably divides the same, the court may consider the extent to which payments made to third parties under the provisions of this section have affected the rights of the parties in marital property and may treat such payments as a partial distribution of marital property notwithstanding the fact that such payments have been denominated temporary spousal support or not so denominated under the provisions of this section.

(d) Nothing contained in this section will abrogate an existing contract between either of the parties and a third party or affect the rights and liabilities of either party or a third party under the terms of a contract.

48-5-508. Preservation of the properties of the parties

(a) If the pleadings include a specific request for specific property or raise issues concerning the equitable division of marital property, the court may enter an order that is reasonably necessary to preserve the estate of either or both of the parties.

(b) The court may impose a constructive trust, so that the property is forthcoming to meet any order that is made in the action, and may compel either party to give security to comply with the order, or may require the property in question to be delivered into the temporary custody of a third party.

(c) The court may order either or both of the parties to pay the costs and expenses of maintaining and preserving the property of the parties during the pendency of the action. At the time the court determines the interests of the parties in marital property and equitably divides the same, the court may consider the extent to which payments made for the maintenance and preservation of property under the provisions of this section have affected the rights of the parties in marital property and may treat such payments as a partial distribution of marital property. The court may release all or any part of such protected property for sale and substitute all or a portion of the proceeds of the sale for such property.

§ 48-5-509. Enjoining abuse, emergency protective order

(a) The court may enjoin the offending party from molesting or interfering with the other, or otherwise imposing any restraint on the personal liberty of the other, or interfering with the custodial or visitation rights of the other. This order may enjoin the offending party from:

(1) Entering the school, business or place of employment of the other for the purpose of molesting or harassing the other;

(2) Contacting the other, in person or by telephone, for the purpose of harassment or threats; or

(3) Harassing or verbally abusing the other in a public place.

(b) Any order entered by the court to protect a party from abuse may grant any other relief authorized by the provisions of article twenty-seven of this chapter, if the party seeking the relief has established the grounds for that relief as required by the provisions of said article.

(c) The court, in its discretion, may enter a protective order, as provided in article twenty-seven of this chapter, as part of the final relief granted in a divorce action, either as a part of an order for temporary relief or as part of a separate order. Notwithstanding the provisions of section five hundred five of said article, a protective order entered pursuant to the provisions of this subsection shall remain in effect until a final order is entered in the divorce, unless otherwise ordered by the judge.
" src="http://statcont.westlaw.com/images/arrow.gif" border=0§ **48-5-511. Disclosure of assets**

To facilitate the resolution of issues arising at a hearing for temporary relief, the court may, or upon the motion of either party shall, order the parties to comply with the disclosure requirements set forth in article 7 of this chapter prior to the hearing for temporary relief. The form for this disclosure shall substantially comply with the form promulgated by the supreme court of appeals, pursuant to said section. If either party fails to timely file a complete disclosure as required by this section or as ordered by the court, the court may accept the statement of the other party as accurate.

48-5-510. Consideration of financial factors in ordering temporary relief

(a) In ordering temporary relief under the provisions of this part 5, the court shall consider the financial needs of the parties, the present income of each party from any source, their income-earning abilities and the respective legal obligations of each party to support himself or herself and to support any other persons.

(b) Except in extraordinary cases supported by specific findings set forth in the order granting relief, payments of temporary spousal support and temporary child support are to be made from a party's income and not from the corpus of a party's separate estate, and an award of such relief shall not be disproportionate to a party's ability to pay as disclosed by the evidence before the court: Provided, That child support shall be established in accordance with the child support guidelines set forth in article 13 of this chapter.

§ 48-5-511. Disclosure of assets

To facilitate the resolution of issues arising at a hearing for temporary relief, the court may, or upon the motion of either party shall, order the parties to comply with the disclosure requirements set forth in article 7 of this chapter prior to the hearing for temporary relief. The form for this disclosure shall substantially comply with the form promulgated by the supreme court of appeals, pursuant to said section. If either party fails to timely file a complete disclosure as required by this section or as ordered by the court, the court may accept the statement of the other party as accurate.

48-5-512. Ex parte orders granting temporary relief

An ex parte order granting all or part of the relief provided for in this part 5 may be granted without written or oral notice to the adverse party if:

(1) It appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or such party's attorney can be heard in opposition. The potential injury, loss or damage may be anticipated when the following conditions exist: Provided, That the following list of conditions is not exclusive:

(A) There is a real and present threat of physical injury to the applicant at the hands or direction of the adverse party;

(B) The adverse party is preparing to quit the state with a minor child or children of the parties, thus depriving the court of jurisdiction in the matter of child custody;

(C) The adverse party is preparing to remove property from the state or is preparing to transfer, convey, alienate, encumber or otherwise deal with property which could otherwise be subject to the jurisdiction of the court and subject to judicial order under the provisions of this section or part 5-601, et seq.; and

(2) The moving party or his or her attorney certifies in writing any effort that has been made to give the notice and the reasons supporting his or her claim that notice should not be required.

5-513. Granting of ex parte relief

(a) Every ex parte order granted without notice must:

(1) Be endorsed with the date and hour of issuance;

(2) Be filed forthwith in the circuit clerk's office and entered of record; and

(3) Set forth the finding of the court that unless the order is granted without notice there is probable cause to believe that existing conditions will result in immediate and irreparable injury, loss or damage to the moving party before the adverse party or his or her attorney can be heard in opposition.

(b) The order granting ex parte relief must fix a time for a hearing for temporary relief to be held within a reasonable time, not to exceed twenty days, unless before the time fixed for hearing, the hearing is continued for good cause shown or with the consent of the party against whom the ex parte order is directed. The reasons for the continuance must be entered of record. Within the time limits described herein, when an ex parte order is made, a motion for temporary relief must be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. If the party who obtained the ex parte order fails to proceed with a motion for temporary relief, the court shall set aside the ex parte order.

(c) At any time after ex parte relief is granted, and on two days' notice to the party who obtained the relief or on such shorter notice as the court may direct, the adverse party may appear and move the court to set aside or modify the ex parte order on the grounds that the effects of the order are onerous or otherwise improper. In that event, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Temporary order not subject to appeal or review

An order granting temporary relief may not be the subject of an appeal or a petition for review.

West Virginia Code 48-7-101 requires the court in every divorce case to divide marital property equally except as otherwise provided in Chapter 7 of the Code.

West Virginia Code 48-7-103 presumes an equal division which allows for the alteration of the presumption of an equal division. However the fault of one party or the other in causing the divorce is not to be considered in making a distribution of property. An unequal distribution may be considered by the court based on the following factors:

> The extent to which each party has contributed to the acquisition, preservation, maintenance or increase in value by monetary contributions including but not limited to employment, income, and earnings contributed to the marriage and funds contributed to the marriage out of separate property.
>
> The court may also consider non-monetary contributions, including but not limited to homemaker services, child care services, labor performed without compensation, or labor performed at less than adequate compensation in a family business, labor performed in the maintenance or improvement of tangible marital property and labor performed in the management or investment of assets.
>
> The court may also consider the extent to which a party expended efforts which limited or decreased such party's income earning ability, including but not limited to contributions to

education and training of the other party and foregoing employment and the extent to which a party may have dissipated or depreciated the value of marital property.

West Virginia Code 48-7-104 requires the court to determine the net value of all marital property of the parties at the date of the separation or as of such later date as determined by the court to be more equitable. Net value obviously means the value of the assets minus the value of the liability.

Signorelli v. Signorelli, 189 W.Va. 710, 434 S.E.2d 382 (1993) which again reiterates that equitable distribution is a three step process as follows: first classify the parties' assets as marital or non-marital, second value the marital assets, and then third divide the marital assets between the parties in accordance with the purposes and needs of the parties. This last step may require a determination as to which party retains business property.

The burden of proof or the burden of persuasion with respect to the characterization of property as separate property is on the party claiming the property is separate property. See Mayhew v. Mayhew, 197 W.Va. 290, 475 S.E.2d 382 (1996). Spouses are entitled to share equally in the appreciation in the value of a business during the marriage arising from the investment of marital property or the work effort of either party in that family business. The court went on to write that contributions of time and effort to the married life within the home and contributions

and effort at the workplace are valued equally, regardless of whether the earnings of the parties have been equal. In other words. The court has recognized that in a marriage people make choices as to how they will divide labor, whether one party is to go out into the workplace and earn a paycheck or increase the value of assets, while the other party stays at home and concentrates their efforts therein.

The court will not strictly limit marital property to property purchased during the marriage if property was purchased in contemplation of the marriage. See Hinderman v. Hinderman, 194 W.Va. 256, 467 S.E.2d 71 (1995) where a husband and wife shopped for a marital home prior to the marriage, purchased it prior to the marriage, and placed it in the husband's name. The court determined that the home was marital property.

Note also that when pre-marital property is put into the joint names of the parties there is a presumption of a gift and the party seeking to rebut that presumption has the burden of proof. See Storrs v. Storrs, 463 S.E.2d 853 (W.Va. 1995), and Loudermilk v. Loudermilk, 183 W.Va. 616, 397 S.E.2d 905 (1990) requiring the party to claim that marital property received as an irrevocable gift has the burden of proof to so prove. See also Whiting v,. Whiting, 183 W.Va. 451, 396 S.E.2d 413 (1990), where during the course of the marriage one spouse transfers title to his or her separate property into the joint names of both spouses. A

presumption that the transferring spouse intended to make a gift to the marital estate and the party seeking to rebut that presumption has the burden of proof.

West Virginia Code 48-7-105 allows the court to order the transfer of legal title to property for equitable distribution. That statute states a preference to effecting equitable distribution through a periodic or lump sum payment except as to motor vehicles, household goods, and former marital domiciles.

For property acquired by gift or inheritance and for business ownership interests the court shall give preference to the retention of the ownership interest in such property and the party in whose name the property is titled or the person running the business. The statute goes on to state that the court shall give preference to the party having the closer involvement, larger ownership interest, or a greater dependency on the business entity for income, however the court can sell property and there is nothing in the statute to prohibit the sale of business property. See also Summers v. Summers, 195 W.Va. 224, 465 S.E.2d 224 (1995).

Pensions are marital property. When a court is required to divide vested pension rights that have not yet matured, the court should be guided in the selection of a method of division by the desirability of disentangling parties from one another as quickly and cleanly as possible. Consequently, the court should look to the following methods of dividing pension rights in such descending

order as preference unless particular facts and circumstances dictate otherwise.

1. A lump sum payment through a cash settlement or an off-set from other available marital assets.

2. Payment over time of the present value of the pension rights at the time of the divorce to the non-working spouse; or

3. The Court Order requiring that the non-working spouse share in the benefit on a proportional basis when and if they mature. See Cross v. Cross, 178 W.Va. 563, 363 S.E.2d 449 (1987), and Raley v. Raley, 181 W.Va. 254, 382 S.E.2d 91 (1989).

Note: For Purposes of a military pension the parties have to be married ten years in order for the non-military spouse to have a vested right in the pension. Note also that it is not unusual for an employer to have more than one tax deferred benefit, whether it is a defined benefit plan, meaning that the retirement is a set amount of money paid monthly based upon a formula which takes into consideration the length of service and salary or whether it is a defined contribution plan such as a 401(k) where the employer and/or employee put money into a retirement fund that hopefully grows over time and which is available to the employee upon their reaching age 59 1/2, retiring, or such earlier point

in time based on the plan. In addition, employers also have stock option plans and savings plans which the employer and employee may contribute to and which may grow tax deferred.

Equitable distribution claim on military retirement pensions may be distributed utilizing the coverture factor to determine the non-military spouse's share. This factor is applied once the initial marital share is determined and consists of the ratio of the number of years the parties have been married while the service person has been in the military to the total number years of military service. See Smith v. Smith, 190 W.Va. 402, 438 S.E.2d 582 (1993).

Note that West Virginia Code 48-7-11 states that a court may not award spousal support or order equitable distribution of property between individuals who are not married to one another. In accordance with the provisions of this article query whether or not that overrules prior case law which has held that when two people live together the court may divide assets acquired jointly based on a ratio of their incomes.

Note W.Va. Code 48-7-106 requires the court to set out in writing the rationale for giving property to one spouse or the other.

In terms of the marital home there are several different factors that collide. One is the concept that the marital home is an asset and should be divided equally by the parties. Another is that alimony or child support also come into play. See W.Va. Code 48-5-506 and W.Va. Code 48-5-604 which provides that the marital home can be awarded to

one party in terms of the exclusive use and occupancy incident to rearing minor children and may also require payments to a third party. This can be accomplished without actually awarding title to one party or the other and defer distribution of that asset. The payment of the house payment may be designated as either child support or alimony. If there is an alimony award and they are not designated either way, then it is deemed to be alimony.

Link to PDF file

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2009 Term

No. 34703

CAROL A. HELFER,
Petitioner Below, Appellant

v.

ROBERT J. HELFER,
Respondent Below, Appellee

Appeal from the Circuit Court of Ohio County
The Honorable James P. Mazzone, Judge
Civil Action No. 02-D-209

AFFIRMED

Submitted: September 9, 2009
Filed: November 2, 2009

Kevin M. Pearl
William R. Keifer
Frankovitch, Anetakis, Colantonio & Simon
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Wheeling, West Virginia
Counsel for Appellee

The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*." Syllabus, *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004).

2. "'"Enterprise goodwill" is an asset of the business and may be attributed to a business by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business.' Syl. Pt. 2, *May v. May*, 214 W.Va. 394, 589 S.E.2d 536 (2003)." Syl. Pt. 2, *Helfer v. Helfer*, 221 W.Va. 625, 656 S.E.2d 70 (2007).

3. "'In determining whether goodwill should be valued for purposes of equitable distribution, courts must look to the precise nature of that goodwill. . . . [E] nterprise goodwill, which is wholly attributable to the business itself, is subject to equitable distribution.' Syl. Pt. 4, in pertinent part, *May v. May*, 214 W.Va. 394, 589 S.E.2d 536 (2003)." Syl. Pt. 3, *Helfer v. Helfer*, 221 W.Va. 625, 656 S.E.2d 70 (2007).

4. "A measure of discretion is accorded to a family law master in making value determinations after hearing expert testimony. However, the family law master is not free to reject competent expert testimony which has not been rebutted. This statement is analogous to the rule that '[w]hen the finding of a trial court in a case tried by it in lieu of a jury is against the preponderance of the evidence, is not supported by the evidence, or is plainly wrong, such finding will be reversed and set aside by this Court upon appellate review.' Syllabus Point 1, in part, *George v. Godby*, 174 W.Va. 313, 325 S.E.2d 102 (1984), *quoting* Syllabus Point 4, *Smith v. Godby*, 154 W.Va. 190, 174 S.E.2d 165 (1970)." Syl. Pt. 1, *Bettinger v. Bettinger*, 183 W.Va. 528, 396 S.E.2d 709 (1990).

5. "Upon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." Syl. Pt. 3, *State ex rel. Frazier & Oxley v. Cummings*, 214 W.Va. 802, 591 S.E.2d 728 (2003).

6. "A circuit court's interpretation of a mandate of this Court and whether the circuit court complied with such mandate are questions of law that are reviewed *de novo*." Syl. Pt. 4, *State ex rel. Frazier & Oxley v. Cummings*, 214 W.Va. 802, 591 S.E.2d 728 (2003).

Per curiam:

This is the second appeal by Appellant Carol A. Helfer ("Appellant wife" or "Appellant") concerning the valuation of the chiropractic practice of her former spouse, Appellee Robert J. Helfer ("Appellee husband" or "Appellee"), for purposes of equitable distribution in the parties' divorce. In a previous appeal, this Court concluded that the family court committed reversible error insofar as it failed to take into account the intangible asset of enterprise goodwill when it adopted the valuation calculation offered by Appellee husband's accounting expert. *Helfer v. Helfer*, 221 W.Va. 625, 656 S.E.2d 70 (2007) ("*Helfer I*"). Accordingly, we ordered, *inter alia*, that, "[o]n remand...the valuation of Appellee's business should include a reasonable

approximation of the business' enterprise goodwill, if any, based upon competent evidence and on a sound valuation method. If the lower court finds there to be no enterprise goodwill, it is essential that the court not only articulate that finding, but also explain its reasons for making such finding." 221 W.Va. at 628, 656 S.E.2d at 73.

The issue in the present appeal is whether, following remand, the family court properly attributed an enterprise goodwill value of zero to Appellee's chiropractic business.

Having carefully considered the briefs, record and arguments of counsel, this Court affirms the order of the circuit court.

I. Factual and Procedural Background

This divorce proceeding began in 2002 when Appellee husband filed for divorce from Appellant wife after almost twenty years of marriage. As in *Helfer I*, the singular issue in the present appeal involves the valuation of Appellee's chiropractic business for purposes of equitable distribution. The precise issue herein concerns the value, if any, of the enterprise goodwill as it relates to the business, a sole proprietorship. (See footnote 1)

During an evidentiary hearing conducted on April 1, 2005, in the Family Court of Ohio County, the parties' accounting experts testified in connection with their respective written reports on the valuation, or fair market value, of Appellee's chiropractic practice. Appellee's accounting expert, Louis J. Costanzo, III, used the straight capitalization of earnings method to value the business at $41,000.00. (See footnote 2) It is undisputed that Mr. Costanzo's valuation calculation of the business did not specifically address enterprise goodwill.

Appellant's accounting expert, Jack R. Felton, CPA, calculated the value of Appellee's business at $388,000.00, using the capitalization of excess earnings approach. (See footnote 3) During the April 1, 2005, hearing, Mr. Felton opined that there is some enterprise goodwill associated with Appellee's business. According to Mr. Felton, "[e]nterprise goodwill considers things such as location, facilities, convenience, advertising, telephone numbers, patient lists and other data base materials." Mr. Felton was of the opinion that Appellee's business has a "great location" that is in a "high traffic area" where there has been "a lot of development." However, Mr. Felton acknowledged that Appellee's business was experiencing a "downward trend" in terms of number of patients seen per day and yearly revenue. (See footnote 4) Mr. Felton noted that, according to his research, the use of chiropractic services
is generally increasing in this country; however, Appellee's practice is "trending downwards." Finally, Mr. Felton testified:

The last part that I'll say about the goodwill section is I guess you'd have to think in terms of, you know, what if [Appellee husband] didn't show up tomorrow, what would be the goodwill in his practice at that point, and that would be a good question to ask. And I think that at this point in time you would say hypothetically if the practice was left there on its own could [Appellant wife] take the practice over,

hire a chiropractor _ this is all hypothetical _ and basically pay that person a fee and collect the balance of the money that was available and earn what would be the goodwill at that point."

Although Mr. Felton opined that there was enterprise goodwill associated with Appellee's business, it is undisputed that he failed to assign a value to it.

Following the testimony of Mr. Felton, Appellee husband presented a rebuttal witness, accountant John S. Bodkin, Jr., the managing partner of a local certified public accounting firm. Mr. Bodkin testified that, upon reviewing the valuation reports of both Mr. Costanzo and Mr. Felton, he ascertained their similarities and differences and, in his professional judgment, indicated what he "thought were reasonable assumptions and reasonable approaches." First, Mr. Bodkin testified that the valuation method used by Mr. Felton, the capitalization of excess earnings method (a cost approach) was not an appropriate method in this case, particularly because the business is a sole proprietorship. Mr. Bodkin stated:

Mr. Costanzo [Appellee husband's expert] made an assumption that the cash and the accounts receivable which ultimately had been liquidated into cash would be distributed as cash and not as assets of the practice itself (See footnote 5) .

I think that this fact that this is a sole proprietorship and as the assets, cash, and ultimately the accounts receivable were divided as marital assets and not assets of the practice, the selection of the excess earnings method by Mr. Felton are inappropriate. There would basically be no assets at this point to substantially impact the value of the practice.

According to Mr. Bodkin,

The excess earnings method is a method of valuing businesses that was devised by the Internal Revenue Service back in 1968, and the IRS recommends it be used, but only if there's no better method available. That's what it says in ruling 68-679, only if there's no better basis available. The conceptual basis for the [excess] earnings method computes the company's equity based on the appraised value of tangible assets.

So Mr. Felton says that the majority of assets are intangibles in this method. But also to that you would add the tangible assets, but only if you have appraised values available.

Mr. Bodkin was critical of the fact that Mr. Felton did not use appraised values for the business' tangible assets, but instead, used assumed values:

If we're trying to figure out what the value of those assets is, we have to know what the appraised value is, and I think that the literature on how to use the excess earnings method clearly states that you need to have an appraised value. . . . I thought it was interesting, Mr. Felton said that his value of $53,000 for the assets was determined based on his understanding from [Appellant wife] of the condition of

the assets. (See footnote 6)

(Footnote added)

Mr. Bodkin emphasized that "without an appraisal this method [capitalization of excess earnings method] shouldn't be used." On the other hand, Mr. Bodkin opined that Mr. Costanzo followed IRS guidelines in calculating the depreciated values of the business' tangible assets. (See footnote 7)

Another difference in the two experts' valuation reports addressed by Mr. Bodkin involved reasonable compensation. Mr. Costanzo, Appellee husband's expert, reported that the business does not deduct as an expense compensation to Appellee because the business is a sole proprietorship. Thus, Appellee is taxed on all of the business' earnings, whether or not he takes a distribution. According to Mr. Costanzo's report, "the basis of normalizing compensation lies in the market value of the service (performed), not necessarily in the money distributed. In other words, what would a hypothetical willing buyer have to pay someone to perform the same services provided by [Appellee]." Based upon his analysis, Mr. Costanzo opined that a total compensation amount of $110,000 would be reasonable. (See footnote 8)

In contrast, Mr. Felton, Appellant wife's expert, reported that he "did not use the usual comparative compensation information found on salary.com" because Appellee's business was only open 30 hours per week. (See footnote 9) Rather, according to Mr. Felton, "the financial studies of small business has determined the average owner salary of a chiropractic practice to be 23% of total revenues. We used this percentage (23%) and multiplied by total practice revenues. This amount was subtracted." Thus, in calculating the value of the business, Mr. Felton testified that he used not the actual income of Appellee, as set forth on his tax returns, but a hypothetical number having "nothing to do with [Appellee's] income" for purposes of determining excess earnings. (See footnote 10)

As Mr. Bodkin explained, the impact of using a lower compensation value, as Mr. Felton did, is that it increases the earnings of the business; conversely, using a higher compensation value, as Mr. Costanzo did, decreases the earnings of the business.

Another difference between the reports of the parties' accounting experts was the amount of rental income for the use of the 2,200 square foot building where the chiropractic business is located. (See footnote 11) Mr. Costanzo determined fair market rental value to be
$18 per square foot. Mr. Felton, on the other hand, used $10 per square foot. Upon review of the two rental values, Mr. Bodkin stated:

The lower the rent the higher the earnings being capitalized, so the lower the rent the greater the value. I thought it was interesting that Mr. Felton in his discussion of enterprise goodwill talked about how valuable a location was and that people _ I personally, I think I would go to a doctor whether he was on that side of Chicken Neck Hill or he was downtown. I go to a doctor because of the doctor, not

because of location. But when Mr. Felton talked about enterprise goodwill he talked about how valuable the location was. I was surprised to hear him say it was only worth $10 a square foot. (See footnote 12)

As described above, Mr. Bodkin opined that the straight capitalization of earnings approach as used by Appellee's expert, Mr. Costanzo, was the appropriate method to value this chiropractic business. When asked by Appellant wife's counsel whether the "multiple of gross" method of valuation would also have been an appropriate method (See footnote 13), Mr. Bodkin replied,

And that could be one method that could be used, just like a CPA would. And I would say that in looking at my CPA practice and in discussing with my partners just when we're not doing anything else _ not that we're selling our practice, what would we sell it for or what would we buy someone else's practice for? There's a CPA firm in town that might have declining revenues, (See footnote 14) and what would we pay for theirs.

It used to be in our town that you could get one times revenue, that you could get maybe 1.1 and 1.2 times revenue. Never a 1.5, okay? But you can't get that any more. And the way that that method is used in our community, if it's used at all, because there aren't that many practices that are trading, but a way that that method is used is, okay, that's a goal and I'll pay you based on retention. *Because there is no enterprise goodwill.*

(Emphasis added)

Additionally, with regard to whether the fair market value of Appellee's chiropractic business has any value for enterprise goodwill, Mr. Bodkin was asked by Appellant wife's counsel, "You don't give any value to enterprise goodwill; is that correct?" Mr. Bodkin replied, "I really don't." (See footnote 15)

In a Final Order Regarding Equitable Distribution, entered May 3, 2005, the family court concluded that the value of the business was $41,000, in accordance with the valuation calculation of Appellee husband's expert, Mr. Costanzo. On June 2, 2006, Appellant wife filed a petition for appeal from the family court's order to the Circuit Court of Ohio County. In an Amended Order entered August 21, 2006, that court refused Appellant's petition. Appellant filed a petition for appeal to this Court, which we granted on the issue of whether it was error for the family court to adopt the valuation of Appellee's expert because it did not include the intangible asset of enterprise goodwill. (See footnote 16) In *Helfer I*, we relied on our prior opinion of *May v. May*, 214 W.Va. 394, 598 S.E.2d 536 (2003), and ordered that the family court's order be reversed "insofar as the adopted valuation failed to take into account enterprise goodwill as it relates to Appellee's chiropractic practice." 221 W.Va. at 628, 656 S.E.2d at 73. We further ordered that, "[o]n remand, and consistent with our decision in *May*, the valuation of Appellee's business should include a reasonable approximation of the business' enterprise goodwill, if any, based upon competent evidence and on a sound valuation method. If the lower court finds there to be no

enterprise goodwill, it is essential that the court not only articulate that finding, but also explain its reasons for making such finding." 221 W.Va. at 628-29, 656 S.E.2d at 73-74 (citing *May*, 214 W.Va. at 407, 589 S.E.2d at 549).

On November 20, 2007, following our decision in *Helfer I*, the circuit court entered an Order on Remand. On February 19, 2008, Appellee husband filed Petitioner's Motion/Request to Clarify Final Order Regarding Equitable Distribution Entered May 3, 2006, Based Upon Existing Competent Evidence Existing in the Record of these Proceedings. Also on that date, Appellant wife filed a response to Appellee's motion, opposing the request that the matter be decided upon the existing record and requesting, instead, that the issue of the value of enterprise goodwill as it relates to Appellee's chiropractic business be set for trial. (See footnote 17)

On March 31, 2008, the family court entered Order Upon Remand Supplementing and Clarifying the Final Order Regarding Equitable Distribution Entered on the 3rd Day of May, 2006. In that order, the family court indicated that, notwithstanding this Court's admonition in *Helfer I*, it, in fact, "recognize[d] the concept of enterprise goodwill, considered the same, and gave no value to it." The court acknowledged, however, that it "failed to specifically express a zero dollar ($0.00) value and explain the reasons for attributing no value to the enterprise goodwill of the chiropractic business." Furthermore, the court acknowledged the transcription error involving the testimony of Appellee's rebuttal witness, Mr. Bodkin, regarding whether he gave any value to enterprise goodwill in this case. As previously indicated, Mr. Bodkin responded "I really don't." However, the original transcript erroneously noted his response as "I broke it down." See n. 15, supra. In its March 31, 2008, order, the family court relied on this testimony by Mr. Bodkin, as corrected in the transcript, and concluded that Appellee husband's business has an enterprise goodwill value of zero. The court also relied on Mr. Bodkin's testimony in which he "rejected any concept of a multiplier theory 'because there is no enterprise goodwill.'"

Finally, the family court determined that it would not allow the parties to submit additional evidence on the enterprise goodwill issue:

> In determining the issue of enterprise goodwill, this Court is constrained (fortunately or unfortunately) by the record the parties make or fail to make. . . . this Court can make its decision solely upon the record before it. In the case at bar, the only evidence presented indicated that the petitioner's chiropractic business had a zero value related to enterprise goodwill.

Accordingly, the family court concluded that "[t]here exists no enterprise goodwill attributable to the petitioner's chiropractic business which is a distributable asset for equitable distribution purposes. The value of the enterprise goodwill of the petitioner's chiropractic business is zero dollars ($0.00)." Thereafter, by order entered June 26, 2008, the circuit court refused Appellant wife's petition for appeal from the family court's March 31, 2008, order. It is from this order that Appellant now appeals.

II. Standard of Review

Our standard of review of the circuit court's order is governed by the Syllabus of *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004):

> In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

III. Discussion

Appellant wife's argument that the family court erred in concluding Appellee's chiropractic business has an enterprise goodwill value of zero is essentially two-fold: First, Appellant argues that in relying on the testimony of Appellee's rebuttal witness, John Bodkin, the family court failed to use a sound valuation method to determine the enterprise goodwill value of Appellee's chiropractic business. Second, Appellant contends that *Helfer I* required the family court to conduct an additional evidentiary hearing on the enterprise goodwill issue and that it was error for the court to refuse to do so. We are not persuaded by Appellant's arguments and, as discussed below, conclude that the family court committed no error in finding that Appellee's business has an enterprise goodwill value of zero.

A.

This Court recognized, in *Helfer I*, that "enterprise goodwill" is an asset subject to equitable distribution in a divorce:

> "'"Enterprise goodwill" is an asset of the business and may be attributed to a business by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business.' Syl. Pt. 2, *May v. May*, 214 W.Va. 394, 589 S.E.2d 536 (2003).
>
> "'In determining whether goodwill should be valued for purposes of equitable distribution, courts must look to the precise nature of that goodwill. . . . [E]nterprise goodwill, which is wholly attributable to the business itself, is subject to equitable distribution.' Syl. Pt. 4, in pertinent part, *May v. May*, 214 W.Va. 394, 589 S.E.2d 536 (2003).

Syl. Pts. 2 and 3, 221 W.Va. at 628, 656 S.E.2d at 71.

As previously indicated, in *Helfer I*, the family court adopted the valuation of Appellee husband's accounting expert, which did not include any value (zero or otherwise) for enterprise goodwill. Accordingly, we reversed the family court's decision insofar as it failed to take into account enterprise goodwill, and remanded the matter with instructions that "the valuation of Appellee's business should include a reasonable approximation of the business' enterprise goodwill, if any, based upon competent evidence and on a sound valuation method." 221 W.Va. at 628, 656 S.E.2d at 73. We further instructed that should the lower court find "there to be no enterprise goodwill, it is essential that the court not only articulate that finding, but also explain its reasons for making such finding." 221 W.Va. at 628-29 656 S.E.2d at 73-74. It is Appellant wife's contention that rebuttal witness

John Bodkin did not provide a sound valuation method upon which he based his opinion that Appellee's business has no enterprise goodwill and that, as a result, it was error for the family court to rely on his opinion in assigning a zero value to the enterprise goodwill of the business. (See footnote 18)

Mr. Bodkin, a certified public accountant, testified that he reviewed the written valuation reports of both parties' experts and explained, in his professional judgment, why the straight capitalization of earnings method, as used by Appellee husband's expert, was the appropriate valuation method to be used in this case. Moreover, Mr. Bodkin also explained, in great detail, why the valuation method used by Appellant wife's expert _ the capitalization of excess earnings method _ was not appropriate. (See footnote 19)

In his report, Mr. Felton stated that, under the capitalization of excess earnings method, "[a] rate of return is determined first on the company's tangible assets. The excess earnings is then calculated by determining the difference between the company's net earnings and a fair return on its tangible assets. To compute the value of the intangible, the excess earnings are capitalized using a cap rate suitable for intangibles." See n. 3 *supra*. Mr. Felton's report made clear that the value of the company is determined by adding its intangible assets to its net tangible assets. However, as indicated above, Mr. Felton, Appellant's expert, failed to use appraised values for the business' furniture, fixtures and equipment, but instead used assumed values based upon Appellant wife's description of them as being in "good repair" or "good condition." According to Mr. Bodkin, without appraised values, Mr. Felton simply should not have valued the business using the capitalization of excess earnings method.

Mr. Bodkin also noted the differences in the experts' respective calculations of reasonable compensation and fair market rental value of the building where the business is located. With regard to the latter, Mr. Bodkin questioned the fact that Mr. Felton testified
that the business was located in a desirable location, yet valued the property at $10 per square foot, a value substantially less than the going rate.

Importantly, Mr. Bodkin testified that because the business is a sole proprietorship and the "assets, cash, and ultimately the accounts receivable were divided as marital assets and not assets of the practice, the selection of the excess earnings method by Mr. Felton are [sic] inappropriate. *There would basically be no assets at this point to substantially impact the value of the practice.*" (Emphasis added) Indeed, on this point, Appellee's expert, Mr. Costanzo, concurred, testifying that the capitalization of excess earnings method "is not appropriate for an evaluation of [Appellee's] practice because there are not any excess earnings to be valued."

Ultimately, during cross examination by Appellant's counsel, Mr. Bodkin testified that he did not give any value to enterprise goodwill as it relates to Appellee's business. He further explained, when questioned by Appellant's counsel, that a multiple of gross method of valuation would not be appropriate in valuing a business with declining revenues because "there is no enterprise goodwill."

In syllabus point one of *Bettinger v. Bettinger*, 183 W.Va. 528, 396 S.E.2d 709 (1990), this Court held:

> A measure of discretion is accorded to a family law master in making value determinations after hearing expert testimony. However, the family law master is not free to reject competent expert testimony which has not been rebutted. This statement is analogous to the rule that '[w]hen the finding of a trial court in a case tried by it in lieu of a jury is against the preponderance of the evidence, is not supported by the evidence, or is plainly wrong, such finding will be reversed and set aside by this Court upon appellate review.'" Syllabus Point 1, in part, *George v. Godby*, 174 W.Va. 313, 325 S.E.2d 102 (1984), *quoting* Syllabus Point 4, *Smith v. Godby*, 154 W.Va. 190, 174 S.E.2d 165 (1970).

See Syl. Pt. 5, *Kimble v. Kimble*, 186 W.Va. 147, 411 S.E.2d 472 (1991); Syl. Pt. 2, *McGraw v. McGraw*, 186 W.Va. 113, 411 S.E.2d 256 (1991).

In the case *sub judice*, we find that the family court did not abuse its discretion in finding there to be no enterprise goodwill associated with Appellee's chiropractic business. Though Appellant contends that Mr. Bodkin's testimony was not based upon a sound valuation method and competent evidence, as required by *Helfer I*, this Court disagrees. Mr. Bodkin reviewed both experts' written reports and his testimony revealed that he was clearly knowledgeable with regard to their valuation calculations. He explained, in detail, why he found the valuation calculation of Appellant wife's expert to be seriously flawed and why he concurred with the valuation formulated by Appellee husband's expert. Both Mr. Bodkin and Mr. Costanzo agreed that the business has no excess earnings, which supported Mr. Bodkin's conclusion that there is no enterprise goodwill to be valued. *See May,* 214 W.Va. at 406 n.18, 589 S.E.2d at 548 n.18 (recognizing that "'[g]oodwill is excess earning power: once the normal rate of return for identifiable tangible and intangible assets is determined, any rate of return in excess of a normal return is attributable to unidentifiable intangible assets _ goodwill.'"(*quoting* Alicia Brokars Kelly, "Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill," 51 Rutgers L.Rev. 569, 610 (1999)). It was not an abuse of discretion for the family court to find Mr. Bodkin's opinion in this regard to be both credible and reliable and, accordingly, to conclude that Appellee's business has an enterprise goodwill value of zero.

B.

Next, Appellant wife argues that our decision in *Helfer I* required the family court to conduct an additional evidentiary hearing on the enterprise goodwill issue and that the court committed error in failing to do so. It is her contention that the following language in *Helfer I* mandated that additional evidence be taken: "On remand. . . the valuation of Appellee's business should include a reasonable approximation of the business' enterprise goodwill, if any, based upon competent evidence and on a sound valuation method. 221 W.Va. at 628, 656 S.E.2d at 73 (internal citations omitted).

In syllabus point 3 of *State ex rel. Frazier & Oxley v. Cummings*, 214 W.Va. 802,

591 S.E.2d 728 (2003), we made clear that

> Upon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.

We also held that "[a] circuit court's interpretation of a mandate of this Court and whether the circuit court complied with such mandate are questions of law that are reviewed *de novo*." *Id.*, at syl. pt. 4.

In *Helfer I*, we limited the issue on remand to that of ascertaining the value, if any, of enterprise goodwill. However, we did not dictate the manner in which the family court was to proceed in that regard. Neither the letter nor the spirit of that opinion required the family court to take additional evidence on the value, if any, of the enterprise goodwill of Appellee's business. Rather, the family court had the discretion to either determine the issue on the existing record or to conduct another evidentiary hearing. As previously discussed, the existing record amply supported the family court's conclusion that the business had a zero value for enterprise goodwill (particularly in light of the correction to the transcript involving Mr. Bodkin's testimony in that regard). Thus, we find that the family court in no way abused its discretion in declining to take additional evidence on the issue of enterprise goodwill.

IV. Conclusion

Based upon the foregoing, the June 26, 2008, order of the Circuit Court of Ohio County, is hereby affirmed.

Affirmed.

Footnote: 1

Because the issue in *Helfer I* involved only whether the family court was required to take into account the value, if any, of enterprise goodwill, it was not necessary in that case that we set forth the substance of either the valuation reports prepared by the parties' respective accounting experts or the experts' testimony elicited at the April 1, 2005, hearing. In the instant appeal, however, the experts' reports and testimony are crucial to our determination that the family court committed no error in concluding that Appellee's chiropractic business has an enterprise goodwill value of zero. Accordingly, this opinion sets forth, in some detail, those portions of the experts' testimony and reports which are relevant to our holding in this appeal.

Footnote: 2

In his written report, Mr. Costanzo explained that the capitalization of earnings method is "used when a company's future operations are not expected to change significantly from its current normalized operations or where future operations are

expected to grow at a somewhat predictable rate." He reported that he selected "adjusted net income as the earnings stream to be capitalized." Mr. Costanzo used "historical earnings over the last five years (1997-2001). Since the date of valuation is October of 2002, the most recent completed five-year period (1997 through 2001)" was used in his valuation. He further reported that "[i]n normalizing the income stream, non-recurring and discretionary expenses were adjusted. To these amounts, adjustments were made to eliminate extraordinary or nonrecurring items and discretionary expenses, to obtain the reasonable sustainable operating profit that a buyer could expect to receive from the [Appellee's] Practice." Furthermore, "[t]he estimated future earnings of the [Appellee's] Practice [were] capitalized by an appropriate capitalization rate to arrive at the fair market value of the Practice." Valuation Report of the Fair Market Value of the Chiropractic Practice of Robert J. Helfer, D.C. (A Sole Proprietorship), prepared by Louis J. Costanzo, III, CPA, MBA.

According to Mr. Costanzo's report, he arrived at a total normalized income for the years 1997 through 2001, and then estimated future earnings by averaging the earnings over that same time period. He "weighted the most recent years heavier than prior years by using a multiplier for each of the five years[,]" in order to obtain a "weighted average pre-tax earnings before reasonable compensation." Mr. Costanzo "then deducted reasonable compensation. . . and deducted a provision for federal and state income taxes, which resulted in a weighted average after-tax earnings of $10,664." Finally he capitalized the normalized earnings stream. "In arriving at an appropriate capitalization rate, [he] used the build-up approach, which . . . . is based on the premise that a company's discount rate (and, consequently, its related capitalization rate) is composed of a number of identifiable risk factors which result in a total return that a prudent investor would demand from the purchase of the Practice. Using this approach, [Mr. Costanzo] arrived at a net earnings capitalization rate of 26 percent. . . . Applying this rate to the weighted average earnings yields a value of $41,000 (rounded)."

Footnote: 3

In his report, Mr. Felton indicated that under the capitalization of excess earnings method, "[a] rate of return is determined first on the company's tangible assets. The excess earnings is then calculated by determining the difference between the company's net earnings and a fair return on its tangible assets. To compute the value of the intangible, the excess earnings are capitalized using a cap rate suitable for intangibles. To determine the value of the company, the value of [the] company's intangible assets is added to the company's net tangible assets." In his report, Mr. Felton opined that the "excess earnings method is used frequently in valuations of professional practices. This method was designed to measure intangible assets. The majority of assets in professional practices are intangibles therefore, the use of this method is the most appropriate." Valuation of the Chiropractic Practice of Robert J. Helfer D.C., prepared by Felton & Felton, A.C. CPAs.

Footnote: 4

According to the tax returns of Appellee's business (used by both parties' accounting experts in their respective valuation reports), the net revenue of Appellee's business for 1997 was $358,031; for 1998, $333,262; for 1999, $250,000; for 2000, $255,757; and for 2001, $224,908.

Footnote: 5

This is because, as Mr. Bodkin explained, the subject business "is a sole proprietorship, not a corporation. A sole proprietorship is owned by the owner. The assets are owned by the owner. The cash in a sole proprietorship is owned by the owner."

Footnote: 6

Mr. Felton testified that he interviewed Appellant wife regarding the quality of the equipment because she worked in the office of the chiropractic business. Mr. Felton stated that he never personally saw the tangible assets to which he was assigning a value, but that, according to Appellant wife, they were in "good repair, good condition, obviously being used every day in part of the practice."

Footnote: 7

With regard to the equipment, furniture and fixtures of the business, Mr. Costanzo, Appellee husband's expert, noted that "most of them are in excess of 15 years old." He opined that "[t]hey have very little value." Mr. Costanzo indicated that, in preparing his valuation report, "[w]e in effect have ignored that, ignore[d] those items in this valuation to a great extent because they do not have much of a value." He further indicated that, after his report was completed, the furniture and fixtures were professionally assessed for $1,228, and the equipment, for approximately $5,645.

Footnote: 8

According to Mr. Costanzo, the figure $110,000 was deemed reasonable based upon knowledge of salaries in the local area. Mr. Costanzo also consultedwww.salary.com to determine that the average salary for a typical chiropractor in the area is $102,182. Considering Appellee has more than 15 years of experience, Mr. Costanzo opined that compensation in the amount of $110,000 would be required to get someone to perform the same services as Appellee.

Footnote: 9

It is unclear how Mr. Felton determined that the business was opened only 30 hours per week. The basis for this assumption does not appear to be in the record.

Footnote: 10

Mr. Felton testified that "[t]he hypothetical number represents what you would pay an individual to come in and run the practice." The average reasonable compensation over the five-year period, as calculated under the capitalization of excess earnings method used by Mr. Felton, was approximately $65,000. Hypothetically, if Appellant wife were to take over the practice, she would receive the remaining income from the practice after paying a chiropractor a salary. Obviously, the lower the salary she were to pay a chiropractor, the higher the amount of income to her.

Footnote: 11

The building out of which the business operates is owned by Appellee but was not to be part of the valuation of the business; rather, it was to be valued separately. Mr. Costanzo testified that, because the building was to be separately valued, "it

became important to deduct _ to remove from the Schedule C the depreciation regarding the building and also the interest cost that was being used to pay for the building. So as a result...we removed both and you add back the depreciation and add back the interest expense to affect those normalizing adjustments." Mr. Costanzo explained that the values for the depreciation and the interest expense came directly from Appellee's Schedule C because "if we are removing the building and the land, we've removed the depreciation and the interest, but since he's still operating there we must reflect some costs. So basically I estimated what I interpret to be a fair market value of a rental for the use of that building."

Footnote: 12

Mr. Bodkin testified that he has experience in ascertaining fair market rental values in the local area as he has an ownership interest in an office building located near Appellee's business. According to Mr. Bodkin, "we don't have any space rented to anyone who's not an owner for less than $16 a square foot."

Footnote: 13

Neither accounting expert in this case used the multiple of gross method.

Footnote: 14

It is undisputed that Appellee's chiropractic business experienced declining revenues for the five-year period 1997 - 2001 (the period used in both experts' valuation calculations). See n. 4, *supra*.

Footnote: 15

In the first appeal, the transcript submitted to this Court indicated that Mr. Bodkin's answer to this question of whether he gave any value to enterprise goodwill was "I broke it down." Following our decision in *Helfer I*, however, Appellee husband filed with the family court Petitioner's Motion/Request to Clarify Final Order Regarding Equitable Distribution Entered May 3, 2006, Based Upon Existing Competent Evidence Existing in the Record of these Proceedings, in which he averred that "I broke it down" was not an accurate transcription of Mr. Bodkin's true response to the question posed. Rather, Appellee argued that, as demonstrated by the audio/video recording of Mr. Bodkin's testimony, it is clear that Mr. Bodkin's precise answer was "I really don't." Appellee also submitted an affidavit by Mr. Bodkin, which likewise indicated his true answer. The error was ultimately corrected without objection by Appellant wife. As discussed below, the family court relied on the corrected answer in its conclusion that there is no value for enterprise goodwill as it
relates to Appellee's business.

Footnote: 16

Appellant raised several assignments of error in her petitions for appeal to both the circuit court and this Court. Her petition for appeal to this Court was granted only as to the assignment of error related to enterprise goodwill.

Footnote: 17

On February 21, 2008, Appellant wife filed Respondent's Supplemental Disclosure of Expert Witness's Valuation Report. Attached thereto was a valuation

report of Appellee's business prepared by another accounting expert, which included, *inter alia*, an enterprise goodwill value of $102,270.

Footnote: 18

Appellant also argues that Mr. Bodkin's testimony was inadmissible as expert testimony under West Virginia Rule of Evidence 702 and should not have been considered by the family court in the first instance. However, Appellant wife did not object to Mr. Bodkin's testimony at the time it was given (nor did she raise the issue of its admissibility before the circuit court in her petition for appeal). It is well settled that "'"[t]his Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syllabus Point 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958).' Syllabus Point 2, *Duquesne Light Co. v. State Tax Dept.* 174 W.Va. 506, 327 S.E.2d 683 (1984), *cert. denied*, 471 U.S. 1029, 105 S.Ct. 2040, 85 L.Ed.2d 322 (1985)." Syllabus Point 8, *Charlton v. Charlton*, 186 W.Va. 670, 413 S.E.2d 911 (1991). Therefore, we will not consider this argument regarding the admissibility of Mr. Bodkin's testimony because it was not properly preserved below.

Footnote: 19

In *May*, we recognized that there are "'a variety of acceptable methods of valuing the goodwill of a professional practice, and no single method is to be preferred as a matter of law.'" 214 W.Va. at 405-06, 589 S.E.2d at 547-48 *(quoting McDiarmid v. McDiarmid*, 649 A.2d 810, 815 (D.C.App. 1994)). *See Helfer I*, 221 W.Va. at 628 n.4, 656 S.E.2d at 73 n.4. Thus, in *May*, this Court recognized five major (and acceptable) valuation formulas: the straight capitalization method; the capitalization of excess earnings method; the IRS variation of capitalized excess earnings method; the market value approach; and the buy/sell agreement method. 214 W.Va. at 406, 589 S.E.2d at 548.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2003 Term

No. 31123

HILLMAN H. MAY,
Appellant,

V.

CAROL S. MAY,
Appellee.

Appeal from the Family Court of Hancock County
Honorable Joyce Dumbaugh Chernenko, Judge
Civil Action No. 00-D-119

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED

Submitted: September 9, 2003
Filed: November 10, 2003

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JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. In reviewing a final order of a family court judge that is appealed directly to this Court, we review findings of fact by a family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

2. "Enterprise goodwill" is an asset of the business and may be attributed to a business by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business.

3. "Personal goodwill" is a personal asset that depends on the continued presence of a particular individual and may be attributed to the individual owner's personal skill, training or reputation.

4. In determining whether goodwill should be valued for purposes of equitable distribution, courts must look to the precise nature of that goodwill. Personal goodwill, which is intrinsically tied to the attributes and/or skills of an individual, is not subject to equitable distribution. On the other hand, enterprise goodwill, which is wholly attributable to the business itself, is subject to equitable distribution.

Davis, Justice:

This matter arises from a final order of the Family Court of Hancock County resolving the equitable distribution of marital property between Hillman H. May (hereinafter referred to as "Dr. May"), appellant/defendant below, and Carol S. May (hereinafter referred to as "Mrs. May"), appellee/plaintiff below. In this appeal, Dr. May contends that the family court judge erred in adopting a report by Mrs. May's expert that assigned a value for goodwill to his dental practice, and erred in the distribution of real property. After considering the briefs and oral arguments of the parties, we affirm in part, reverse in part, and remand.

I.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on June 23, 1979. In 1980, the couple built a home on property adjacent to Dr. May's dental office. (See footnote 1) From about 1980 to 1993, Mrs. May "worked at least 20 hours per week" at Dr. May's dental office. (See footnote 2) During the marriage the parties had three children.

On May 22, 2000, Mrs. May filed for divorce. On September 24, 2001, the Circuit Court of Hancock County granted the parties a divorce on the grounds of irreconcilable differences. The decree granting the divorce left unresolved the issue of the distribution of marital property. (See footnote 3) That issue was subsequently litigated in front of the family court judge.

During the proceeding before the family court judge, the parties presented expert testimony on the valuation of Dr. May's solo dental practice. Dr. May's expert valued the dental practice at $55,000.00, which included a 20% discount for lack of marketability. Mrs. May's expert placed a fair market value on the dental practice at $120,000.00. The fair market value included a value for goodwill.

By order entered on February 26, 2002, the family court judge adopted the dental practice valuation proffered by Mrs. May's expert. Mrs. May's equitable distribution

payment for her interest in the dental practice was payable to her in the amount of $889.00 per month from June 1, 2004, to May 31, 2012. Additionally, the family court judge found that the real estate involved in the case was marital property that had a net value of $125,324.44. Mrs. May was awarded a one-half interest in the value of the real estate. From these rulings, Dr. May filed an appeal directly to this Court.

II.

STANDARD OF REVIEW

This case presents the first opportunity for this Court to address the issue of the standard of review of a direct appeal from a final order of a family court judge. The family law master system ceased to operate on January 1, 2002. It was replaced by a family court system. *See* W. Va. Code § 51-2A-1 *et seq.* (Supp. 2003). In creating the family court system, the Legislature provided that an appeal of a family court judge's decision may be taken to a circuit court. *See* W. Va. Code § 51-2A-14 (Supp. 2003). The decision of the circuit court then may be appealed to this Court. *See* W. Va. Code § 51-2A-15(b) (Supp. 2003). Additionally, the Legislature has provided that a litigant may waive the right to appeal to the circuit court and prosecute an appeal directly to this Court. *See* W. Va. Code § 51-2A-15(a) (Supp. 2003). *But see* Syl. pt. 5, *State ex rel. Silver v. Wilkes*, ___ W. Va. ___, 584 S.E.2d 548 (2003) ("Where circuit courts have concurrent original jurisdiction with the West Virginia Supreme Court of Appeals over matters arising in family court, the preferred court of first resort is the circuit court.").

The standard of review by this Court, either from an appeal of a decision by a circuit court or an appeal directly from a ruling by a family court judge, is set forth in W. Va. Code § 51-2A-14(b). (See footnote 4) Pursuant to this statute, in reviewing a final order of a family court judge that is appealed directly to this Court, we review findings of fact by a family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

III.

DISCUSSION

The main issue presented in this appeal (See footnote 5) is whether the family court judge erred by adopting a fair market value of Dr. May's dental practice provided by Mrs. May's expert which fair market value included a valuation for goodwill. The evidence established that Dr. May operated a dental office that should be characterized as a professional practice. (See footnote 6) In this regard, courts have developed a specific body of law to address the issue of goodwill in a professional practice in the context of divorce litigation. (See footnote 7) Because Dr. May was a sole practitioner (See footnote 8) in his dental office, we will examine the case law applicable to goodwill in a professional practice, (See footnote 9) and thereby determine whether goodwill may be assigned to Dr. May's dental practice for the purpose of equitable distribution.

A. General Definition of Goodwill

Goodwill may be defined generally as

> [T]he advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein, in consequence of general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

McDiarmid v. McDiarmid, 649 A.2d 810, 813 (D.C.App. 1994) (citations omitted). *See also Yoon v. Yoon*, 711 N.E.2d 1265, 1268 (Ind. 1999) (defining goodwill "as the value of a business or practice that exceeds the combined value of the net assets used in the business"). Essentially, goodwill is "'the favor which the management of a business has won from the public, and probability that old customers will continue their patronage.'" *Gaydos v. Gaydos*, 693 A.2d 1368, 1372 (Pa. Super. 1997) (quoting *Ullom v. Ullom*, 559 A.2d 555, 558-59 (Pa. Super. 1989)). Further, marketable "[g]oodwill associated with a business is an asset distributable upon dissolution of a marriage." *Seiler v. Seiler*, 706 A.2d 249, 251 (N.J. Super. 1998) (citation omitted). However, "[w]here no market exists for goodwill, it should be considered to have no value." *Manelick v. Manelick*, 59 P.3d 259, 265 (Alaska 2002).

B. Goodwill in Divorce Litigation: Enterprise and Professional

Essentially, there are two types of goodwill recognized by courts in divorce litigation: enterprise goodwill (also called commercial or professional goodwill) and personal goodwill (also called professional goodwill). (See footnote 10) A good working definition of enterprise goodwill is:

> Enterprise goodwill attaches to a business entity and is associated separately from the reputation of the owners. Product names, business locations, and skilled labor forces are common examples of enterprise goodwill. The asset has a determinable value because the enterprise goodwill of an ongoing business will transfer upon sale of the business to a willing buyer.

Courtney E. Beebe, "The Object of My Appraisal: Idaho's Approach to Valuing Goodwill as Community Property in *Chandler v. Chandler*," 39 Idaho L. Rev. 77, 83-84 (2002). *See also Frazier v. Frazier*, 737 N.E.2d 1220, 1225 (Ind. App. 2000) ("Enterprise goodwill is based on the intangible, but generally marketable, existence in a business of established relations with employees, customers and suppliers, and may include a business location, its name recognition and its business reputation."). Personal goodwill has been described as follows:

> [P]ersonal goodwill is associated with individuals. It is that part of increased earning capacity that results from the reputation, knowledge and skills of individual people. Accordingly, the goodwill of a service business, such as a professional practice, consists largely of personal goodwill.

Diane Green Smith, "'Til Success Do Us Part: How Illinois Promotes Inequities in Property Distribution Pursuant to Divorce by Excluding Professional Goodwill," 26 J. Marshall L. Rev. 147, 164-65 (1992). As discussed later in this opinion, the goodwill calculated by Mrs. May's expert was personal goodwill.

C. Jurisdictional Consideration of Goodwill as Marital Property

There is a split of authority on whether enterprise goodwill and/or personal goodwill in a professional practice may be characterized as marital property and thus equitably distributed. Three different approaches have developed. (See footnote 11) We will review each approach before determining the rule of law we now adopt in West Virginia. (See footnote 12)

1. No Distinction. A large number of courts (13) *make no distinction* between personal and enterprise goodwill. These jurisdictions have taken the position that both personal and enterprise goodwill in a professional practice constitute marital property. (See footnote 13) A case which best illustrates this position is *Poore v. Poore*, 331 S.E.2d 266 (N.C. App. 1985).

In *Poore*, the wife sued for divorce from her husband. The husband was a dentist and the sole owner and operator of an incorporated dental practice. At the trial level, the husband produced expert evidence as to the value of his dental practice. The husband's expert opined that the practice had a net value of $7,549.00 and had no goodwill. The wife's expert contended that the dental practice had a value of $232,000.00, which included a value for personal goodwill. (See footnote 14) The trial court rejected the evidence by both experts and found that the dental practice had a value of $73,561.00. The trial court also found that the dental practice had no goodwill. Both parties appealed. An issue on appeal that is relevant to this case involved the wife's contention that the dental practice had goodwill.

In addressing the issue of valuing a professional practice in general, the court in *Poore* made the following observations:

> The valuation of each individual practice will depend on its particular facts and circumstances. In valuing a professional practice, a court should consider the following components of the practice: (a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities. Among the valuation approaches courts may find helpful are: (1) an earnings or market approach, which bases the value of the practice on its market value, or the price which an outside buyer would pay for it taking into account its future earning capacity; and (2) a comparable sales approach which bases the value of the practice on sales of similar businesses or practices. Courts might also consider evidence of offers to buy or sell the particular practice or an interest therein.

Poore, 331 S.E.2d at 270 (citations omitted). Turning to the issue of valuing goodwill in a professional practice, the *Poore* Court stated:

> The component of a professional practice which is the most controversial and difficult to value, and yet often the most valuable, is its goodwill. Goodwill is commonly defined as the expectation of continued public patronage. It is an intangible asset which defies precise definition and valuation. It is clear, however, that goodwill exists, that it

has value, and that it has limited marketability.

. . . .

There is no set rule for determining the value of the goodwill of a professional practice; rather, each case must be determined in light of its own particular facts. The determination of the existence and value of goodwill is a question of fact and not of law, and should be made with the aid of expert testimony. . . . Among the factors which may affect the value of goodwill and which therefore are relevant in valuing it are the age, health, and professional reputation of the practitioner, the nature of the practice, the length of time the practice has been in existence, its past profits, its comparative professional success, and the value of its other assets.

Various appraisal methods can be and have been used to value goodwill. Any legitimate method of valuation that measures the present value of goodwill by taking into account past results, and not the postmarital efforts of the professional spouse, is a proper method of valuing goodwill. One method that has been widely accepted in other jurisdictions is to determine the market value of the goodwill, *i.e.*, the price that a willing buyer would pay to a willing seller for it. Another method that has been received favorabl[y] is a capitalization of excess earnings approach. . . . Under this approach, the value of goodwill is based in part on the amount by which the earnings of the professional spouse exceed that which would have been earned by a person with similar education, experience, and skill as an employee in the same general locale. It has also been suggested that the value of goodwill be based on one year's average gross income of the practice, or a percentage thereof, and that evidence of sales of comparable practices is relevant to the determination of its value.

Poore, 331 S.E.2d at 271-72 (citations omitted). The court in *Poore* reversed the trial court's ruling on the issue of the value of the dental practice and remanded the matter for reconsideration of the goodwill issue consistent with its opinion.

The underlying rationale for the position taken by *Poore* and the courts that follow its position was succinctly stated in *Golden v. Golden*, 75 Cal. Rptr. 735 (1969):

[I]n a divorce case, the good will of the husband's professional practice as a sole practitioner should be taken into consideration in determining the award to the wife. . . . [I]n a matrimonial matter, the practice of the sole practitioner husband will continue, with the same intangible value as it had during the marriage. Under the principles of community property law, the wife, by virtue of her position of wife, made to that value the same contribution as does a wife to any of the husband's earnings and accumulations during marriage. She is as much entitled to be recompensed for that contribution as if it were represented by the increased value of stock in a family business.

Golden, 75 Cal. Rptr. at 737-38. *See also In re Marriage of Nichols*, 606 P.2d 1314, 1315 (Colo. App. 1979) ("A professional, like any entrepreneur who has established a reputation for skill and expertise, can expect his patrons to return to him, to speak well of him, and upon selling his practice, can expect that many will accept the buyer and will utilize his professional expertise. These expectations are a part of goodwill, and

they have a pecuniary value.").

2. Minority View. On the other hand, a minority of courts (5) have taken the position that neither personal nor enterprise goodwill in a professional practice constitutes marital property. (See footnote 15) The case which best illustrates the position taken by these courts is *Singley v. Singley*, 846 So. 2d 1004 (Miss. 2003).

In *Singley,* the husband, who maintained a solo dental practice, filed for divorce. During the proceedings, an expert, appointed by the court, valued the husband's dental practice at $145,000.00. The valuation included goodwill. The trial court refused to admit evidence of the husband's expert on the issue of the value of his dental practice. The trial court thereafter equitably divided the value of the dental practice. The husband appealed to the state's mid-level appellate court arguing, among other things, that goodwill should not have been included in the valuation of his dental practice. The appellate court disagreed and affirmed the trial court's ruling. The husband thereafter appealed to the state Supreme Court.

Addressing the issue of assigning goodwill to a professional practice in a divorce case, the *Singley* court noted initially that:

> The issue of goodwill in the context of distribution in a divorce action is indeed one of first impression. . . . [R]ecently by footnote in *Mace v. Mace*, 818 So. 2d 1130, 1133 n. 3 (Miss. 2002), this Court stated that "the opinions of other jurisdictions are split regarding whether goodwill may be considered in valuing a professional practice and, if so, how good will is to be calculated."

Singley, 846 So. 2d at 1010. The opinion in *Singley* further held:

> We disagree with the Court of Appeals that goodwill may be included in the valuation of a business when the issue of that valuation concerns distribution in a divorce action. We join the jurisdictions that adhere to the principle that goodwill should not be used in determining the fair market value of a business, subject to equitable division in divorce cases.

Singley, 846 So. 2d at 1010. The *Singley* court gave the following justification for its determination that goodwill in a professional practice is not marital property:

> The term goodwill as used in determining valuation of a business for equitable distribution in a domestic matter is a rather nebulous term clearly illustrating the difficulty confronting experts in arriving at a fair, proper valuation. Goodwill within a business depends on the continued presence of the particular professional individual as a personal asset and any value that may attach to that business as a result of that person's presence. Thus, it is a value that exceeds the value of the physical building housing the business and the fixtures within the business. It becomes increasingly difficult for experts to place a value on goodwill because it is such a nebulous term subject to change on a moment's notice due to many various factors which may suddenly occur, i.e., a lawsuit filed against the individual or the death and/or serious illness of the individual concerned preventing that person from continuing to participate in the business. It is also difficult to attribute the goodwill of the individual personally to the business. The difficulty is resolved however when we recognize that goodwill is

simply not property; thus it cannot be deemed a divisible marital asset in a divorce action.

Singley, 846 So. 2d at 1011. *See also Chance v. Chance*, 694 So.2d 613, 617 (La. App. 1997) ("It is well-settled that goodwill does not form a part of the corporate assets of a medical practice in that the goodwill results from the physician's professional medical competence and his relationship with patients, not from any affiliation between the corporation and the patient.").

3. Majority View. "[T]he majority of states [24] differentiate between 'enterprise goodwill,' . . . and 'personal goodwill[.]'" *Gilman v. Hohman*, 725 N.E.2d 425, 429 (Ind. App. 2000). Courts in these states take the position that personal goodwill is not marital property, but that enterprise goodwill is marital property. (See footnote 16) One of the leading cases discussing and adopting the distinction between personal goodwill and enterprise goodwill is the decision in *Yoon v. Yoon*, 711 N.E.2d 1265 (Ind. 1999).

In *Yoon,* the wife was granted a divorce from her husband. In granting the divorce the trial court assigned a value of $2,519,366.00 to the husband's medical practice. This figure included a value for goodwill. The husband appealed to a mid-level appellate court. There, the valuation was upheld. The husband then appealed to the state Supreme Court. In addressing the issue of goodwill, the Indiana Supreme Court stated:

> Goodwill has been described as the value of a business or practice that exceeds the combined value of the net assets used in the business. Goodwill in a professional practice may be attributable to the business enterprise itself by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business. It may also be attributable to the individual owner's personal skill, training or reputation. This distinction is sometimes reflected in the use of the term "enterprise goodwill," as opposed to "personal goodwill."
>
> Enterprise goodwill is an asset of the business and accordingly is property that is divisible in a dissolution to the extent that it inheres in the business, independent of any single individual's personal efforts and will outlast any person's involvement in the business. It is not necessarily marketable in the sense that there is a ready and easily priced market for it, but it is in general transferrable to others and has a value to others.
>
> . . . .
>
> In contrast, the goodwill that depends on the continued presence of a particular individual is a personal asset, and any value that attaches to a business as a result of this "personal goodwill" represents nothing more than the future earning capacity of the individual and is not divisible. Professional goodwill as a divisible marital asset has received a variety of treatments in different jurisdictions, some distinguishing divisible enterprise goodwill from nondivisible personal goodwill and some not.
>
> Accordingly, we join the states that exclude goodwill based on the personal attributes of the individual from the marital estate.
>
> [B]efore including the goodwill of a self-employed business or professional practice

in a marital estate, a court must determine that the goodwill is attributable to the business as opposed to the owner as an individual. If attributable to the individual, it is not a divisible asset and is properly considered only as future earning capacity that may affect the relative property division.

Yoon, 711 N.E.2d at 1268-69 (citations omitted). *See* Syl. pt. 2, *Antolik v. Harvey*, 761 P.2d 305 (Haw.App. 1988) ("In determining whether the goodwill of the business of a professional that is accumulated during the marriage is marital property, a distinction must be made between true goodwill which is a marketable business asset and the goodwill which is dependent on the voluntary continued presence of the professional. The former is marital property, while the latter is not."); *Taylor v. Taylor*, 386 N.W.2d 851, 858 (Neb. 1986) ("[I]f goodwill depends on the continued presence of a particular individual, such goodwill, by definition, is not a marketable asset distinct from the individual. Any value which attaches to the entity solely as a result of personal goodwill represents nothing more than probable future earning capacity, which although relevant in determining alimony, is not a proper consideration in dividing marital property in a dissolution proceeding."); *Butler v. Butler*, 663 A.2d 148, 156 (Pa. 1995) ("[W]here there has been an award of alimony, . . . to also attribute a value to goodwill that is wholly personal to the professional spouse, would in essence result in a double charge on future income."). Insofar as the trial court adopted a business valuation in *Yoon* that did not distinguish between personal goodwill and enterprise goodwill, the Indiana Supreme Court reversed and remanded the issue for disposition consistent with its opinion.

4. West Virginia. In our examination of the three views on the issue of goodwill in a professional practice, we believe the majority view represents the soundest legal approach. Therefore, we hold that "enterprise goodwill" is an asset of the business and may be attributed to a business by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business. Additionally, we hold that "personal goodwill" is a personal asset that depends on the continued presence of a particular individual and may be attributed to the individual owner's personal skill, training or reputation.

Furthermore, we hold that in determining whether goodwill should be valued for purposes of equitable distribution, courts must look to the precise nature of that goodwill. Personal goodwill, which is intrinsically tied to the attributes and/or skills of an individual, is not subject to equitable distribution. It is not a divisible asset. It is more properly considered as the individual's earning capacity that may affect property division and alimony. On the other hand, enterprise goodwill, which is wholly attributable to the business itself, is subject to equitable distribution.

The position adopted by this Court, in holding that personal goodwill is not marital property, is consistent with our holding in Syllabus point 1 of *Hoak v. Hoak*, 179 W.Va. 509, 370 S.E.2d 473 (1988), wherein we held that "[a] professional degree or license earned during marriage is not marital property subject to equitable distribution." (See footnote 17) Our marital property law would be in disarray were we to adhere to the holding in *Hoak*, that a professional degree was not a marital asset, yet, conclude that personal goodwill was a marital asset. In *Sorensen v. Sorensen*, 839 P.2d 774, 776 (Utah 1992), the Utah Supreme Court recognized that a professional degree and personal goodwill could not be treated differently in a divorce action. *Sorensen*

addressed the issue as follows:

> The reputation of a sole practitioner is personal, as is a professional degree. Both enhance the professional's earning capacity. The combination of the degree and the practitioner's reputation enables him or her to earn in many cases a substantial income, the fruits of which are shared by the children in the form of child support and by the former spouse in the form of alimony.
> *Sorensen*, 839 P.2d at 776.

In the final analysis, *Hoak* recognized that a professional degree is "personal" to the holder and could not be separated from the holder as a marital asset. Similarly, personal goodwill is an asset that cannot be divided from its holder. This point was echoed in *Strauss v. Strauss*, 647 A.2d 818, 824 (Md. App. 1994), wherein the court observed that "[a]ssets that are 'uniquely personal' to the holder cannot, by their very nature, be held jointly with another person and, consequently, cannot be classified as marital property."

D. Valuation of Goodwill

Finally, once a professional practice has been determined to possess distributable goodwill, a value must be placed thereon. "[T]here are a variety of acceptable methods of valuing the goodwill of a professional practice, and no single method is to be preferred as a matter of law." *McDiarmid v. McDiarmid*, 649 A.2d 810, 815 (D.C. App. 1994). *Accord Russell v. Russell*, 399 S.E.2d 166, 169 (Va. App. 1990) ("[T]here are a number of acceptable methods of computing the goodwill value of a professional practice, and . . . no single method is to be preferred as a matter of law."). The Court in *In re Marriage of Hall*, 692 P.2d 175, 179 (Wash. 1984), pointed out that "[i]n valuing goodwill five major formulas have been articulated." *Hall* discussed the valuation methods as follows:

> Under the straight capitalization accounting method the average net profits of the practitioner are determined and this figure is capitalized at a definite rate, as, for example, 20 percent. This result is considered to be the total value of the business including both tangible and intangible assets. To determine the value of goodwill the book value of the business' assets are subtracted from the total value figure.

> The second accounting formula is the capitalization of excess earnings method. Under the pure capitalization of excess earnings the average net income is determined. From this figure an annual salary of average employee practitioner with like experience is subtracted. The remaining amount is multiplied by a fixed capitalization rate to determine the goodwill. (See footnote 18)

> The IRS variation of capitalized excess earnings method takes the average net income of the business for the last 5 years and subtracts a reasonable rate of return based on the business' average net tangible assets. From this amount a comparable net salary is subtracted. Finally, this remaining amount is capitalized at a definite rate. The resulting amount is goodwill. (See footnote 19)

The fourth method, the market value approach, sets a value on professional

goodwill by establishing what fair price would be obtained in the current open market if the practice were to be sold. This method necessitates that a professional practice has been recently sold, is in the process of being sold or is the subject of a recent offer to purchase. Otherwise, the value may be manipulated by the professional spouse.

The fifth valuation method, the buy/sell agreement method, values goodwill by reliance on a recent actual sale or an unexercised existing option or contractual formula set forth in a partnership agreement or corporate agreement. Since the professional spouse may have been influenced by many factors other than fair market value in negotiating the terms of the agreement, courts relying on this method should inquire into the presence of such factors, as well as the arm's length nature of the transaction. (See footnote 20)
Hall, 692 P.2d at 178-80 (footnotes added). *Accord Moffitt v. Moffitt*, 749 P.2d 343, 348 (Alaska 1988) (referencing all five methods); *Hanson v. Hanson*, 738 S.W.2d 429, 435-36 (Mo. 1987) (discussing all five methods). *See also McAffee v. McAffee*, 971 P.2d 734, 740 (Idaho App. 1999) (discussing straight capitalization and capitalization of excess earnings); *Skrabak v. Skrabak*, 673 A.2d 732, 736-38 (Md. App. 1996) (discussing capitalization of excess earnings).

It has been correctly noted that "[o]n appeal, if it appears that the trial court reasonably approximated the net value of the practice and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed." *Conway v. Conway*, 508 S.E.2d 812, 818 (N.C. App. 1988). *Accord Russell v. Russell*, 399 S.E.2d 166, 169 (Va. App. 1990) ("[O]n appeal, the trial court's valuation of goodwill will not be disturbed if it appears that the court made a reasonable approximation of the goodwill value, if any, of the professional practice based on competent evidence and the use of a sound method supported by that evidence.").

E. Resolution of Instant Appeal

In the instant proceeding, Mrs. May's expert placed a fair market value on the dental practice at $120,000.00, which included a value of $80,568.00 for goodwill. It appears Mrs. May's expert used the IRS variation of capitalized excess earnings method to calculate a value for goodwill in Dr. May's dental practice. (See footnote 21) The family court judge adopted the valuation by Mrs. May's expert. (See footnote 22) For the reasons set forth herein, we find that the family court judge erred in adopting the goodwill portion of the report compiled by Mrs. May's expert.

During one of the hearings in this matter, Mrs. May's expert gave the following testimony regarding the nature of the goodwill assigned to the dental practice: (See footnote 23)

Q. Well, did you include [enterprise] goodwill _

A. In that value of Dr. May's practice what I included was the personal goodwill of Dr. May.

. . . .

Q. What is enterprise goodwill?

. . . .

A. [Enterprise] goodwill is that goodwill which is tied and associated with the goodwill of the total practice itself. [Enterprise] goodwill normally must be involved with more than one practitioner in the office _ in the practice.

Q. How does that apply to Dr. May? Isn't he a solo practitioner?

A. He has only personal goodwill, he has no [enterprise] goodwill.

Q. But you included personal goodwill in your evaluation?

A. I did, that is correct.

Q. And is not personal goodwill the attributes and/or skills of a person?

A. Personal goodwill?

Q. Yes.

A. It is definitely tied into the professional himself, the doctor.

Q. It's the intangibles that go along with Hillman May in this case itself; is that right?

A. I am sorry, what?

Q. It was not very clear. I can understand why you didn't understand it. Personal goodwill would be completely and totally tied to Dr. May, to Hillman May himself?

A. Correct.

Q. If he walked out the door and finished practicing tomorrow, that value of goodwill would be gone?

A. It would stay with him.

Q. I'm sorry, it would be gone for the practice? I want to make that very clear.

A. Yes.

Q. And you think that personal goodwill is something appropriate, again, to valuation?

A. It's usually the highest single asset.

The above testimony makes clear that the $80,568.00 goodwill assigned to Dr. May's dental practice, by Mrs. May's expert, was personal goodwill. Insofar as we have

declined to follow the jurisdictions that permit personal goodwill to be a marital asset, it was error for the family court judge to accept the personal goodwill valuation portion of the report issued by Mrs. May's expert.

IV.

CONCLUSION

Based upon the foregoing, we conclude that the family court judge correctly determined that the real estate in this case was marital property, subject to equitable distribution. We therefore affirm the family court's ruling as to the real estate. However, we find that the family court judge's adoption of the fair market value of the dental practice by Mrs. May's expert, which included a value for personal goodwill, was in error. We therefore reverse the family court's ruling on this issue and remand the matter for a resolution that is consistent with this opinion. (See footnote 24)

Affirmed, in part; Reversed, in part; and
Remanded.

Footnote: 1

On February 14, 1978, Dr. May and his mother purchased real estate, including the office building, in Chester, West Virginia. Dr. May and his mother each had a one-half interest in the property. In November, 1978, Dr. May opened his dental practice on the property. On February 7, 1985, Dr. May's mother and father conveyed to him their interest in the property.

Footnote: 2

In 1993, Mrs. May entered a nursing program. After four years, she obtained a degree as a licensed practical nurse.

Footnote: 3

Other issues not pertinent to this appeal were also left for the family court judge to resolve.

Footnote: 4

The appellate jurisdiction of this Court that is set out in W. Va. Code § 51-2A-15 references the standard of review set out in W. Va. Code § 51-2A-14(b).

Footnote: 5

We find no merit to Dr. May's additional argument regarding the equitable distribution of the real estate. The record supports the family court judge's determination that marital assets were used to increase the net value of the real estate. See Syl. pt. 2, in part, Mayhew v. Mayhew, 205 W.Va. 490, 519 S.E.2d 188 (1999) ("Active appreciation of separate property of either of the parties to a marriage, or that increase which 'results from (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property, or (B) work performed by either or both of the parties during the marriage' is marital property which is subject to

equitable distribution."(internal quotations and citation omitted)).

Footnote: 6

Although the parties and the family court judge loosely characterized this issue in the context of goodwill in a closely-held corporation, there was no evidence that Dr. May's solo dental practice was a closely-held corporation. "A closely-held corporation cannot be defined with exactitude. Generally, it is a 'corporation in which the stock is held in a few hands, or in a few families, and wherein it is not all, or only rarely, dealt in buying and selling.'" John K. Gray, "Proving the Value of Goodwill of a Spouse's Closely-Held Commercial Corporation in a Divorce Proceeding," 25 J. Fam. L. 549, 550 (1986) (quoting Lavene v. Lavene, 392 A.2d 621, 623 (N.J. Super. 1978)). In valuing the assets of a closely- held corporation courts generally agree that "[g]oodwill is a recognized tangible asset of a corporation and should be considered when valuing a closely held corporation for the division of marital assets." In re Marriage of Brenner, 601 N.E.2d 1270, 1275 (Ill. App. 1992).

Footnote: 7

"The valuation of a professional business practice presents unique issues not encountered in conventional businesses. Generally, the professional practice's most valuable asset is its goodwill. . . . However, this value is more difficult to quantify." David H. Levy, "Hunting (Professional) Goodwill," 25-WTR Fam. Advoc. 31 (2003). See Weaver v. Ritchie, 197 W.Va. 690, 695 n.13, 478 S.E.2d 363, 468 n.13 (1996) (noting in passing that "[G]oodwill is generally not associated to such a great extent in the sale of a professional practice[.]").

Footnote: 8

By "sole practitioner" we mean that no other dentist was employed in any capacity by Dr. May's dental practice. Dr. May employed three people on a part-time basis: a receptionist, a dental hygienist and a dental assistant.

Footnote: 9

Some examples of businesses that fall under the heading of professional practice include a law practice, dental practice, accounting practice and medical practice.

Footnote: 10

Courts have recognized that "the burden is on the party who seeks to establish goodwill as a marital asset to produce convincing proof delineating between [enterprise] goodwill on the one hand and personal goodwill on the other." Williams v. Williams, 108 S.W.3d 629, 642 (Ark. App. 2003). For a general discussion of enterprise goodwill and personal goodwill see Alicia Brokars Kelly, "Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill," 51 Rutgers L. Rev. 569 (1999). In an article by Helga White "Professional Goodwill": Is it a Settled Question or Is There 'Value' in Discussing It?," 15 J. Am. Acad. Matrim. Law. 495 (1998), the author carves out subtle distinctions between enterprise goodwill, commercial goodwill, professional goodwill and personal goodwill (distinctions that are different from those mentioned in the body of this opinion). In making these distinctions, White notes that "a definition of professional goodwill may span all the categories [of goodwill]. In fact, a hard and fast distinction between commercial goodwill and professional goodwill may actually be misleading." White, "Professional Goodwill, 15 J. Am. Acad. Matrim. Law at

500. Although we appreciate the subtle distinctions White makes in her article, we have found no judicial opinion setting out such distinctions. The reason is simple. The distinctions elevate form over substance and do not affect the ultimate outcome in a goodwill analysis. By way of illustration, during the testimony of Mrs. May's accounting expert, the expert stated that he was not familiar with the term "enterprise" goodwill, but that he was familiar with the term "professional" goodwill. The expert's working definition of professional goodwill was, in fact, the working definition of enterprise goodwill. In the final analysis, we believe that to judicially recognize the distinctions White makes in her article would only convolute an already complex area of marital property law.

Footnote: 11

Our research revealed that the following jurisdictions have not squarely decided the issue of whether personal goodwill or enterprise goodwill of a professional practice constitutes marital property: Alabama, Georgia, Idaho, Iowa, Maine, and Vermont. In Ohio, the state Supreme Court has not addressed the issue. Consequently, there appears to be an unresolved split of authority among the Ohio appellate court districts. One appellate court district has held that personal goodwill and enterprise goodwill in a professional practice constitute marital property. See Kahn v. Kahn, 536 N.E.2d 678 (Ohio App. 2d Dist. 1987) (medical practice). Another appellate court district has ruled that personal goodwill is not marital property. See Goswami v. Goswami, 787 N.E.2d 26 (Ohio App. 7th Dist. 2003) (medical practice). Additionally, in Endres v. Endres, 532 N.W.2d 65 (S.D. 1995), the South Dakota Supreme Court found that enterprise goodwill in a professional practice is marital property, but expressly declined to decide whether personal goodwill in a professional practice is marital property.

Footnote: 12

In Mrs. May's brief, she contends that this Court adopted North Carolina's position on goodwill in Tankersley v. Tankersley, 182 W.Va. 627, 390 S.E.2d 826 (1990). Mrs. May has misread Tankersley.

In Tankersley, the husband filed for and was granted a divorce from his wife. One of the property issues resolved by the circuit court involved a funeral home that was owned by the husband. The Tankersley opinion characterized the funeral home as a closely-held corporation. The trial court concluded that the funeral home was marital property and had a market value of $325,000.00. The husband appealed the trial court's ruling on the value of the funeral home. In the appeal, the husband argued that the trial court erred in deducting only one debt from the market value of the business. It was the husband's position that the court should have deducted all the debts of the business to determine its net value.

In addressing the issue of valuing a closely-held corporation, this Court made the following observation:

Commonly, the purchase of a closely held corporation occurs in one of two ways. Where the purchaser acquires the stock of the corporation, he ordinarily acquires all of the corporation's assets and liabilities. In this situation, the amount paid to the owner-seller for his stock ordinarily represents the net value of the business because the owner-seller is not obligated to pay off the corporate debts.

The second method of purchasing a corporation or business is where the buyer acquires its assets. Under this arrangement, the market value does not equal the net value because the owner-seller will ordinarily be responsible for some or all of the business's debts or liabilities. Again, the pertinent inquiry is what is the net sum that will be realized by the owner of the business if it is sold for its fair market value.

Tankersley, 182 W. Va. at 631, 390 S.E.2d at 830. The decision further held:

[T]he net value of a closely held corporation or business equals the net amount realized by the owner should the corporation or business be sold for its fair market value. The pertinent inquiry that must be made is whether the owner-seller will be responsible for the debts of the corporation or business, assuming a sale for its market value.

Tankersley, 182 W. Va. at 631, 390 S.E.2d at 830. Ultimately, the decision reversed and remanded the case for further consideration of the valuation of the funeral business.

In making its pronouncement on how to value a closely-held corporation, the decision in Tankersley cited in passing to a North Carolina decision that included consideration of goodwill in valuing a closely-held corporation. Tankersley also quoted Revenue Ruling 59-60, 1959-1 C.B. 237, 238, which lists goodwill as one of eight factors that should be analyzed in valuing the stock of a closely-held corporation for federal gift and estate taxes. However, since the issue of goodwill was not directly before the Court in Tankersley there was no definitive position taken by the Court. In fact, in no decision has this Court meaningfully examined the issue of goodwill in a business in the context of a divorce. See Stevens v. Stevens, 202 W. Va. 611, 613 n.4, 505 S.E.2d 674, 676 n.4 (1998) (per curiam) (a divorce case in which it was noted in passing that goodwill was included in valuation of a funeral business); Signorelli v. Signorelli, 189 W. Va. 710, 714 n.2, 434 S.E.2d 382, 386 n.2 (1993) (per curiam) (same); Kimble v. Kimble, 186 W. Va. 147, 411 S.E.2d 472 (1991) (per curiam) (affirming, without any meaningful discussion, a family law master's determination that a funeral business had $6,000.00 in goodwill); Bettinger v. Bettinger, 183 W. Va. 528, 532, 396 S.E.2d 7,09, 713 (1990) (mentioning in passing that the husband's interest in a medical corporation had no goodwill).

Footnote: 13

See Wisner v. Wisner, 631 P.2d 115 (Ariz. App. 1981) (medical practice); In re Foster, 117 Cal. Rptr. 49 (1974) (medical practice); In re Marriage of Huff, 834 P.2d 244 (Colo. 1992) (law practice); Heller v. Heller, 672 S.W.2d 945 (Ky. App. 1984) (accounting practice); Kowalesky v. Kowalesky, 384 N.W.2d 112 (Mich. App. 1986) (dental practice); In re Marriage of Stufft, 950 P.2d 1373 (Mont. 1997) (law practice); Ford v. Ford, 782 P.2d 1304 (Nev. 1989) (medical practice); Dugan v. Dugan, 457 A.2d 1 (N.J. 1983) (law practice); Moll v. Moll, 722 N.Y.S.2d 732 (2001) (stockbroker); Poore v. Poore, 331 S.E.2d 266 (N.C. App. 1985) (dental practice); Mitchell v. Mitchell, 719 P.2d 432 (N.M. App. 1986) (accounting practice); Sommers v. Sommers, 660 N.W.2d 586 (N.D. 2003) (medical practice); In re Marriage of Hall, 692 P.2d 175 (Wash. 1984) (medical practice).

Footnote: 14

The opinion does not characterize the goodwill as personal goodwill, but all of the factors relied upon by the wife's expert are personal goodwill factors.

Footnote: 15 See Powell v. Powell, 648 P.2d 218 (Kan. 1982) (medical practice); Chance v. Chance, 694 So. 2d 613 (La. App. 1997) (medical practice); Singley v. Singley, 846 So.2d 1004 (Miss. 2003) (dental practice); Donahue v. Donahue, 384 S.E.2d 741 (S.C. 1989) (dental practice); Smith v. Smith, 709 S.W.2d 588 (Tenn. Ct. App. 1985) (law firm).

Footnote: 16

See Richmond v. Richmond, 779 P.2d 1211 (Alaska 1989) (law practice); Tortorich v. Tortorich, 902 S.W.2d 247 (Ark. App. 1995) (dental practice); Eslami v. Eslami, 591 A.2d 411 (Conn. 1991) (medical practice); E.E.C. v. E.J.C., 457 A.2d 688 (Del. 1983) (law practice); McDiarmid v. McDiarmid, 649 A.2d 810 (D.C. App. 1994) (law practice); Thompson v. Thompson, 576 So. 2d 267 (Fla. 1991) (law practice); Antolik v. Harvey, 761 P.2d 305 (Haw. App. 1988) (chiropractic business); In re Marriage of Head, 652 N.E.2d 1246 (Ill. App. 1995) (medical practice); Yoon v. Yoon, 711 N.E.2d 1265 (Ind. 1999) (medical practice); Prahinski v. Prahinski, 540 A.2d 833 (Md. App. 1988) (law practice); Goldman v. Goldman, 554 N.E.2d 860 (Mass. App. 1990) (medical practice); Roth v. Roth, 406 N.W.2d 77 (Minn. App. 1987) (chiropractic business); Hanson v. Hanson, 738 S.W.2d 429 (Mo.1987) (medical practice); Taylor v. Taylor, 386 N.W.2d 851 (Neb. 1986) (medical practice); In re Watterworth, 821 A.2d 1107 (N.H. 2003) (medical practice); Travis v. Travis, 795 P.2d 96 (Okla. 1990) (law practice); Matter of Marriage of Maxwell, 876 P.2d 811 (Or. App. 1994) (self-employed advertising copywriter); Butler v. Butler, 663 A.2d 148 (Pa. 1995) (accounting firm); Moretti v. Moretti, 766 A.2d 925 (R.I. 2002) (professional landscaper); Guzman v. Guzman, 827 S.W.2d 445 (Tex. App. 1992) (accounting firm); Sorensen v. Sorensen, 839 P.2d 774 (Utah 1992) (law practice); Howell v. Howell, 523 S.E.2d 514 (Va. App. 2000) (law practice); Peerenboom v. Peerenboom, 433 N.W.2d 282 (Wis. App. 1988) (dental practice); Root v. Root, 65 P.3d 41 (Wyo. 2003) (medical practice).

Footnote: 17

We justified our holding in Hoak as follows:

[T]he value of a professional degree is the value of the enhanced earning capacity of the degree-holder. Not only is that value speculative, but also it represents money or assets earned after dissolution of the marriage. As such, it falls outside our statutory definition of marital property. . . .

On the whole, a degree of any kind results primarily from the efforts of the student who earns it. Financial and emotional support are important, as are homemaker services, but they bear no logical relation to the value of the resulting degree.

Hoak, 179 W. Va. at 512-13, 370 S.E.2d at 477.

Footnote: 18

"The most commonly relied upon approach for valuing professional practices is the

capitalization of excess earnings approach. Goodwill is excess earning power: once the normal rate of return for identifiable tangible and intangible assets is determined, any rate of return in excess of a normal return is attributable to unidentifiable intangible assets-goodwill." Alicia Brokars Kelly, "Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill," 51 Rutgers L. Rev. 569, 610 (1999). See also Alan S. Zipp, "Divorce Valuation of Business Interests: A Capitalization of Earnings Approach," 23 Fam. L.Q. 89 (1989) (discussing capitalization of excess earnings approach).

Footnote: 19

The IRS method (also called the formula approach) is found in Revenue Ruling 68-609, and reads as follows:

> A percentage return on the average annual value of the tangible assets used in a business is determined, using a period of years (preferably not less than five) immediately prior to the valuation date. The amount of the percentage return on tangible assets, thus determined, is deducted from the average earnings of the business for such period and the remainder, if any, is considered to be the amount of the average annual earnings from the intangible assets of the business for the period. This amount (considered as the average annual earnings from intangibles), capitalized at a percentage of, say, 15 to 20 percent, is the value of the intangible assets of the business determined under the 'formula' approach.

Rev. Rul. 68-609 (1968).

Footnote: 20

This Court observed in Bettinger v. Bettinger, 183 W. Va. 528, 534, 396 S.E.2d 709, 715 (1990), "that buy-sell agreements in a closely held corporation can be manipulated by the shareholders to reflect an artificially low value. This is why caution should be exercised in accepting their value for equitable distribution purposes."

Footnote: 21

The overall fair market value of the dental practice was determined by using five valuation methods: excess earnings method, capitalization of income, discounted future cashflow method, comparable market method, and revenue multiplier method. However, from our review of the record it appears that the goodwill assigned to the dental practice was taken directly from the valuation obtained from the excess earnings method.

Footnote: 22

We take this opportunity to address some concerns we have about the valuation by Dr. May's expert. Dr. May's expert provided a fair market value of the practice of $55,000.00. The record is conflicting regarding that valuation. In its findings of fact, the family court judge found that the valuation by Dr. May's expert "did not include a designated value for goodwill and included a twenty percent (20%) reduction for 'lack of marketability.'" The family court judge rejected the valuation of $55,000.00 given by Dr. May's expert "due to the use of the twenty percent (20%) 'lack of marketability' reduction and the failure to specifically reflect a calculable goodwill analysis." However, the record in this case does not support the family law judge's conclusion that Dr. May's

expert did not include goodwill in the valuation. The report generated by Dr. May's expert lists $21,000.00 as the value for enterprise goodwill. During his testimony, Dr. May's expert confirmed this point as follows:

Q. This $55,000 figure that you came up with, does that include a value for goodwill?

A. It includes a value for the intangibles that we listed at $21,000.

Q. And it would include those $21,000 of intangibles or what you had listed as enterprise goodwill as opposed to [personal] goodwill?

A. Right.

Q. So then you actually have a calculation in here of the enterprise goodwill of this practice?

A. Yes.

We are troubled by the family court judge's finding that Dr. May's expert did not provide a value for goodwill, and a statement in Dr. May's brief that his expert "concluded there was no goodwill in [the] dental practice[.]" In fact, the record appears to contradict both the family law judge and Dr. May on this point. Because this issue has not been presented to us, we need not determine whether the factors used by Dr. May's expert to determine enterprise goodwill were valid considerations. However, we will point out that "enterprise goodwill may exist in a sole proprietorship." Gaydos v. Gaydos, 693 A.2d 1368, 1373 (Pa. Super. 1997).

Insofar as the family court judge rejected the valuation report by Dr. May's expert, we agree with this ruling, but not with the reason provided. See Syl. pt. 3, Barnett v. Wolfolk, 149 W. Va. 246, 140 S.E.2d 466 (1965) ("This Court may, on appeal, affirm the [ruling] of the lower court when it appears that such [ruling] is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its [ruling]."). A discount for lack of marketability occurs when there is evidence that a business will receive less than its true value in a sale for any number of reasons. See Rattee v. Rattee, 767 A.2d 415, 420 (N.H. 2001) (pointing out that a lack of marketability "discount accounts for the fact that the lack of a ready market for [a business] makes it a less attractive investment to a prospective purchaser"). The family court judge rejected the 20% discount for lack of marketability, on the grounds that there was no evidence that the practice would actually be sold. To accept this reasoning as a basis for rejecting the 20% discount would make such discounts inappropriate in all divorce cases. As a practical matter, business valuations in divorce cases will generally be done on the basis of a theoretical sale, as opposed to an actual sale. See Michael v. Michael, 196 W. Va. 155, 469 S.E.2d 14 (1996) (per curiam) (affirming a 25% reduction for lack of marketabilty in the theoretical sale of a closely-held corporation). Instead, we find that the 20% discount must be rejected because it was based merely upon an assumption by Dr. May's expert that the practice would be hard to sell and therefore its true value would not be realized in a sale. Unlike the decision in Michael, where the expert provided a factual basis for the discount, i.e.,

documented heavy debts, Dr. May's expert did not provide any evidentiary proof that the practice would be hard to sell and, therefore, that its true value would not be realized in a sale.

Footnote: 23

During such testimony, Mrs. May's expert referred to "enterprise" goodwill as "professional" goodwill. The expert was not familiar with the use of the term "enterprise" goodwill. For the sake of clarity in this opinion, we have inserted "enterprise" when the expert used the term "professional".

Footnote: 24

The family court judge has discretion to decide whether additional evidence is required to determine the fair market value of the dental practice.

Link to PDF file

No. 31123 - *Hillman H. May v. Carol S. May*

Albright, Justice, concurring:

The majority tackles many tough aspects of domestic relations law not addressed by this Court since the principle of equitable distribution of marital property was first adopted in *LaRue v. LaRue*, 172 W.Va. 158, 304 S.E.2d 312 (1983), which the Legislature later codified. As such, the opinion provides a useful road map not only for present application but also for future development of this area and thus deserves serious study and reflection by the Bar. To aid in this process, I write separately.

The majority builds on the still vital equitable distribution principle set forth in *Tankersley v. Tankersley*, 182 W.Va. 627, 390 S.E.2d 826 (1990): that the starting point for valuing a business is fair market value, with the net value of a business calculated by deducting the debts related to the business from the total market value. By recognizing goodwill as a component of the valuation process and a distinction between enterprise and personal goodwill to determining the distributable value of sole proprietorships, professional practices and, by extension, other non-corporate forms of business or practices such as partnerships, the majority has provided needed uniform direction for the lower courts. In time, this concept may eventually be extended to include closely-held corporations where one of the litigants is a major stockholder whose involvement in a business may represent a significant portion of overall goodwill. By defining and adopting a distinction between the intangible assets of "enterprise" and "personal" goodwill and providing that only enterprise goodwill is subject to equitable distribution, the majority has established a consistent foundation on which determinations regarding both equitable distribution and alimony can be made. As I indicated before, the benefits of this approach may well be extended to apply not only to sole proprietorships, professional practices and other non- corporate forms of business but also to closely-held corporations. Clearly, the categorization of goodwill decreases the likelihood that future earning capacity _ personal goodwill _ will be improperly considered as part of the valuation process while increasing the probability that it will be correctly factored into the determination of alimony.

The majority provides further helpful guidance by identifying five commonly used, but not exclusive, methods for valuing goodwill once it has been determined that a sole proprietorship, professional practice or non-corporate form of business possesses distributable goodwill. These methods include: straight capitalization accounting; capitalization of excess earnings; IRS variation of capitalized excess earnings; market value; and the buy/sell agreement. Admittedly, none of the methods provides a completely accurate measure of worth and no method is favored over another. Nonetheless, they should provide an adequate evidentiary basis for the lower court to reach its factual conclusion regarding an amount of distributable goodwill for business valuation purposes. However, as the majority clearly related, the parties and the experts in the case at hand were not using the same terminology with regard to goodwill, resulting in conclusions _ and a record _ which were indeed confusing. While trial courts have broad discretion in factual determinations, the record must show some reliable evidentiary basis for the factual conclusions in order to withstand appellate

review. Courts and practitioners alike need to have a working knowledge of the valuation methods as well as of relevant accounting terms and definitions (See footnote 1) so that their use is selectively and appropriately applied. (See footnote 2) The definitions set forth in the opinion should, by supplying a standard, aid in reaching this end.

Two issues which I believe require further comment include the discount for lack of marketability and spousal contribution. While the majority did not find a discount for marketability appropriate in this case, the reason for doing so was not related to any one valuation method. Rather, this conclusion was reached because the recommendation was made on the factually unsupported assumption of Dr. May's expert that the practice would be hard to sell. Consequently, in my view such discounts are a viable tool in the valuation process when they are appropriate to the valuation method being employed and the circumstances, supported by documented evidence, so warrant.

As a point of clarification with regard to spousal contribution, the majority implies what *Hoak v. Hoak*, 179 W.Va. 509, 370 S.E.2d 473 (1988), explicitly decided: the contribution a spouse makes to the home during the time a person is earning a professional degree or by assisting in the establishment of a professional practice plays no part in determining the portion of a professional practice's value which is subject to equitable distribution. Rather, these contributions may be considered in appropriate circumstances for award of reimbursement alimony. *Id.* at Syl. pt. 2.

While I expect that this opinion will generate additional valuation concerns for this Court to address, the majority has made significant strides in this area of equitable distribution of marital property with which I unhesitatingly concur.

Footnote: 1

There are a number of publications which can serve to develop a working familiarity with business valuation terminology, including one published by the American Bar Association's Section of Family Law Publications Development Board entitled The Lawyer's Business Valuation Handbook by Shannon Pratt (2000).

Footnote: 2

I simply note that the problem with inaccurate use of accounting terms appears to plague this area of law generally, as demonstrated in the opinion in quotes of courts from other jurisdictions which incorrectly categorize goodwill as a tangible asset and cash as a fixed asset.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1999 Term

No. 25214

NANCY H. MAYHEW,
Plaintiff Below, Appellant,

V.

ROBERT E. MAYHEW,
Defendant Below, Appellee.

Appeal from the Circuit Court of Hampshire County
Honorable John M. Hamilton, Judge
Civil Action No. 93-C-166

REVERSED AND REMANDED
WITH INSTRUCTIONS

Submitted: November 10, 1998
Filed: July 14, 1999

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JUSTICE DAVIS delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Passive appreciation of separate property of either of the parties to a marriage, or that increase 'which is due to inflation or to a change in market value resulting from conditions outside the control of the parties,' is separate property which is not subject to equitable distribution." Syl. Pt. 1, *Shank v. Shank*, 182 W. Va. 271, 387 S.E.2d 325 (1989).

2. "Active appreciation of separate property of either of the parties to a marriage, or that increase which 'results from (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property, or (B) work performed by either or both of the parties during

the marriage' is marital property which is subject to equitable distribution." Syl. Pt. 2, *Shank v. Shank*, 182 W. Va. 271, 387 S.E.2d 325 (1989).

3. To the extent Syllabus point 9 of *Mayhew v. Mayhew*, 197 W.Va. 290, 475 S.E.2d 382 (1996), imposes a dual burden of persuasion to determine to what extent the increase in value of the separate, nonmarital property is active appreciation or passive appreciation, it is expressly overruled.

4. The party seeking to exclude property from the marital estate that is presumptively marital property, has the burden of persuasion on that issue. The party seeking to have the increase in value, if any, of the separate, nonmarital property deemed to be marital as a result of active appreciation, has the burden of persuasion on that issue.

5. The formula for an active or passive appreciation analysis requires a determination of the following five-step test: (1) whether the property, in general, is either separate or marital property; (2) placing a value on the nonmarital property at the commencement of the action; (3) the value of the nonmarital property, before it became subject to the active and passive appreciation analysis; (4) the circuit court calculation of the property's value at the commencement of the action, in relation to its value on the date(s) gifted; and (5) a determination as to what extent the increase in the value of the nonmarital property is active appreciation or passive appreciation. The resulting amount due to active appreciation is marital property and subject to equitable distribution.

Davis, Justice:

For a second time, this case is before the Court. Nancy H. Mayhew, appellant/plaintiff below, (hereinafter referred to as Ms. Mayhew) challenges the ruling of the Circuit Court of Hampshire County as the same relates to the disposition of 24 shares of corporate stock.See footnote 1 [1] Specifically, Ms. Mayhew seeks reversal of the circuit court's apportionment and calculation regarding the active and passive appreciation in value of the 24 shares of stock of Mayhew Chevrolet-Oldsmobile, Inc. The stock in question was gifted to Robert E. Mayhew, appellee/defendant below (hereinafter referred to as Mr. Mayhew) by his father. Simply put, Ms. Mayhew asserts that all appreciation in value of Mr. Mayhew's 24 shares of stock was the direct result of active appreciation and therefore any increase in its value is marital property. In contrast, Mr. Mayhew argues that any increase in the stocks's value was the result of passive appreciation and therefore remains his separate property. Accordingly, Mr. Mayhew presents as a cross-assignment of error the lower court's ruling that the sum of $60,525.00 represents the active appreciation of Mr. Mayhew's separate property and, as such, is marital property subject to equitable distribution. Finally, Mr. Mayhew assigns as error the circuit court's ruling that there be no adjustment to the amount and duration of alimony awarded to Ms. Mayhew.See footnote 2 [2] We conclude that the lower court erred in its analysis regarding the active appreciation of the 24 shares of stock in Mayhew Chevrolet-Oldsmobile, Inc. and further conclude that the circuit court abused its discretion by determining that the active appreciation was determined to be $60,525.00. Moreover, we conclude that as a result of Mr. Mayhew's failure to preserve at the trial court level his appeal of an alimony award to Ms. Mayhew, we now decline to address the issue.

I.
FACTUAL AND PROCEDURAL HISTORY

In *Mayhew v. Mayhew*, 197 W. Va. 290, 475 S.E.2d 382 (1996), (hereinafter referred to as *Mayhew I*), we affirmed the divorce granted to the parties and resolved other matters. In *Mayhew I*, the Court ruled that Mr. Mayhew had received 24 shares of stock during his marriage, as a gift from his father.See

footnote 3 [3] As a result of the stock being gifted to Mr. Mayhew, this Court appropriately ruled in *Mayhew I* that the 24 shares of stock were the separate property of Mr. Mayhew. Further, in *Mayhew I*, the Court valued the stock at $457,826.00.See footnote 4 [4] However, *in Mayhew I*, we reversed and remanded two specific issues to the circuit court.See footnote 5 [5] We instructed the circuit court to make an evidentiary determination as to the monetary value to be assigned to any active and passive appreciation of the 24 shares of corporate stock of Mayhew Chevrolet-Oldsmobile, Inc. held by Mr. Mayhew. Additionally, *Mayhew I* instructed the circuit court to revisit the issue of rehabilitative alimony.

Specifically, *Mayhew I* further directed the circuit court on remand to make two analytical determinations regarding any appreciation in the stock's value. First, a determination of the stock's value had to be made for each date on which the stock was gifted to Mr. Mayhew.See footnote 6 [6] Once having determined the stock's value on each gifted date, that value had to be deducted from the stocks' overall valuation of $457,826.00 and awarded to Mr. Mayhew as his separate property. The first analytical step established the grossSee footnote 7 [7] appreciated value without regard to the appreciation being active or passive. Next, the circuit court was directed to separate the stock's gross appreciated value into passive appreciation or active appreciation. Ms. Mayhew would then be entitled to one-half of the stock's active appreciation based upon the second analytical step.

On remand and in its first step analysis, the circuit court determined that the value of the stock on the four dates gifted was $113,045.00. This amount was deemed, as a matter of law, to be Mr. Mayhew's separate property. The circuit court then deducted $113,045.00 from the stocks' total valuation, erroneously stated by the circuit court as $457,824.00, leaving a balance of $344,779.00 as the stock's gross appreciated value.See footnote 8 [8]

As to the second step in its analysis, the circuit court determined that the gross appreciated value of the stock, in the sum of $344,779.00, was further divisible into active and passive appreciation. It was determined by the circuit court that $60,525.00 was active appreciation. The remaining balance of $284,254.00 was determined to be the result of passive appreciation. As such, the circuit court awarded to Mr. Mayhew, as his separate, nonmarital property, the full amount of the passive appreciation. Ms. Mayhew was awarded one-half of the value of the stock's active appreciation calculated to be $30,262.50. This appeal resulted from those rulings.See footnote 9 [9]

II.
STANDARD OF REVIEW

In the instant proceeding the circuit court adopted the recommended decision of the family law master. We have held that "[i]n reviewing challenges to findings made by a family law master that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a de novo review." Syl. Pt. 1, *Burnside v. Burnside*, 194 W. Va. 263, 460 S.E.2d 264 (1995).

III.
DISCUSSION
A. The Doctrine Of Active And Passive Appreciation

Ms. Mayhew invites this Court to adopt a "bright line" test or formula for determining active and passive appreciation involving closely-held corporations. Ms. Mayhew suggests that this Court adopt the following closely-held corporation formula:

When a spouse receives stock of a closely-held corporation as a gift and that spouse devotes all of his time and effort to the operation and management of the closely-held corporation and also derives most or all of the family income from said business, and when the non-titled spouse provides all the domestic and homemaker services for the family so the titled spouse can devote all his time to the operation of the closely-held corporation, then one hundred percent (100%) of the increase of the value of the stock during the years of marriage will be active appreciation subject to equitable distribution.

The formula suggested by Ms. Mayhew is both pragmatic and efficient. However, as we endeavor to explain, the doctrine of active and passive appreciation in West Virginia is defined and controlled by statute. It is because of such statutory constraints that we cannot and do not adopt Ms. Mayhew's "bright line" test.

In general, the doctrine of active and passive appreciation provides that any increase in the value of separate, nonmarital property acquired before or during marriage may be classified as either active, passive, or both. Any increase in the value of nonmarital property caused by marital contributions is deemed to be active appreciation and constitutes marital property. Any increase in the value of nonmarital property caused by nonmarital factors is deemed passive appreciation and constitutes separate property. *See* Brett R. Turner, Equitable Distribution of Property § 5.22, at 233 (1994).

The active and passive appreciation rule accurately reflects the marital partnership theory that supports our equitable distribution principles. That is, increased value resulting from spousal efforts becomes the property of the marital partnership. Whereas, increased value attributable to other sources remains separate property. *See* Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 Miss. L.J. 115, 147-149 (1997). Professor Bell noted in her article that one of the most troubling issues involving the active and passive appreciation doctrine is finding a viable "method or formula for determining the portion of appreciation attributable to spousal efforts and the portion that resulted from third party or market forces." Id., 67 Miss. L.J. at 149.

Equitable distribution jurisdictions have rejected all efforts to make the "causation" determination for active and passive appreciation, be based exclusively upon a set formula. Instead, courts "uniformly apply a flexible, discretionary approach." Turner, Equitable Distribution of Property § 5.22, at 247.See footnote 10 [10] The discretionary or fact- based approach used by courts in assessing causation in active and passive appreciation, reflects the belief that "there is no 'bright line' distinction between active and passive increases in value, and any attempt to create one is likely to do more harm than good."See footnote 11 [11] Sally B. Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. Rev. 195, 233 (1987). While the fact-based approach is the preferred method in equitable distribution jurisdictions, the fact-based approach has been criticized as making "appreciation much harder to classify, increasing litigation costs and discouraging negotiated settlements." Turner, Equitable Distribution of Property § 5.22, at 247.See footnote 12 [12]

Criticism of the fact-based approach to causation in the active and passive appreciation analysis is legitimate. In none of this Court's seminal opinions have we questioned applying the fact-based approach to causation in an active and passive appreciation analysis. *See Mayhew I*; *Smith v. Smith*, 197 W. Va. 505, 475 S.E.2d 881 (1996); *Shank v. Shank*, 182 W. Va. 271, 387 S.E.2d 325 (1989). The Court's silence is traced to the source of the definitions for active and passive appreciation in West Virginia. The definitions of active and passive appreciation are of statutory origin. These statutory definitions were first articulated by this Court in *Shank*. In syllabus point 1 of *Shank* we indicated that passive appreciation is

defined by statute as follows:

Passive appreciation of separate property of either of the parties to a marriage, or that increase "which is due to inflation or to a change in market value resulting from conditions outside the control of the parties," is separate property which is not subject to equitable distribution.See footnote 13 [13]

We also noted in syllabus point 2 of *Shank* that active appreciation is defined by statute as follows:

Active appreciation of separate property of either of the parties to a marriage, or that increase which "results from (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property, or (B) work performed by either or both of the parties during the marriage" is marital property which is subject to equitable distribution.See footnote 14 [14]

Although a formula-based approach may be the most efficient method of performing an active and passive appreciation analysis, such a formula must be articulated by the legislature. The statutory definitions for active and passive appreciation require a fact-based analysis when determining causation in an active and passive appreciation analysis. Indeed, Ms. Mayhew's suggested closely-held corporation formula nullifies the legislative requirement that any increase "which is due to inflation or to a change in market value resulting from conditions outside the control of the parties," is nonmarital property and therefore is not subject to equitable distribution.

B. Re-examining The Burden Of Persuasion On A Claim For Appreciated Value Of Nonmarital Property

Before we proceed with our analysis of the substantive issues in this appeal, we are obligated to *sua sponte* revisit the dual burden of persuasion standard enunciated in *Mayhew I*.See footnote 15 [15] We take this step because of the apparent difficulties the dual burden of persuasion standard caused the circuit court in evaluating the evidence presented on remand. In syllabus point 9 of *Mayhew I* we set out the following dual burden of persuasion standard:

The burden of persuasion is on the party asserting a right to the property, that is to say that the burden of persuasion with respect to characterizing the property as separate property is on the one claiming the property to be separate and the burden of persuasion with respect to characterizing the property as marital is on the party claiming the benefit of that result.

The burden of persuasion standard set out in *Mayhew I* was an extension of our holding in syllabus point 3 of *Roig v. Roig*, 178 W. Va. 781, 364 S.E.2d 794 (1987), wherein we held that "[w]hen the issue in a divorce proceeding is the equitable distribution of marital property, both parties have the burden of presenting competent evidence to the trial court concerning the value of such property."See footnote 16 [16] The obvious difference in *Mayhew I* and *Roig*, is that *Roig* addresses, in general terms, the "burden of presenting evidence,"See footnote 17 [17] while *Mayhew I* imposes a dual "burden of persuasion." Moreover, the most compelling distinction between the two decisions is that *Mayhew I* discussed the issue of valuing nonmarital property as active and passive appreciation, whereas the decision in *Roig* discussed the issue of correctly valuing pension assets.

Our decisions have previously recognized the placement of a burden of persuasion on both parties, with respect to different issues in a case.See footnote 18 [18] For example, in syllabus point 4 of *Huber v. Huber*, 200 W. Va. 446, 490 S.E.2d 48 (1997) we set out the following shifting burden of persuasion:

In a divorce proceeding a noninjured spouse who claims money from a tort settlement or verdict award as loss of consortium, must prove the same by a preponderance of the evidence. The injured

spouse who claims money for noneconomic loss and post-divorce economic loss must prove the same by a preponderance of evidence. If either or both parties carry their burdens of proof, the money proven under such burdens shall be deemed separate property. To the extent that the parties do not provide sufficient evidence to make a reasonable allocation of all of the tort settlement or verdict award under their respective burdens, such balance shall be classified as marital property and divided accordingly.

In *Huber* is was necessary and pragmatic to allocate a burden of persuasion on both parties for several reasons. First, *Huber's* analysis involved quantifiable property that both spouses claimed to own as separate property. Second, both spouses had bona fide theories that, if proven, could allocate the property as separate property. Finally, to the extent that one or both spouses failed to meet their burden of persuasion, or if they met their burdens but property remained, the remaining property became marital property-- subject to equitable distribution. Thus, *Huber* presented a factual setting that made it logically appropriate to have a shifting burden of persuasion.

The factual setting of *Huber* is different from that of *Mayhew I*. *Mayhew I* involves one spouse alleging that the increased value of separate property is active or marital property, whereas the other spouse claims that the increased value in nonmarital property is passive and therefore remains separate property. The *Mayhew I* fact pattern reaches an absurd and illogical result, if both parties are given the burden of persuasion. For example, suppose the nonproperty owning spouse proves that 10% of the separate property's increase in value was the result of active appreciation and thus marital property. In contrast, the property owning spouse proves that 30% of the separate property's increase in value was the result of passive appreciation and thus remained separate property. This result means that 60% of the increase in value of the property belongs to no one. It cannot be marital property because the active appreciation value was proven to be 10%. Equally true, it cannot be separate property because the passive appreciation value was proven to be 30%.See footnote 19 [19]

One can readily see that a dual burden of persuasion to prove active and passive appreciation is simply not functionable.See footnote 20 [20] To the extent Syllabus point 9 of *Mayhew I* imposes a dual burden of persuasion to determine to what extent the increase in value of the separate, nonmarital property is active appreciation or passive appreciation, it is expressly overruled. We make this ruling mindful of the doctrine of stare decisis. "Stare decisis is the policy of the court to stand by precedent." *Banker v. Banker*, 196 W. Va. 535, 546 n.13, 474 S.E.2d 465, 476 n.13 (1996). However, "as a practical matter, a precedent-creating opinion that contains no extrinsic analysis of an important issue is more vulnerable to being overruled[.]" *State v. Guthrie*, 194 W. Va. 657, 679 n.28, 461 S.E.2d 163, 185 n.28 (1995). *Mayhew I* simply does not provide a logical analysis to support its formulation of a dual burden of persuasion standard.See footnote 21 [21] "Remaining true to an 'intrinsically sounder' doctrine ... better serves the values of stare decisis than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error. . . In such a situation 'special justification' exists to depart from the recently decided case." *Adarand Constr., Inc. v. Pena*, ___ U.S. ___, ___, 115 S.Ct. 2097, 2115, 132 L.Ed.2d 158 (1995).

We simply cannot find any persuasive reasoning to continue with the precedent established in *Mayhew I*.

1. The analytical framework for conducting active and passive appreciation: a five-step test

We must assign the burden of persuasion to one of the parties, having rejected a shifting burden of persuasion standard when segregating separate property into active and passive appreciation. To do so, we must first establish the general analytical framework within which the active and passive appreciation analysis occurs. This requires a five step test.

The first step involves determining whether the property, in general, is either separate See footnote 22 [22] or marital property.See footnote 23 [23] This initial step requires no independent determination of active or passive appreciation. The burden of persuasion at the first step rests with the party claiming the property as separate, nonmarital property.See footnote 24 [24] The second step in the analysis requires placing a value on the nonmarital property at the commencement of the action.See footnote 25 [25] The burden of persuasion at the second step rests with the owner of the nonmarital property. The third step involves placing a value on the nonmarital property, before it became subject to any active or passive appreciation analysis.See footnote 26 [26] The burden of persuasion at the third step rests with the owner of the nonmarital property.See footnote 27 [27] The fourth step requires that the circuit court calculate the property's value at the commencement of the action, in relation to its value on the dates gifted.See footnote 28 [28] That is, the court must make two distinct calculations to determine whether there was, in fact, any increase in value of the nonmarital property.See footnote 29 [29] The fifth step in the analysis requires a determination as to what extent the increase in value of the nonmarital property is active appreciation or passive appreciation. The burden of persuasion at the fifth step is discussed separately below.

2. The burden of persuasion: Valuing the active and passive appreciation of separate, nonmarital property

The fifth step in the active and passive appreciation analysis requires the actual segregation of separate, nonmarital property into active and passive appreciation.

We have already determined *Mayhew I's* shifting burden of persuasion standard to be unworkable. Thus, the burden of persuasion must rest on the party claiming active appreciation or on the party claiming passive appreciation, but not on both parties. An examination of other equitable distribution jurisdictions that have addressed the burden of persuasion issue, in the context of the active and passive appreciation analysis, reveal several distinct approaches. A few jurisdictions hold that the party claiming passive appreciation has the burden of persuasion. *See In re Marriage of Weiler*, 629 N.E.2d 1216, 1221(Ill.App. 1994). *Adkins v. Adkins*, 650 So.2d 61, 68 (Fla.App. 1994); *Williams v. Williams*, 645 A.2d 1118, 1121 (Me. 1994); *Berenberg v. Berenberg*, 474 N.W.2d 843, 846 (Minn.App. 1991). One jurisdiction requires, by statute, that the spouse claiming active appreciation show that contributions of marital property or personal effort were made to the separate property, before the burden of persuasion shifts to the party claiming passive appreciation. *Decker v. Decker*, 435 S.E.2d 407, 410-411 (Va.App. 1993). By statute in another jurisdiction the burden of persuasion is placed on both parties. Under the statute, if both parties meet their burdens any increase in the value of the property is deemed separate. *Ciobanu v. Ciobanu*, 409 S.E.2d 749, 752 (N.C.App. 1991). A majority of jurisdictions place the burden of persuasion on the party claiming active appreciation. *See Connealy v. Connealy*, 578 N.W.2d 912, 915 (Neb.App. 1998); *Garfinkel v. Garfinkel*, 945 S.W.2d 744, 746 (Tenn.App. 1996); *Thielenhaus v. Thielenhaus*, 890 P.2d 925, 931 (Okl. 1995); *Elmaleh v. Elmaleh*, 584 N.Y.S.2d 857, 858 (1992); *Schneider v. Schneider*, 824 S.W.2d 942, 946 (Mo.App. 1992); *Popp v. Popp*, 432 N.W.2d 600, 605 n.3 (Wis.App. 1988); *Brooks v. Brooks*, 733 P.2d 1044, 1054 (Alaska 1987).

One commentator, reviewing West Virginia's equitable distribution laws, has suggested that "all increase in separate property should be classed as marital unless the separate property owner sustains the burden of showing that the increase is due to market conditions beyond the control of the parties." Joan M. Krauskopf, *Classifying Marital and Separate Property--Combinations and Increase in Value of Separate Property*, 89 W. Va. L. Rev. 997, 1022 (1987). In other words, Professor Krauskopf argues that in West Virginia the burden of persuasion should be placed on the party claiming passive appreciation. We disagree.

Logic and fairness dictate that, in West Virginia, the burden of persuasion on the issue of the increase in value of separate property should be upon the party claiming its active appreciation. It must be remembered that W. Va. Code § 48-2-1(e)(1) "expresses a marked preference for characterizing the property of the parties to a divorce action as marital property." Syl. Pt. 3, in part, *Whiting v. Whiting*, *supra*. In order to take property out of the preferred marital property characterization, the party claiming property as separate has the burden of persuasion. *See Roig*, 178 W. Va. at 785, 364 S.E.2d at 798 ("In all instances, the burden of proof is upon the spouse who would claim the gift"). It does not appear to be irrefutably logical to impose a party with the burden of persuasion in establishing property as separate and, after so doing, to continue this burden on the separate property owner merely because the non-owner claims active appreciation. Logic and fairness dictate that once a party has shown by a preponderance of the evidence that property is separate, the burden of persuasion then should fall on the non-owning party to show that some or all of the appreciation in value of the property is the result of active appreciation. *See generally*, *McCulloch v. McCulloch*, 435 N.W.2d 564, 568 (Minn.App. 1989) (holding that after a spouse establishes initially that an asset is nonmarital, the other spouse asserting that the nonmarital asset was given by gift to the marital estate, so as to become marital property, has the burden of persuasion). Therefore, when determining to what extent the increase in value of separate, nonmarital property is active appreciation, the burden of persuasion is upon the party asserting a claim of active appreciation.See footnote 30 [30]

3. Summation of the analytical framework for conducting the active and passive appreciation analysis

Based upon the foregoing discussion, we hold the party seeking to exclude property from the marital estate that is presumptively marital property, has the burden of persuasion on that issue. The party seeking to have the increase in value, if any, of the separate, nonmarital property deemed to be marital as a result of active appreciation, has the burden of persuasion on that issue.

We further hold that the formula for an active or passive appreciation analysis requires a determination of the following five-step test: (1) whether the property, in general, is either separate or marital property; (2) placing a value on the nonmarital property at the commencement of the action; (3) the value of the nonmarital property, before it became subject to the active and passive appreciation analysis; (4) the circuit court calculation of the property's value at the commencement of the action, in relation to its value on the date(s) gifted; and (5) a determination as to what extent the increase in the value of the nonmarital property is active appreciation or passive appreciation. The resulting amount due to active appreciation is marital property and subject to equitable distribution.

C. Application Of The Active And Passive Appreciation Five Step Test

1. Step one and step two

Our task now is to review the circuit court's order by utilizing the active and passive appreciation framework heretofore outlined. Application of this new burden of persuasion to the instant proceeding is not prejudicial, because both parties had previously been given the burden of persuasion on each of the relevant elements of the test. *See Kornberg v. Kornberg*, 542 N.W.2d 379, 387 n. 3 (Minn.1996) (holding that application of an incorrect standard of proof by the lower court only requires reversal if the error prejudices the other party).

In the instant proceeding the first and second steps of our analysis were actually performed in *Mayhew I*. We held in *Mayhew I* that Mr. Mayhew had established that the 24 shares of stock gifted to him were his separate, nonmarital property.See footnote 31 [31] It was also determined in *Mayhew I* that

the 24 shares of stock had a value of $457,826.00.See footnote 32 [32]

2. Step Three: Valuation of the stock at the dates gifted

The third step of our active and passive appreciation analysis involves placing a value on the 24 shares of stock at the various dates on which they were gifted to Mr. Mayhew. The burden of persuasion at step three rests with Mr. Mayhew.

The stock was gifted to Mr. Mayhew on four different occasions: 8 shares on January 2, 1985; 2 shares on May 19, 1988; 7 shares on January 4, 1989; and 7 shares on January 3, 1990.See footnote 33 [33] Mr. Mayhew introduced evidence through his expert witness that the total value of the 24 shares of stock on the dates gifted was $101,816.57. In contrast, Ms. Mayhew's expert witness testified that the total value of the 24 shares of stock on the dates gifted was $124,275.00. Rejecting both experts, the circuit court decided to average the two proffered figures and valued the 24 shares of stock on the dates gifted at $113,045.00. The circuit court gave no justification for its decision to average the two disputed figures. By this Court's placement of the burden of persuasion solely upon Mr. Mayhew at this step, we do not approve of the circuit court's decision to average the two figures.See footnote 34 [34] However, neither party assigned as error the circuit court's resolution of this issue. Therefore, we will not disturb the circuit court's finding on this matter.See footnote 35 [35]

3. Step four: Calculation of the stock's value at commencement of the action in relation to its value on each date gifted

The fourth step requires calculating the stock's value at the commencement of the action,See footnote 36 [36] in relation to its value on the dates gifted. This step requires the circuit court to subtract $113,045.00 (value on dates gifted) from $457,826.00 (value at commencement of action). The circuit court performed the calculation and concluded that the stock had appreciated in value by the amount of $344,779.00.See footnote 37 [37] We find no basis to disturb the circuit court's finding that the 24 shares of stock had, in fact, appreciated in value in the amount of $344,799.00.

4. Step Five: Separating the active and passive appreciation

The fifth step involves determining what portion of the increase should be allocated as active and/or passive appreciation. The burden of persuasion is on Ms. Mayhew. The evidence presented by Ms. Mayhew may be divided into three parts: (a) additional compensation, (b) dividends, and (c) extraordinary work efforts.See footnote 38 [38] We review the evidence below.

(a) Additional compensation. Ms. Mayhew presented evidence of additional compensation that Mr. Mayhew should have received for approximately a two year period after he obtained control of the corporation. The compensation argument and evidence presented by Ms. Mayhew involved his earned, but unpaid salary. As is set out in W. Va. Code § 48-2-1(e)(1), marital property means "earnings acquired by either spouse during a marriage[.]"See footnote 39 [39] Ms. Mayhew argues that retention by the corporation of Mr. Mayhew's salary constituted the active appreciation of separate property. Courts have held that retained salary or dividends may be deemed active appreciation of nonmarital stock where evidence shows "that the corporate owner-spouse had the power to influence the compensation paid and that the owner-spouse received inadequate compensation." *Watkins v. Watkins*, 924 S.W.2d 542, 545 (Mo.App. 1996) (citation omitted).

Ms. Mayhew's evidence revealed that Mr. Mayhew had unearned income of $147,000.00 for the two year period after he obtained control of the corporation. The circuit court accepted Ms. Mayhew's evidence on this issue. However, the circuit court reduced the unearned income amount by one-half to reflect "the tax consequences and the anticipated consumption of the proceeds by the parties[.]" Ms. Mayhew contends on appeal that there was no justification for such a reduction, and the circuit court took this action sua sponte.See footnote 40 [40] Moreover, it appears that the decision to reduce the figure by one-half was arbitrary and void of any findings to support the reduction. We believe that the evidence supported the circuit court's finding that Mr. Mayhew could have paid himself an additional $147,000.00. We further conclude that the circuit court was clearly erroneous in reducing the additional compensation evidence by one-half.

(b) Dividends. Ms. Mayhew argued that Mr. Mayhew earned $62,076.00 as dividends for the period 1985 through 1993. It has been correctly held that "[d]ividends from non-marital property received during the coverture are marital property." *In re Marriage of Perkel*, 963 S.W.2d 445, 450 (Mo.App. 1998).See footnote 41 [41] It has also been held that reinvestment of dividend income does not terminate its status as marital property.See footnote 42 [42] *See Harriman v. Harriman*, 710 A.2d 923, 925 (Me. 1998); *Fowler v. Fowler*, 463 N.W.2d 370, 373 (Wis.App. 1990). Moreover, as we have previously indicated, courts have held that retained dividends may be deemed active appreciation. In order for Ms. Mayhew to establish her right to share in the retained dividends she had to prove that Mr. Mayhew had the power to influence the payment of earned dividends. *See Watkins v. Watkins*, *supra*.

The circuit court found that Ms. Mayhew's evidence established that Mr. Mayhew had the power to pay earned dividends only for the years 1992 and 1993. The dividends earned for the years 1992 and 1993 totaled $29,603.00. Ms. Mayhew contends on appeal that the circuit court erred by failing to conclude that Mr. Mayhew was entitled to receive dividends for the full period covering 1985 through 1993. We disagree. Ms. Mayhew's evidence did not establish that Mr. Mayhew had the power to pay himself dividends for the period 1985 through 1991. Mr. Mayhew became the principal owner and controller of Mayhew Chevrolet-Oldsmobile, Inc. during the period 1992-93. Therefore, only during the years 1992 and 1993, did Mr. Mayhew have the authority to influence the payment of those dividends.

After the circuit court found that Ms. Mayhew had established that Mr. Mayhew increased the value of his nonmarital stock by retaining dividends in the amount of $29,603.00, the circuit court again reduced the amount by one-half to reflect "the tax consequences and the anticipated consumption of the proceeds by the parties[.]" Ms. Mayhew contends on appeal that there was no justification for such a reduction. For the reasons set fourth in Section III, Part C, § 4(a)., *supra,* we agree with Ms. Mayhew and find that the circuit court's reduction of the proven retained dividends, was clearly erroneous.

(c) Extraordinary work efforts. Finally, Ms. Mayhew contends that the circuit court erred by refusing to rule that the stock increased in value because of the extraordinary time and effort spent at the corporation by Mr. Mayhew. Ms. Mayhew also contended that she assisted in increasing the stock's value due to her work efforts both at home and in the community, as well as the sacrifices she made because of the time Mr. Mayhew was away from home. Ms. Mayhew presented evidence that the extraordinary work efforts increased the stock's value by $90,000.00 and thus constituted active appreciation.

This Court recognized Ms. Mayhew's theory of extraordinary work efforts in syllabus point 4 of *Smith v. Smith*:

Participation as an officer or director of a corporation together with significant stock ownership by a spouse constitutes sufficient participation to qualify, at least to some degree, as active appreciation for purposes of equitable distribution. When these factors are coupled with full-time work activity by the

spouse for the corporation, some degree of active participation must be assessed.

The circuit court rejected the evidence on this issue as "mere speculation not justified by any accounting principles as testified by the witnesses." We find that the circuit court committed error in rejecting evidence concerning extraordinary work efforts.See footnote 43 [43] We understand the circuit court's rejection of this evidence to be based upon its "speculative" nature. However, implicit in this Court's recognition of extraordinary work effort is the determination to permit "expert" testimony as to the likely value to be attached to extraordinary work effort. Ms. Mayhew presented such expert testimony. Ms. Mayhew's expert calculated that the extraordinary work effort in this case amounted to $90,000.00. We discern no basis to reject or reduce that amount. In addressing the issue of expert testimony under Rule 702 of the West Virginia Rules of Evidence in *Gentry v. Mangum*, 195 W.Va. 512, 524, 466 S.E.2d 171, 183 (1995), this Court noted that "Rule 702 has three major requirements: (1) the witness must be an expert; (2) the expert must testify to scientific, technical or specialized knowledge; and (3) the expert testimony must assist the trier of fact." We find *Gentry's* criteria to have been met by Ms. Mayhew's expert.

4. Income, dividends and work efforts

The circuit court committed error in reducing, by one-half, Mr. Mayhew's retained earning of $147,000.00 and dividends in the amount of $29,603.00. There was also error committed by the circuit court in rejecting Ms. Mayhew's expert evidence that the value of the stock increased by $90,000.00 due to the extraordinary work efforts of Mr. and Mrs. Mayhew. We find that the total active appreciation was proven to be $266,603.00. Based upon the analysis set forth in this opinion, Ms. Mayhew is entitled to one-half of $266,603.00 or $133,301.50, as her equitable distribution of the stock's active appreciation.

D. Rehabilitative Alimony

The decision in *Mayhew I* remanded the issue of rehabilitative alimony to the circuit court. Unfortunately, *Mayhew I* did not provide guidance as to what the circuit court should reconsider regarding rehabilitative alimony. The family law master's recommended order stated "[t]hat there shall be no adjustment to the amount of alimony awarded to the Plaintiff, but the alimony shall extend beyond the death of the Defendant." The circuit court's final order stated that "[n]either party argued that alimony should not extend beyond the death of the Payor, so the Court will not address that issue." Thus, the record is clear that the issue of rehabilitative alimony was not argued before the circuit court. Mr. Mayhew attempts now to resurrect the issue before this Court. We decline to address the issue. Our law is clear in holding that, as a general rule, we will not pass upon an issue raised for the first time on appeal. *See Koffler v. City of Huntington*, 196 W. Va. 202, 207 n.6, 469 S.E.2d 645, 649-650 n.6 (1996).

IV.
CONCLUSION

For the reasons set forth herein, we find that Ms. Mayhew proved the active appreciation of Mr. Mayhew's stock to be $266,603.00. She is therefore entitled to $133,301.50 as her portion of the marital property.See footnote 44 [44] We further conclude that the issue of rehabilitative alimony was not argued before the circuit court. Therefore, we decline to address the issue on appeal.

Reversed and Remanded with Instructions.

Footnote: 1 [1]The circuit court's order adopted, in whole, the recommendations of the family law master. Therefore, unless otherwise indicated, this opinion will refer to the circuit court's order without an independent reference to the family law master's recommendations.

Footnote: 2 [2]Ms. Mayhew's reply brief challenges Mr. Mayhew's right to make cross- assignments of error. Under Rule 10(f), of the Rules of Appellate Procedure, an appellee has the right to make cross-assignments of error. See Stump v. Ashland, Inc., 201 W. Va. 541, 499 S.E.2d 41 (1997); Petruska v. Petruska, 200 W. Va. 79, 488 S.E.2d 354 (1996); Marlin v. Bill Rich Const., Inc., 198 W. Va. 635, 482 S.E.2d 620 (1996).

Footnote: 3 [3]Mr. Mayhew became the principal owner of the car dealership approximately 17 months before the divorce action was filed in this case.

Footnote: 4 [4]During the parties' marriage, the Mayhews purchased an additional 10 shares of stock from the car dealership. In Mayhew I, we determined that the additional 10 shares of stock which were purchased during the parties' marriage was marital property with a value of $190,760.00. Those 10 shares of stock are not at issue in this appeal.

Footnote: 5 [5]The relevant facts of the marital history and divorce of the Mayhew family is succinctly set forth in Mayhew I. We will not repeat those facts in this opinion. See Green v. Mullins, 146 W. Va. 958, 962, 124 S.E.2d 244, 247 (1962) ("Reference is made to the two previous opinions of the Court for detailed statements of pertinent facts"); Earl T. Browder, Inc. v. County Court of Webster County, 145 W. Va. 696, 699, 116 S.E.2d 867, 869 (1960) ("Because of the detailed statement of pertinent facts in the previous opinion, the facts will be stated herein to a limited extent only").

Footnote: 6 [6]The stock was gifted on four different occasions: 8 shares were gifted on January 2, 1985; 2 shares were gifted on May 19, 1988; 7 shares were gifted January 4, 1989; and 7 shares were gifted on January 3, 1990.

Footnote: 7 [7]The term "gross" is being used to refer to the appreciation in value of the 24 shares of stock without identifying whether the appreciation was active or passive.

Footnote: 8 [8]As previously indicated, in Mayhew I, this Court held that the 24 shares of stock had a

total value of $457,826.00. The circuit court, without explanation, used the figure $457,824.00 as the total value of the stocks. In footnote 43 of this opinion we have made the appropriate adjustment for the erroneous deduction of $2.00 by the circuit court. The parties and lower court were bound by the figure set out in Mayhew I. That figure could only be altered upon a rehearing of Mayhew I by this Court. A rehearing of Mayhew I did not occur. "The determination of an issue by an appellate court will be regarded as the law of the case upon a subsequent review unless there has been a material change in the record justifying a different ruling." Syl., Reynolds v. Virginian Ry. Co., 117 W. Va. 359, 185 S.E. 568 (1936).

Footnote: 9 [9]*See infra Section III. D. for discussion of the issue of rehabilitative alimony.*

Footnote: 10 [10]*Community property jurisdictions determine causation, in the context of active and passive appreciation analysis, utilizing rigid formulas. Turner, Equitable Distribution of Property § 5.22, at 244- 247.*

Footnote: 11 [11]*The American Law Institute (ALI) has suggested (for use by equitable distribution jurisdictions) the following draft proposal as a formula-based determination of causation in the active and passive appreciation analysis:*

The portion of the increase in value that is marital property . . . is the difference between the actual amount by which the property has increased in value, and the amount by which capital of the same value would have increased over the same time period if invested in assets of relative safety requiring little management.

Quoted in, Bell, Equitable Distribution, 67 Miss. L.J. at 154. The proposal by the ALI is simplistically seducing. Yet, there is one readily apparent problem with the formula: How do courts fairly determine an investment vehicle that requires little management? Resolving this question would no doubt require the creation of yet another formula.

Footnote: 12 [12]*Indeed, Ms. Mayhew's desire for this Court to adopt her proposed formula is recognition of the difficulties involved with the fact-based approach determining causation in an active and passive appreciation analysis.*

Footnote: 13 [13]*See also, W. Va. Code § 48-2-1(f)(6) (1992).*

Footnote: 14 [14]*See also, W. Va. Code § 48-2-1(e)(2) (1992).*

Footnote: 15 [15]*As a general matter, the burden of proof consists of two components: burden of production and burden of persuasion. The burden of persuasion requires the party upon whom it is placed, to convince the trier of fact by a preponderance of the evidence on a given issue. When a party has the burden of persuasion on an issue, that burden does not shift. The burden of production merely requires a party to present some evidence to rebut evidence proffered by the party having the burden of persuasion. The term burden of production is also used to refer to either party presenting some evidence on a matter. See e.g., Syl. Pt. 3, in part, Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995) ("If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party"); Crain v. Lightner, 178 W.Va. 765, 769 n. 2, 364 S.E.2d 778, 782 n. 2 (1987) ("[A]n initial burden of production, which may shift to the nonmovant, and an ultimate burden of persuasion as to the nonexistence of a 'genuine issue,' which burden always remains on the movant").*

Footnote: 16 [16]*The decision in Mayhew I actually relied upon Miller v. Miller, 189 W. Va. 126, 428 S.E.2d 547 (1993) (per curiam), wherein this Court quoted syllabus point 3 of Roig.*

Footnote: 17 [17]*The "burden of presenting evidence" in Roig referred to the "production" of evidence. Roig did not create or imply a dual burden of persuasion standard. In fact, Roig clearly and unequivocally ruled that "[i]n all instances, the burden of proof is upon the spouse who would claim the gift." Roig, 178 W. Va. at 785, 364 S.E.2d at 798.*

Footnote: 18 [18]*As a general matter, our cases have permitted the burden of persuasion to shift to the defendant when the defendant alleges an affirmative defense. See, e.g., Skaggs v. Elk Run Coal Co., Inc., 198 W. Va. 51, 479 S.E.2d 561 (1996) (undue hardship is an affirmative defense, upon which the defendant bears the burden of persuasion); Voorhees v. Guyan Machinery Co., 191 W. Va. 450, 446 S.E.2d 672 (1994) (the defense of mitigation of damages is an affirmative defense in which the burden of persuasion lies upon the defendant); State v. Daniel, 182 W. Va. 643, 391 S.E.2d 90 (1990) (burden of persuasion may be imposed on a defendant asserting the affirmative defense of self-defense or accidental killing); Addair v. Bryant, 168 W. Va. 306, 284 S.E.2d 374 (1981) (burden of proof shifts to defendant on issue of contributory negligence).*

Footnote: 19 [19]*In the instant case, the circuit court overcame the situation presented by our hypothetical by utilizing an ad hoc and unacceptable methodology involving the arbitrary adding and averaging of both parties' evidence.*

Footnote: 20 [20]*The rejection of a dual burden of persuasion must be clearly understood as applying only to Mayhew I's requirement that the nonproperty owner carry the burden of proof in establishing active appreciation and the property owner carry the burden of proof in establishing passive appreciation. This is the extent of our rejection of a dual burden of persuasion. As we illustrate later in this opinion, dual burdens of proof are imposed on the parties in active and passive appreciation*

analysis.

Footnote: 21 [21]*In Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403, 90 S.Ct. 1772, 1789, 26 L.Ed.2d 339 (1970), the United States Supreme Court enunciated three factors in stare decisis analysis which should be weighed prior to rejection of a longstanding rule. These factors are: (1) the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; (2) the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and (3) the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. Although the rule of law overruled in Mayhew I is not longstanding, we are confident that Moragne's principles are satisfied by our deviation from this short-lived precedent.*

Footnote: 22 [22]*The definition of separate property is set out in W. Va. Code § 48-2-1(f) (1990) as follows:*

"Separate property" means:
(1) Property acquired by a person before marriage; or

(2) Property acquired by a person during marriage in exchange for separate property which was acquired before the marriage; or

(3) Property acquired by a person during marriage, but excluded from treatment as marital property by a valid agreement of the parties entered into before or during the marriage; or

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(4) Property acquired by a party during marriage by gift, bequest, devise, descent or distribution; or

(5) Property acquired by a party during a marriage but after the separation of the parties and before the granting of a divorce, annulment or decree of separate maintenance; and

(6) Any increase in the value of separate property as defined in subdivision (1), (2), (3), (4) or (5) of this subsection which is due to inflation or to a change in market value resulting from conditions outside the control of the parties.

Footnote: 23 [23]*W. Va. Code § 48-2-1(e) defines marital property as:*

(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, or whether held by the parties to the marriage in some form of co-ownership 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 shall not include separate property as defined in subsection (f) of this section; and

(2) The amount of any increase in value in the separate property of either of the parties to a marriage, which increase results from (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property, or (B) work performed by either or both of the parties during the marriage.

Footnote: 24 [24]*In Roig we recognized the demise of the presumption of an interspousal gift of separate property and explained that the party asserting such a gift had the burden of persuasion:*

[I]n keeping with the spirit of Code, 48-3-10 [1984], in order for property that is transferred from one spouse to the other during marriage to be excluded from the marital property pool, there must be proof that the property was intended as an irrevocable gift . . . In all instances, the burden of proof is upon the spouse who would claim the gift.

Roig, 178 W. Va. at 785, 364 S.E.2d at 798. See Barkley v. Barkley, 694 N.E.2d 989, 998 (Ohio App. 1997) (party seeking to have property deemed nonmarital bears the burden of persuasion); Troffo v. Troffo, 951 P.2d 197, 200 (Or.App. 1997) (party claiming property as nonmarital has burden of persuasion); In re Marriage of Hegge, 674 N.E.2d 124,126 (Ill.App. 1996) (party claiming that the property is nonmarital has the burden of persuasion); Stevenson v. Stevenson, 612 A.2d 852, 854 (Me.1992) (the party claiming that a piece of property is nonmarital bears the burden of persuasion on that issue); Frost v. Frost, 418 N.W.2d 220, 225 (Neb. 1988) (burden of persuasion to show the property is nonmarital property is on the person making the claim).

Footnote: 25 [25]*We have previously held that the "value of . . . marital property, ordinarily [is] the date of the commencement of the action." Whiting v. Whiting, 183 W. Va. 451, 455, 396 S.E.2d 413, 417 (1990).*

Footnote: 26 [26]*The critical determination that must be made at this step involves the date for valuing the property as separate property. If the separate property was acquired during the marriage, the date of such acquisition is the valuation date. If the separate property was acquired before the marriage, the parties' wedding date becomes the valuation date.*

Footnote: 27 [27]*See Williams v. Williams, 645 A.2d 1118, 1121 (Me. 1994). But see, Pulice v. Pulice, 661 N.Y.S.2d 675 (1997) (placing the burden on the non-owning spouse).*

Footnote: 28 [28]*No burden of persuasion is involved in the actual calculation process of the fourth step of our test.*

Footnote: 29 [29]*If there was no increase in value the analysis terminates. See Nowik v. Nowik, 643 N.Y.S.2d 223 (1996) (no evidence of appreciation in value of separate stock shown); Garfinkel v. Garfinkel, 945 S.W.2d 744 (Tenn.App. 1996) (property actually decreased in value); Reich v. Reich, 652 So.2d 1200 (Fla.App. 1995) (holding that it was error to find active appreciation without first making a finding that property actually appreciated in value); Knapp v. Knapp, 874 S.W.2d 520 (Mo.App. 1994) (no increase in value of property); In re Marriage of Hulse, 727 P.2d 876 (Colo.App. 1986) (no increase in value shown).*

Footnote: 30 [30]*The party claiming active appreciation in nonmarital property may carry his or her burden of persuasion by presenting evidence on the issue of active appreciation. There is no obligation on such party to present independent evidence of passive appreciation. The obvious reason for this is that whatever amount the party fails to prove is active appreciation is axiomatically passive appreciation. The opposing party may present independent evidence of passive appreciation or merely challenge the reliability of the evidence presented to prove active appreciation.*

Footnote: 31 [31]*In affirming the circuit court's ruling that the 24 shares of stock were nonmarital property, we indicated the following in Mayhew I regarding the evidence on this issue:*

In reviewing the evidence relating to the ownership of the twenty-four shares of Mayhew Chevrolet-Oldsmobile, Inc., stock in issue under this assignment of error, the Court notes that Robert E. Mayhew adduced evidence showing that those twenty-four shares were gifts from his father. Nancy E. Mayhew took issue with this and claimed that, although they outwardly appeared to be gifts, Robert E. Mayhew received a low salary while working for his father and that the salary was actually reduced shortly after he received his last gift of shares. Robert E. Mayhew countered this by introducing evidence suggesting that his brother had received gifts of

other property at the same time he received gifts of stock. He also introduced evidence indicating that his salary was reduced, as was his father's salary at the same time, due to the fact that the corporation had suffered severe losses from a devastating fire and needed to restore its financial standing. Mayhew I, 197 W. Va. at 298, 475 S.E.2d at 390.

Footnote: 32 [32]*We further indicated in Mayhew I:*

It appears that there was extensive evidence on the value of the shares presented by expert evaluators of such property, that such expert evaluators used appropriate methods for valuing the property, and that the family law master resolved the conflict in the evidence in that regard properly and valued the shares in a manner consistent with the evidence of value advanced by the evaluators. This Court cannot conclude that the findings of fact made by the family law master and the circuit court as to the value of the shares were clearly wrong. Accordingly, . . . the circuit court's ruling is affirmed. Mayhew I, 197 W. Va. at 298, 475 S.E.2d at 390.

Footnote: 33 [33]*This Court actually determined the dates on which the stock was gifted in Mayhew I. See Mayhew I, 197 W. Va. at 294-295, 475 S.E.2d at 386-387.*

Footnote: 34 [34]*When a lower court undertakes active and passive appreciation analysis it should only resort to averaging, when the methodologies used by both parties in arriving at their respective results are significantly flawed. The order of a lower court must specifically set out the significant flaws found by the lower court.*

Footnote: 35 [35]*Mr. Mayhew's brief does pick up this issue, but it does so in the context of arguing a specific enumerated assignment of error. In State, Dept. Of Health v. Robert Morris N., 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995), we pointed out that "[a] skeletal 'argument', really nothing more than an assertion, does not preserve a claim . . . Judges are not like pigs, hunting for truffles buried in briefs." (Citation omitted).*

Footnote: 36 [36]*The opinion in Mayhew I established the total value of the 24 shares of stock. It does not appear that Mayhew I used the commencement date of this action, as the point at which to calculate the total value of the 24 shares of stock. The opinion fails to state the basis for departing from the commencement date of the action. However, we are bound by the date affirmed in that opinion, since no rehearing was granted to reconsider the valuation date.*

Footnote: 37 [37]*The increase in value is actually $344,781.00. As we pointed out elsewhere in this opinion, the circuit court erroneously used the figure of $457,824.00. We will continue to use the figures relied upon by the circuit court until we definitively determine the active and passive appreciation calculation.*

Footnote: 38 [38]*Ms. Mayhew also presented evidence below concerning the assumption of debt by Mr. Mayhew that should have been assumed by the corporation, and valuation of the 24 shares of stock based upon General Motors' stock. The circuit court rejected the evidence on both issues and Ms. Mayhew does not raise them on appeal. The brief of Mr. Mayhew points out that Ms. Mayhew's expert was wrong in comparing General Motors' stock with his closely-held corporation. We agree with Mr. Mayhew and the circuit court agreed with Mr. Mayhew. This Court held in Mayhew I that "evidence can be developed regarding the performance of this business relative to others of similar size, character and circumstances which will aid the court." Mayhew, 197 W. Va at 303, 475 S.E.2d at 395. Clearly, the stock in Mr. Mayhew's closely-held corporation cannot be compared to that of the publicly traded stock of General Motors. In the final analysis, however, this issue is moot insofar as the evidence was rejected by the circuit court as it did not impact in anyway upon the other arguments and evidence presented by Ms. Mayhew.*

Footnote: 39 [39]*The term "earnings" is defined by W. Va. Code § 48-2-1(c) to mean "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program."*

Footnote: 40 [40]*For reasons not explained in Mr. Mayhew's brief, it appears that his expert decided to present evidence on the issue of active and passive appreciation by challenging numbers affirmed in Mayhew I and proceeding therefrom. In Mayhew I this Court determined that the parties owned 10 shares of the corporation's stock as marital property. The 10 shares were valued at $190,760.00. We also determined in Mayhew I that Mr. Mayhew owned 24 shares of the corporation's stock as separate property--subject to active and passive appreciation analysis. The 24 shares were valued at 457,826.00. The total value of the 34 shares was established in Mayhew I as $648,586.00. On remand, Mr. Mayhew's expert challenged the total valuation of the 34 shares of stock. Mr. Mayhew's expert concluded that the total value of the 34 shares of stock was $601,960.05. The expert then proceeded to present mathematical evidence based upon the figure of $601,960.05. Obviously, this Court's determination in Mayhew I that the 34 shares of stock had a value of $648,586.00 could not be challenged on remand. It was a conclusive fact. Accordingly, the circuit court disregarded much of the evidence presented by Mr. Mayhew's expert, but managed to utilize some figures to challenge and reduce numbers posited by Ms. Mayhew's expert. We believe that it was error for the circuit court to utilize any of the numbers or formulas tendered by Mr. Mayhew's expert as they were generated on an incorrect foundation, i.e., the figure of $601,960.05.*

Mr. Mayhew's brief in this appeal has attempted to both, distance itself from his expert's misguided calculations and selectively embrace some of his expert's calculations. The result of such efforts culminated in legal arguments and recalculations that were not presented to nor ruled upon by the circuit court or family law master. This Court has consistently held that we will not, as general rule, pass upon issues raised for the first time on appeal. See Koffler v. City of Huntington, 196 W. Va. 202, 207 n.6, 469 S.E.2d 645, 649-650 n.6 (1996). We apply this rule to Mr. Mayhew's assignments of error on the issue of active and passive appreciation of the 24 shares of stock.

Footnote: 41 [41]*Additionally, interest earned on nonmarital property has been held to constitute marital property. Reed v. Reed, 749 S.W.2d 335, 338 (Ark.App. 1988).*

Footnote: 42 [42]*In Smith, 197 W. Va. at 512-513, 475 S.E.2d at 888-889 we declined to address this issue.*

Footnote: 43 [43]*In her dissenting opinion in Mayhew I, Justice Workman captured the essence of the extraordinary work efforts issue in this case:*

In order to fully appreciate the extent of [Ms. Mayhew's] marital efforts in aiding [Mr. Mayhew] in his work at the dealership, it is helpful to examine these facts: During the parties' marriage, [Mr. Mayhew] worked at the car dealership every day from early in the morning until 7:00 p.m. or 8:00 p.m. at night. In addition, he worked every Saturday until at least 3:00 p.m. or 4:00 p.m. [Ms. Mayhew] would often prepare [Mr. Mayhew's] dinner and take it, together with their two daughters, to the dealership so they would have an opportunity to visit with their father for a short period of time during the weekdays,

and so that he (as well as other employees on some occasions) could have dinner without interrupting their work. [Mr. Mayhew] also was very active in community organizations as an aid to his business and [Ms. Mayhew] assisted in that respect as well. [Ms. Mayhew] helped her husband directly in many ways in the business, including actually working there without compensation before the children were born. On weekends, the family participated in social or civic activities for the purpose of becoming more visible in the community to increase the sale of new and used cars from the dealership. The wife did virtually all the household/child care duties, including mowing six-plus acres and tending to sheep, cattle, chickens and other farm animals. It is impossible not to conclude that the wife's efforts doing virtually all of the domestic work in this marriage, as well as the other efforts she made not only to work directly for the business but also to free her husband up to work in the business, helped this business appreciate. Mayhew I, 197 W.Va. at 309-310, 475 S.E.2d at 401-401 (Workman, J., dissenting).

Footnote: 44 [44]*We indicated elsewhere in this opinion that the circuit court erroneously found that the total value of the 24 shares of stock was $457,824.00, when Mayhew I identified the figure at $457,826.00. On remand the circuit court's order should reflect that from the total value of the stock in the amount of $457,826.00, Ms. Mayhew is entitled to $133,301.50 and Mr. Mayhew is entitled to $324,524.50.*

Rule 701 of the WVs Rules of Evidence
Owner can testify as to value of personal property

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1997 Term

No. 23550

RALPH E. EVANS AND NELLIE S. EVANS,

Plaintiffs Below, Appellants

v.

MUTUAL MINING,

Defendant Below, Appellee

Appeal from the Circuit Court of Logan County

Honorable Roger L. Perry, Judge

Civil Action No. 92-C-622

AFFIRMED, IN PART, REVERSED, IN PART

AND REMANDED

Submitted: February 5, 1997

Filed: April 11, 1997

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JUSTICE STARCHER delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. Civil discovery is governed by the *West Virginia Rules of Civil Procedure*, Rules 26 through 37. "The Rules of Civil Procedure generally provide for broad discovery to ferret out evidence which is in some degree relevant to the contested issue. (footnote omitted)." *Policarpio v. Kaufman*, 183 W. Va. 258, 261, 395 S.E.2d 502, 505 (1990). Discovery disputes that must be resolved by the circuit court are addressed to the circuit court's sound discretion, and the circuit court's order will not be disturbed upon appeal unless there has been an abuse of that discretion.

2. Under Rule 701 [1994] of the *West Virginia Rules of Evidence*, the owner of destroyed or damaged personal property is qualified to give lay testimony as to the value of the personal property based on his or her personal knowledge. When the value of the personal property is disputed, the ultimate determination of the value of personal property must be resolved by the trier of fact.

3. "'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992)." Syllabus Point 1, *Williams v. Precision Coil Co, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

4. "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syllabus Point 3, *Williams v. Precision Coil Co.*, 194 W.Va. 52. 459 S.E.2d 329 (1995).

5. "*Fletcher v. Rylands*, 3 H. & C. 774, 159 Eng.Rep. 737 (1865), *rev'd Fletcher v. Rylands*, L.R. 1 Ex.

265 (1866), *aff'd Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), as articulated in the *Restatement (Second) of Torts* (1976) is hereby adopted into the common law of this jurisdiction." Syllabus Point 1, *Peneschi v. National Steel Corp.*, 170 W.Va. 511, 295 S.E.2d 1 (1982).

Starcher, Justice:

Ralph E. and Nellie S. Evans appeal a jury verdict awarding them $5,000 for the damages they suffered when an impoundment of water under the control of Mutual Mining ("Mutual") inundated their property. On appeal, Mr. and Mrs. Evans allege the damage award was inadequate because of the circuit court's following errors: (1) exclusion of their testimony as owners of the value of their personal property, (2) exclusion of evidence of the concomitant damage which occurred on five other occasions, (3) exclusion of evidence of mental anguish, and (4) failure to grant a directed verdict on the issue of liability. Because we find merit in all the assignments of error except for the exclusion of evidence of mental anguish, we affirm, in part, reverse, in part, and remand this case, with directions.

I.

Facts and Background

On December 2, 1991, a sediment control cell located on the mountainside above the community of Madison Camp ruptured, sending water, mud and debris down the mountain and into Madison Camp. Mr. and Mrs. Evans are residents of Madison Camp and their property was inundated.(1) Numerous items that the Evanses had stored in their garage were damaged or destroyed when the wash covered their property. The sediment control cell is/was part of the drainage structure for Mutual's surface mining operations on the mountainside above Madison Camp. Although Mutual undertook to remove the mud and debris from Madison Camp, the Evanses maintain that because of blocked drains and culverts resulting from the December 21, 1991 incident, additional flooding occurred in Madison Camp on June 29, 1992, July 2, 1992, July 24, 1992, March 24, 1993 and June 4, 1993.

Mr. and Mrs. Evans filed suit in the Circuit Court of Logan County seeking to recover damage to their personal property and real property, for mental anguish and annoyance and inconvenience. During discovery, a dispute arose about the value of the Evanses' personal property. As a result of a circuit court order, the Evanses were unable to present to the jury all damages their personal property had sustained. In addition, by partial summary judgment order, the circuit court excluded evidence of flooding and damage for all the alleged incidents except those two incidents (December 2, 1991 and March 24, 1993) in which Mutual had been cited for failing to protect off site areas by the W.Va. Department of Environmental Protection. Because the Evanses' claim was limited to property damage, the circuit court also excluded damages for mental anguish.

The issue of Mutual's liability was submitted to the jury, which found Mutual liable and returned the following awards for the Evanses: "$1000.00 Damages to Personal property[,] $3000.00 Damages to Real property [and] $1000.00 Loss of use and annoyance and inconvenience." After the circuit court denied the Evanses' motion for either judgment notwithstanding the verdict or a new trial, the Evanses appealed to this Court alleging the circuit court made several errors.

II.

Discussion

A.

Owners' Opinion of the Value of Personal Property

Mr. and Mrs. Evans maintain that their opinion of the value of their personal property was erroneously excluded. During discovery, the Evanses produced a hand-written list of their property that was destroyed/damaged and assigned a value to each item. The list was extensive because the garage where the Evanses had stored some of their personal property had been flooded during the incidents. According to Mr. Evans, the damaged property included: equipment from their recently closed restaurant, camping equipment, off-season clothing and many other items. A dispute arose over whether the value assigned by the Evanses to their damaged property was the "fair market value," as requested by Mutual. During a deposition held on September 28, 1993, Mr. Evans testified that he had used catalogs to help him and that the values obtained from the catalog were "replacement values."

Arguing that "replacement values" were unresponsive to its request for "fair market values," Mutual sought a motion to compel, which was granted by the circuit court. Thereafter, the Evanses produced a second list in which the values of several of the items were reduced. However, most of the values noted on the second list remained unchanged. Mr. Evans also submitted his affidavit stating that none of the values noted on his second list was "a replacement cost." Mr. Evans acknowledged and listed the items which on the first list he had used a replacement value, but "[a]s to all other items on that [the first] list I had not replaced [sic] a replacement value but has assigned my opinion as to the fair market value."

Mutual, arguing that the values placed on the second list were unresponsive to the circuit court's order, moved to excluded the items that appeared on both lists with the same value. After a hearing, the circuit court excluded the items whose values had remained unchanged and refused to let the Evanses testify as to their value. The circuit court allowed the jury to consider items that appeared for the first time on the second list based on its finding "those [new items] to be arguably market value." According to the Evanses, the items excluded from the jury's consideration had a value of $9,756.99.

Civil discovery is governed by the *West Virginia Rules of Civil Procedure*, Rules 26 through 37. "The Rules of Civil Procedure generally provide for broad discovery to ferret out evidence which is in some degree relevant to the contested issue. (footnote omitted)." *Policarpio v. Kaufman*, 183 W. Va. 258, 261, 395 S.E.2d 502, 505 (1990)(absence of compelling evidence of irremediable prejudice, writ of probation does not lie to bar trial based on pretrial discovery ruling). *Cf. Dishman v. Jarrell*, 165 W. Va. 709, 711, 271 S.E.2d 348, 349 (1980)("The rules of pleading are liberal and seek substantial justice"). Discovery disputes that must be resolved by the circuit court are addressed to the circuit court's sound discretion, and the circuit court's order will not be disturbed upon appeal unless there has been an abuse of that discretion. Syllabus Points 1 and 2 of *Bell v. Inland Mut. Ins. Co.*, 175 W.Va. 165, 332 S.E.2d 127, *cert. denied*, 474 U.S. 936, 106 S.Ct. 299, 88 L.Ed.2d 277 (1985), state:

The imposition of sanctions by a circuit court under *W.Va.R.Civ.P.* 37(b) for the failure of a party to obey the court's order to provide or permit discovery is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion.

Syllabus Point 1, *Bell.*

The striking of pleadings and the rendering of judgment by default against a party as sanctions under *W.Va.R.Civ.P.* 37(b) for that party's failure to obey an order of a circuit court to provide or permit discovery may be imposed by the court where it has been established through an evidentiary hearing and

in light of the full record before the court that the failure to comply has been due to willfulness, bad faith or fault of the disobedient party and not the inability to comply and, further, that such sanctions are otherwise just.

Syllabus Point 2, *Bell. Cf. State v. Delaney*, 187 W.Va. 212, 215, 417 S.E.2d 903, 906 (1992)(subject to a defendant's rights "to present evidence on his own behalf and to confront adverse witnesses, pretrial discovery is generally within the discretion of the trial court"); Syllabus Point 8, *State v. Audia*, 171 W.Va. 568, 301 S.E.2d 199, *cert. denied*, 464 U.S. 934, 104 S.Ct. 338, 78 L.Ed.2d 307 (1983)("Subject to certain exceptions, pre-trial discovery in a criminal case is within the sound discretion of the trial court"); Syllabus Point 1, in part, *Nutter v. Maynard*, 183 W.Va. 247, 395 S.E.2d 491 (1990)("trial judge does have discretion to compel 'discovery by other means'" in appropriate circumstances).

In this case, the circuit court found that the values placed by the Evanses on their personal property were not fair market values as a matter of law and excluded the Evanses from testifying about the value of certain items.(2) Normally, opinion testimony by a lay witness is limited to opinions rationally based on the witness' perception which are helpful for a clear understanding of the witness' testimony or a determination of a fact in issue. Rule 701 [1994] of the *West Virginia Rules of Evidence* states:

If the witness is not testifying as an expert, his or her testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Given the requirements for opinion testimony by a lay witness, we find that under Rule 701 [1994] of the *West Virginia Rules of Evidence*, the owner of destroyed or damaged personal property is qualified to give lay testimony as to the value of the personal property based on his or her personal knowledge. When the value of the personal property is disputed, the ultimate determination of the value of personal property must be resolved by the trier of fact. As the owners of the destroyed personal property, the Evanses meet both the Rule 701 requirements to give their opinion concerning their personal property's fair market value and their testimony should not have been excluded. *See Royal Furniture Co. v. City of Morgantown*, 164 W.Va. 400, 263 S.E.2d 878 (1980)(operators of retail businesses with 30 years experience found to have special knowledge relative to the fair market value of the damaged items); *Spencer v. Steinbrecher*, 152 W.Va. 490, 497, 164 S.E.2d 710, 715 (1968)(owner may give opinion of "values of his own personal property, but he must, in order to avoid speculation, have enough experience to know values and be able to tell why"); Syllabus Point 7, *Stenger*, *supra* note 2 (owners of destroyed furniture and fixtures are qualified to give opinion even though their experience and knowledge as to values is very limited); Syllabus Point 14, *Tucker v. Colonial Fire Ins. Co.*, 58 W.Va. 30, 51 S.E. 86 (1905)(owner with sufficient knowledge to speak with intelligence may give opinion of value; the weight of his testimony is a question for the jury).

Our holding concerning personal property is similar to our long recognition that a landowner's opinion concerning the value of his or her land is admissible. *See Justice v. Pennzoil Co.*, 598 F.2d 1339 (4th Cir), *cert. denied,* 444 U.S. 967, 100 S.Ct. 457, 62 L.Ed.2d 380 (1979)(landowner's opinion of the value of standing timber destroyed by the defendant admissible); *W.Va. Dept. of Highways v. Fisher*, 170 W.Va. 7, 289 S.E.2d 213, *cert. denied*, 459 U.S. 944, 103 S.Ct. 257, 74 L.Ed.2d 201 (1982) (in condemnation proceedings, owner may express his opinion concerning the value of his or her land); *W.Va. Dept. of Highways v. Sickles*, 161 W.Va. 409, 242 S.E.2d 567 (1978), *overruled on other grounds*, *W.Va. Dept. of Highways v. Brumfield*, 170 W.Va. 677, 295 S.E.2d 917 (1982)(landowner's opinion of value of land admissible); *Guyandot Valley Ry.Co. v. Buskirk*, 57 W.Va. 417, 50 S.E. 521 (1905)(opinion of persons residing near property to be condemned are admissible on question of value).

We find that the circuit court abused its discretion in excluding the opinion testimony of Mr. and Mrs. Evans concerning the fair market value of their destroyed personal property. The testimony of Mr. and Mrs. Evans should have been presented to the jury for resolution of the factual dispute concerning the value of the destroyed personal property.

B.

Incidents of Flooding

Mr. and Mrs. Evans maintain that after the December 2, 1991 flooding, their property was flooded six more times. On motion for summary judgment, the circuit court excluded the evidence that flooding had occurred in five of the six alleged additional incidents. Only the incidents where Mutual was cited by the W.Va. Division of Environmental Protection (December 2, 1991 and March 24, 1993) were submitted to the jury. Mr. and Mrs. Evans maintain because mud and debris from the December 2, 1991 flooding blocked the sewers and drains, the blockage caused the additional flooding, and they should have been allowed to present evidence of the damage caused by the incomplete clean-up.

"A circuit court's entry of summary judgment is reviewed *de novo.*" Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). *See Williams v. Precision Coil, Inc.* 194 W.Va. 52,58, 459 S.E.2d 329, 335 (1994). Our traditional principle for granting summary judgment is stated in Syllabus Point 3 of *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of N. Y.*, 148 W.Va. 160, 133 S.E.2d 770 (1963):

A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.

In accord Syllabus Point 1, *Croston v. Emax Oil Co.*, 195 W.Va. 86, 464 S.E.2d 728 (1995); Syllabus Point 1, *Williams*, *supra*; Syllabus Point 2, *Painter, supra. See Williams, supra* and *Painter, supra* for discussions of the principles for granting summary judgment.

Rule 56(c) of the *West Virginia Rules of Civil Procedure* permits judgment to be entered when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Syllabus Point 3 of *Williams, supra* states:

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

In this case, the moving party did not support its motion by affirmative evidence showing there was no genuine issue of material fact concerning the flooding of May 19, 1992, June 29, 1992, July 22, 1992, July 24, 1992 and June 4, 1993. The circuit court erred in finding that only a citation by the W.Va. Division of Environmental Protection was evidence of Mutual's liability for the flooding in Madison Camp. Based on our review of the record, we find there was a genuine issue of material fact concerning the cause of the flooding for the additional five dates and therefore, we reverse that portion of the summary judgment order. Under these circumstances the issue of the cause of additional flooding incidents and any resultant damage should have been presented to the trier of fact for resolution of the factual dispute.

C.

Mental Anguish

Mr. and Mrs. Evans also claim damages from mental anguish for their property damage. Without citing any case law, the Evanses maintain that because they feared for their lives when the mud, water and debris washed down the mountain on December 2, 1991, they are entitled to damages for mental anguish. In Syllabus Point 3 of *Jarrett v. E.L. Harper & Son, Inc.*, 160 W.Va. 399, 235 S.E.2d 362 (1977), we noted that "[a]nnoyance and inconvenience can be considered as elements of proof in measuring damages for loss of use of real property." *In accord Kirk v. Pineville Moble Homes, Inc.*, 172 W.Va. 693, 310 S.E.2d 210 (1983). In *Jarrett*, property owners brought suit for damages arising from the destruction of their well, and although we allowed damages for annoyance and inconvenience, damages for mental anguish were not allowed. Our determination to allow recovery for annoyance and inconvenience was because "these considerations . . .[could be] measured by an objective standard of ordinary persons acting reasonably under the given circumstances. (citation omitted)." *Jarrett*, 160 W.Va. at 404, 235 S.E.2d at 365. In *Jarrett*, *id.*, we were "not prepared to allow recovery for mental pain and suffering."(3)

In this case because Mr. and Mrs. Evans fail to offer any reason to depart from *Jarrett*, we affirm the circuit court's decision to exclude damage for mental anguish in this property damage case.

D.

Strict Liability

Finally, Mr. and Mrs. Evans maintain that the circuit court erred in failing to grant them a directed verdict on the issue of liability. Mutual maintains that this issue is moot because "the jury found Mutual negligent for causing the Appellants' damage" in the December 2, 1991 flooding.

We have long held that "where a person chooses to use an abnormally dangerous instrumentality he is strictly liable without a showing of negligence for any injury proximately caused by that instrumentality." *Peneschi v. National Steel Corp.*, 170 W.Va. 511, 515, 295 S.E.2d 1, 5 (1982). In Syllabus Point 1 of *Peneschi*, we adopted a strict liability theory for abnormally dangerous instrumentality by stating:

Fletcher v. Rylands, 3 H. & C. 774, 159 Eng.Rep. 737 (1865), *rev'd Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866), *aff'd Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), as articulated in the *Restatement (Second) of Torts* (1976) is hereby adopted into the common law of this jurisdiction.

In *Peneschi*, 170 W.Va. at 516-17, 295 S.E.2d at 6-7, one of the sections we quoted from *Rylands* said:

We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

In the present case, Mutual, for its mining purposes, collected water in a sediment pond on a mountain overlooking a community. The water and other material in the sediment pond was likely to do mischief if it escaped. When the sediment pond escaped on December 2, 1991, Mutual became *prima facie* answerable for all the damage. A similar incident arose in *Weaver Mercantile Co. v. Thurmond*, 68

W.Va. 530, 70 S.E. 126 (1911) in which a large wooden tank containing water for the defendant's hotel burst and flowed into the plaintiff's store. In *Weaver,* we said: "If the person whose duty it was to keep the tank in good repair had not been negligent in some respect, the tank would not have burst." *Weaver*, 68 W.Va. 532, 70 S.E.2d at 127. Our reasoning in both *Peneschi* and *Weaver* is based on the refusal to shift liability away from the entity that profits from the abnormally dangerous activity.

We find that the circuit court should have found Mutual strictly liable for the damages suffered by the Evanses when the sediment pond broke sending water, mud and debris down the mountain and any sequel thereof.

III.

Conclusion

For the above stated reasons, the circuit court's decision is affirmed, in part, reversed, in part, and remanded, with directions. On remand, the circuit court is directed to conduct a new trial limited solely to the issue of damages. In the new trial, Mr. and Mrs. Evans should be permitted to offer their own opinion as to the fair market value of all their destroyed/damaged personal property. Any factual dispute as to the value of the personal property is for jury resolution. To the extent that the December 2, 1991 flooding/cleanup caused additional flooding on subsequent dates because of blocked drains and culverts, evidence of such damage is to be submitted to the jury. Although damages for mental anguish are not appropriate in this case, the jury can consider annoyance and inconvenience for all the incidents caused by Mutual. Finally, the jury is to be instructed that Mutual is strictly liable for all damage caused by the rupture of its sediment pond, including additional incidents of flooding caused by the original flooding.

Based on the foregoing, the decision of the Circuit Court of Logan County is affirmed, in part, and reversed, in part, and this case is remanded with directions.

Affirmed, in part,

reversed, in part,

and remanded.

1. Several other residents of Madison Camp filed complaints against Mutual Mining and the cases were consolidated. However, the Evanses were the only persons to appeal the circuit court's decision.

2. *See* Syllabus Point 5, *Stenger v. Hope Natural Gas Co.*, 139 W.Va. 549, 80 S.E.2d 889 (1954); Syllabus Point 4, *Adkins v. City of Hinton*, 149 W.Va. 613, 142 S.E.2d 889 (1965)(fair market value is the measure of damages for personal property).

3. Our opinion today does not foreclose a recovery for mental anguish in a case where only property is damaged. The circumstances in this case come close, but we have insufficient evidence of whether, using an objective standard, an ordinary person would have feared for his or her life when the water

rupture came down the mountainside and into the community.

Rule 702 WVa Rule of Evidence / what is an expert to testify to value of Real Estate

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1999 Term

No. 25791

THE WEST VIRGINIA DIVISION OF HIGHWAYS, A CORPORATION,
Petitioner Below, Appellee

v.

JACK BUTLER AND THE NICHOLAS COUNTY SHERIFF/TREASURER,
Respondents Below

JACK BUTLER,
Respondent Below, Appellant

Appeal from the Circuit Court of Nicholas County
Honorable Gary L. Johnson, Judge
Civil Action No. 96-C-20

REVERSED AND REMANDED

Submitted: May 11, 1999
Filed: June 15, 1999

G. Alan Williams, Esq.
West Virginia Division of Highways
District Attorney Sutton, West Virginia
Attorney for the Appellee

William C. Martin, Esq.
Cooper and Martin
Lewisburg, West Virginia
Attorney for Butler

JUSTICE MAYNARD delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong." Syllabus Point 6, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991), *cert. denied,* 502 U.S. 908, 112 S.Ct. 301, 116 L.Ed.2d 244 (1991).

2. "W.Va. Code, 37-14-1, *et seq.*, is not designed to prevent an expert otherwise qualified under Rule 702 of the West Virginia Rules of Evidence from testifying with regard to the value of real property

or the damages that may have resulted to it." Syllabus Point 8, *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728 (1994).

3. Under the permissive standard for the admission of expert testimony set forth in Rule 702 of the West Virginia Rules of Evidence, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify to the value of real property in an eminent domain proceeding if the proffered testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.

4. In an eminent domain proceeding to take private property for public use, it is within the sound discretion of the trial court as to whether the purchase price paid by the owner of the condemned property should be admitted into evidence.

5. In an eminent domain proceeding to take private property for public use, the trial court's sound discretion is not unbridled, and the decision as to whether the purchase price paid by the owner of the condemned property should be admitted into evidence is to be guided by several factors or conditions. The general rule is that evidence of the price paid for property which is the subject of appropriation proceedings is admissible, if the following conditions are satisfied: (a) The sale must be bona fide; (b) The sale must be voluntary, not forced; (c) The sale must have occurred relevantly in point of time; and (d) The sale must cover substantially the same property which is the subject of the appropriation action.

Maynard, Justice:

This is an appeal from a final order of the Circuit Court of Nicholas County which entered judgment for the appellant, Jack Butler[See footnote 1 1], in the total sum of $26,600.00 which was the sum returned by the jury at the close of eminent domain proceedings as just compensation for land taken by the appellee West Virginia Department of Transportation, Division of Highways.[See footnote 2 2] The appellant raises three assignments of error which he alleges resulted in an unfair trial. After careful consideration of the issues, we reverse and remand for proceedings consistent with this decision.

I.
FACTS

The appellant, Jack Butler, owned twenty acres of undeveloped land located along U.S. Route 19 in Nicholas County. In order to widen U.S. Route 19 to four lanes, the appellee, West Virginia Department of Transportation, Division of Highways (DOH), instituted eminent domain proceedings, pursuant to W.Va. Code § 54-2-14a (1981), in the Circuit Court of Nicholas County for the purpose of acquiring title to 3.665 acres of the appellant's property.

By order of March 4, 1996, the Circuit Court of Nicholas County found that the DOH had a lawful right to take the subject property for public purposes. The circuit court ordered the DOH to pay to the clerk of the court $24,300.00, the amount deemed by the DOH to be just compensation for the property, pending the completion of the report of the condemnation commissioners appointed to ascertain the property's value.

By report of May 1, 1997, the commissioners found that $30,000.00 would be just compensation for the 3.665 acre tract of land. Both the DOH and the appellant excepted to this sum and demanded a jury trial which was held in January 1998 in the Circuit Court of Nicholas County. The crux of the issue at trial was whether the subject tract of land should be valued as commercial property. The appellant

testified that he purchased all twenty acres of the property in 1986 for $20,000.00 for investment purposes. Gary Herndon, a residential real estate appraiser, and Calvert Estill, a general real estate appraiser and consultant, testified that all 3.665 acres constituted commercial property worth $70,000.00 an acre, making the entire 3.665 acre tract worth $257,000.00. David Heater, a corporate secretary and real estate manager for Go-Mart Incorporated testified that Go-Mart considered purchasing the tract at issue in 1990 in order to build a convenience store or truck stop but chose to forego the purchase in light of the DOH's plans to widen U.S. Route 19. The appellant sought to have Mr. Heater qualified as an expert in site selection for convenience stores so that Mr. Heater could testify as to the value of the property at issue. The circuit court excluded the testimony based on the fact that Mr. Heater was not a certified or licensed appraiser.

Evidence on behalf of the DOH consisted of the testimony of Gordon Cole, a general real estate appraiser, that only .38 acres of the subject tract consisted of commercial property. He valued this portion of the property at $73,000.00 an acre and the remaining 3.29 acres at $405.00 an acre, making the total value of the property $24,350.00. David Casto, a general real estate appraiser, testified that he concurred with Mr. Cole's appraisal.

At the close of the evidence, the jury returned a verdict of $26,600.00. The appellant's motion for a new trial was denied by the circuit court by order of March 31, 1998 in which judgment for the DOH was rendered in the total sum of the verdict rendered by the jury. The appellant now appeals this final order.

II.
DISCUSSION

The first issue raised by the appellant is whether the circuit court erred in refusing to allow David Heater, the corporate secretary and real estate manager for Go- Mart Incorporated, to testify as an expert witness regarding his opinion of the value of the property. Concerning this Court's standard of reviewing the circuit court's decision to exclude this testimony, we have previously stated that "[t]he admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong." Syllabus Point 6, *Helmick v. Potomac Edison Co.,* 185 W.Va. 269, 406 S.E.2d 700 (1991), *cert. denied,* 502 U.S. 908, 112 S.Ct. 301, 116 L.Ed.2d 244 (1991).

As noted above, the DOH objected to Mr. Heater's testimony on the value of the property at issue, and the circuit court excluded the testimony, on the ground that Mr. Heater was not a certified or licensed appraiser and thus could not give an opinion as to the value of the property. The appellant correctly argues that the circuit court erred in excluding the testimony because Mr. Heater met *W.Va.R.Evid.* 702 qualifications of knowledge, experience, and training.

Article 14, Chapter 37 of the W.Va. Code is titled "The Real Estate Appraiser Licensing and Certification Act," *see* W.Va. Code § 37-14-1 (1990). W.Va. Code § 37-14-3(a) (1991) states, in relevant part, that "it is unlawful for any person, for compensation or valuable consideration, to prepare a valuation appraisal or a valuation appraisal report relating to real estate or real property in this state without first being licensed or certified as provided in this article." According to W.Va. Code § 37-14-2 (a) (1992), in part, "'[a]ppraisal' means an analysis, opinion or conclusion prepared by a real estate appraiser relating to the nature, quality, value or utility of specified interests in, or aspects of, identified real estate or identified real property." Finally, W.Va. Code § 37-14- 2(c) defines "[a]ppraisal report" as "any communication, written or oral, of an appraisal" and states that "the testimony of an appraiser dealing with the appraiser's analyses, conclusions or opinions concerning identified real estate or identified real property is deemed to be an oral appraisal report." The circuit court found that these code

sections prohibit in-court opinion testimony as to the value of property by anyone other than a licensed or certified appraiser.

This same issue was recently addressed by this Court in *Teter v. Old Colony Co.,* 190 W.Va. 711, 441 S.E.2d 728 (1994) where we rejected the appellant's assertion "that W.Va. Code, 37-14-2 and -3 (1991) . . . preclude appraisal testimony in court unless the appraiser is licensed under the [Real Estate Appraiser Licensing and Certification] Act." *Teter,* 190 W.Va. at 723, 441 S.E.2d at 740. In analyzing this issue in *Teter,* we first determined that there is a certain ambiguity in this code section as to the extent of its coverage under the phrase "the testimony of an appraiser dealing with the appraiser's analyses . . . is deemed to be an oral appraisal report." Because this code section is ambiguous and in derogation of the common law, we found that it should be strictly construed. Accordingly, we concluded that "W.Va. Code, 37-14-1, *et seq.,* is not designed to prevent an expert otherwise qualified under Rule 702 of the West Virginia Rules of Evidence from testifying with regard to the value of real property or the damages that may have resulted to it." Syllabus Point 8, *Teter.* We noted further, however, that even if W.Va. Code § 37-14-1 *et seq.,* unambiguously prohibited anyone but a licensed or certified appraiser from testifying with regard to the value of real estate in a court proceeding, this prohibition would be contrary to the Rules of Evidence promulgated by this Court, pursuant to article eight, section three of our Constitution, and, thus, the prohibition would be void. For support, we quoted Syllabus Point 1 of *Stern Brothers, Inc. v. McClure,* 160 W.Va. 567, 236 S.E.2d 222 (1977) which states:

> Under Article VIII, Section 8 of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them.

It is clear, therefore, that issues of expert testimony in general, and the specific issue before us in the instant case, is controlled by Rule 702 of the West Virginia Rules of Evidence. "Rule 702 . . . is the paramount authority for determining whether or not an expert is qualified to give an opinion." Syllabus Point 6, in part, *Mayhorn v. Logan Medical Foundation,* 193 W.Va. 42, 454 S.E.2d 87 (1994). According to Rule 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The DOH concedes that W.Va. Code § 37-14-1 *et seq.,* do not prevent Mr. Heater from giving opinion testimony regarding the value of the property at issue, but avers that Mr. Heater's testimony should nevertheless be excluded under *W.Va.R.Evid.* 702. The DOH bases this contention on its allegation that Mr. Heater lacked sufficient knowledge of the facts to state an opinion thereon. According to the DOH, Mr. Heater had no knowledge of how much land the DOH was taking, which part of the property was being taken, how much and where the residue of the property would be situated, and the amount of damages, if any, to the residue.See footnote 3 [3] Therefore, concludes the DOH, Mr. Heater had no basis on which to form an opinion, and the circuit court did not abuse its discretion in excluding his opinion testimony.

Historically, this Court has "been very liberal with regard to the qualifications necessary for an expert witness to testify on the value of property in condemnation proceedings." *West Virginia Dept. of Highways v. Sickles,* 161 W.Va. 409, 413, 242 S.E.2d 567, 571 (1978), *overruled on other grounds, W.Va. Dept. of Highways v. Brumfield,* 170 W.Va. 677, 295 S.E.2d 917 (1982) (citation omitted). Generally, "anyone having special knowledge of real estate, such as the owner who may have some peculiar qualification or more knowledge than jurors are ordinarily supposed to possess, can generally

express an opinion as to its value." *Leftwich v. Wesco Corporation,* 146 W.Va. 196, 208, 119 S.E.2d 401, 408-409 (1961), *overruled on other grounds, Bradley v. Appalachian Power Co.,* 163 W.Va. 332, 256 S.E.2d 879 (1979). *See also, Chesapeake & Ohio Ry. Co. v. Johnson,* 137 W.Va. 19, 26, 69 S.E.2d 393, 397 (1952) (". . . opinion evidence of market value as to property being acquired in condemnation proceedings is received with great liberality[.]"); Syllabus Point 1, *United Fuel Gas Co. v. Allen,* 137 W.Va. 897, 75 S.E.2d 88 (1953) ("In a proceeding in eminent domain the testimony of a witness, bearing on damages to the residue of the property sought to be taken, whose qualifications are meager and whose opinion is to some extent based upon hearsay, but who to some extent is qualified, is admissible in evidence over objection."); Syllabus Point 4, *State Road Commission v. Darrah,* 151 W.Va. 509, 153 S.E.2d 408 (1967) (" In an eminent domain proceeding, a nonexpert witness is not competent to express an opinion concerning the market value of the land taken or the damages to the residue, beyond benefits, unless he has some peculiar qualification or more knowledge in relation to the subject of such opinion than jurors are ordinarily supposed to have."); *Ellison v. Wood & Bush Company,* 153 W.Va. 506, 518, 170 S.E.2d 321, 329 (1969) ("Opinion evidence dealing with value and damages to land is admissible if the witness has some peculiar qualification or more knowledge than jurors are ordinarily supposed to have" (citations omitted).); *State Road Commission v. Ferguson,* 148 W.Va. 311, 134 S.E.2d 900 (1964); and *State v. Sanders,* 128 W.Va. 321, 36 S.E.2d 397 (1945).

Rule 702 of the West Virginia Rules of Evidence is generally consistent with this preexisting common law. *See Reager v. Anderson,* 179 W.Va. 691, 700, n. 4, 371 S.E.2d 619, 628, n. 4 (1988). Specifically, the liberality in the admission of expert testimony is retained. Rule 702 permits the admission of expert testimony if the witness qualifies as an expert upon the subject in which he or she is called to testify, and the testimony can assist the trier of fact. As under our prior law, the standard for qualifying as an expert is a permissive one in that a witness may be qualified as an expert by "knowledge, skill, experience, training, or education." *W.Va.R.Evid.* 702. "If a witness qualifies on any of the grounds listed in Rule 702, [he or she] should be allowed to testify as an expert." Franklin D. Cleckley, *Handbook On Evidence For West Virginia Lawyers,* Vol. 2, § 7-2(A)(1), p. 28 (3rd ed. 1994).

To summarize what we have said thus far, we hold that Rule 702 of the West Virginia Rules of Evidence is the paramount authority for determining whether an expert is qualified to give an opinion on the value of real estate in an eminent domain proceeding. Under the permissive standard for the admission of expert testimony set forth in Rule 702 of the West Virginia Rules of Evidence, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify to the value of real property in an eminent domain proceeding if the proffered testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. We will now apply this rule to the specific facts of this case.See footnote 4 [4]

Plainly, the circuit court erred in excluding Mr. Heater's testimony concerning the value of the condemned land for the reason that Mr. Heater was not a certified or licensed appraiser. The dispositive issue, therefore, is whether Mr. Heater qualifies as an expert under Rule 702. Mr. Heater testified that his job is to select properties on which to build convenience stores and truck stops for Go-Mart Incorporated. This job includes both the buying and selling of real estate. He testified further that he has been involved in property selection for twenty years, and he has purchased real estate for Go-Mart all over West Virginia and Ohio. In addition, he has taken appraising classes as well as classes on property selection through the National Association of Convenience Stores. All of this leads us to conclude that Mr. Heater is qualified to testify as an expert on the value of the property at issue because of his knowledge, skill, experience, training and education in the areas of property selection and appraisal. There is no dispute that Mr. Heater's testimony would assist the trier of fact in determining the fact in issue.

As noted above, the DOH complains that Mr. Heater lacked sufficient knowledge to testify as an

expert. Any lack of knowledge, however, goes to the weight of the testimony and not its admissibility. Once Mr. Heater testifies as to the value of the property, the DOH can cross-examine him and reveal any weaknesses in his opinion. "Once a witness is permitted to testify, it is within the province of the jury to evaluate the testimony, credentials, background, and qualifications of the witness to address the particular issue in question. The jury may then assign the testimony such weight and value as the jury may determine." *Cargill v. Balloon Works, Inc.,* 185 W.Va. 142, 147, 405 S.E.2d 642, 647 (1991). We conclude, therefore, that the circuit court was clearly wrong in excluding the testimony of David Heater as to the value of the appellant's property. Accordingly, we reverse and remand on this issue.

Although we dispose of this case on the issue discussed above, we deem it necessary to decide the remaining issues raised by the appellant in order to provide direction to the circuit court on remand. The second and third issues concern jury instructions on the weight to be given evidence of the appellant's purchase price of the subject property in determining the property's fair market value at the time of the take. The appellant first contends that the circuit court erred in refusing to give his proffered jury instruction No. 1 which states:

> The price which Mr. Butler paid to acquire the property is not the measure of damages in this case and should not be considered in your deliberations unless you find that transaction is representative of the fair market value of the property for its highest and best use at the time it was taken by the Department of Transportation.

The circuit court instead gave the following instruction to which the appellant also objects:

> The price which Mr. Butler paid to acquire the property in 1986 is not the measure of damages in the case. It is one of the elements that can be considered in determining the value of the property, but what you are to determine is the fair market value of the property for its highest and best use at the time it was taken by the Department of Transportation.
>
> Thus the true measure of just compensation to the landowner is the fair market value of the land taken on the 4th day of March, 1996, and the damage to the residue, if any.

The record discloses that the appellant testified on cross-examination concerning the price he paid for the subject property. At that time, appellant's counsel did not object to the admission of the evidence. The purchase price evidence did not become an issue until the formulation of jury instructions. Accordingly, the appellant now couches the issue of the probative value of this evidence in terms of whether the proper jury instructions were given. We note, however, that the question of the probative value of the original purchase price in an eminent domain proceeding usually is whether the evidence is admissible into evidence in the first instance. Therefore, we condense the appellant's final assignments of error into the single issue of whether the price paid by the appellant for the subject property and adjoining acres is admissible into evidence as probative of the fair market value of the 3.665 acres involved in the eminent domain proceeding.

The appellant contends that purchase price evidence is improper in the instant case because the purchase occurred ten years previously, covered twenty acres which is substantially more than the 3.665 acres taken, and was forced insofar as the seller was anxious to sell for financial reasons. *Citing West Virginia Dept. of Highways v. Mountain Inc.,* 167 W.Va. 202, 279 S.E.2d 192 (1981). The DOH counters that *Mountain Inc.* is factually distinguishable from the instant case, and the purchase price evidence is relevant.See footnote 5 [5]

We previously have stated that in an eminent domain proceeding to take private property for public

use, "[i]t is within the sound discretion of the trial court as to whether the purchase price paid by the owner of the condemned property should be admitted into evidence." *West Virginia Dept. of Highways v. Woods,* 180 W.Va. 93, 96, 375 S.E.2d 564, 567 (1988) (citation omitted). However, in an eminent domain proceeding to take private property for public use, the trial court's sound discretion is not unbridled, and the decision as to whether the purchase price paid by the owner of the condemned property should be admitted into evidence is to be guided by several factors or conditions. *See Mountain Inc., supra.*

The general rule is that evidence of the price paid for property which is the subject of appropriation proceedings is admissible, if the following conditions are satisfied:

(a) The sale must be bona fide;
(b) The sale must be voluntary, not forced;
(c) The sale must have occurred relevantly in point of time; and
(d) The sale must cover substantially the same property which is the subject of the appropriation action.

Mountain Inc., 167 W.Va. 202, 205, 279 S.E.2d 192, 194 (1981), *Quoting* 5 *Nichols on Eminent Domain,* § 21.2, at 21-4-21-8 (3rd rev.ed. 1979) (footnote omitted).

In the instant case, the admissibility of the purchase price is determined by factors (c) and (d). There is no contention that the sale in which the appellant purchased the property was not bona fide. Also, even though the appellant claims that the sale was not voluntary but forced because "the seller was anxious to sell for financial reasons," we are unable to determine from this vague assertion whether the seller "freely exercis[ed] prudence and intelligent judgment as to its value, and [was] unaffected by compulsion of any kind." Syllabus Point 2, in part, *Guyandotte Valley Ry. Co. v. Buskirk,* 57 W.Va. 417, 50 S.E. 521 (1905).

Concerning whether the sale occurred relevantly in point of time, we determined in *Guyandotte Valley Ry. Co., supra,* that purchase price evidence was properly considered by the jury where the property was purchased about three months prior to the commencement of the eminent domain action. In *Mountain Inc., supra,* we found that four and a half years between the time the appellant purchased the property and the time the property was taken for public use did not render the purchase price evidence "inadmissible *per se.*" 167 W.Va. at 206, 279 S.E.2d at 195. Finally, in *West Virginia Dept. of Highways v. Woods,* 180 W.Va. 93, 96, fn. 5, 375 S.E.2d 564, 567, fn. 5 (1988), we concluded that the purchase of the subject property three years earlier "was not so remote in time from the condemnation proceedings as to render evidence of the purchase price inadmissible for that reason."

In the present case, the appellant purchased the subject property in June 1986 and the take occurred in March 1996, approximately nine years and nine months later. Economic conditions in a given area may change significantly in a period of close to ten years. This appears to be the case here. There was testimony at trial of a "remarkable and dramatic" change in the desirability of land in the area where the subject property is located which, of course, caused a substantial increase in property value. One expert witness testified that recent economic developments made the purchase price paid by the appellant irrelevant to a determination of the property's fair market value. Accordingly, we find that the price paid by the appellant for the condemned land was too remote in time so that it is not probative of the fair market value of the property at the time of the take.

Further, we find that the fourth condition listed above is not met here. In *Mountain Inc.,* we concluded that purchase price evidence was not admissible when there had been a substantial change in the physical characteristics of the property due to the leveling of its slope. In the instant case, there was not a substantial change in the physical characteristics of the property. We also stated in *Mountain Inc.,* however, that the fourth condition for admissibility can be construed to cover those instances in which the

amount of property taken is substantially different from the amount of property originally purchased. This is the case here. The appellant originally purchased 20 acres of land. The portion of this land taken by the DOH amounts to only 3.665 acres. Further, most of the twenty acres purchased by the appellant consists of hilly property whereas the portion taken is, to a large degree, level. This makes it difficult for a jury to apportion from the purchase price paid for the entire tract of land the value of the actual property taken. Therefore, we believe that because the sale in which the appellant purchased the property does not cover substantially the same property which is the subject of the eminent domain action, evidence of the purchase price is inadmissible.

We therefore find that in this eminent domain proceeding to take private property for public use, the purchase price paid by the owner for the subject property is not admissible because there was a period of approximately nine years and nine months between the time the landowner purchased the subject property and the time a portion of the property was taken for public use. Also, the amount of property taken, 3.665 acres, is substantially different from the amount of property originally purchased which was twenty acres.

III.
CONCLUSION

In light of the above, we find that the circuit court abused its discretion in excluding the testimony of David Heater as to the value of the appellant's property and in admitting evidence of the purchase price paid by the appellant for the subject property for the purpose of determining its fair market value at the time of the take. Accordingly, we reverse and remand for proceedings consistent with this opinion.

Reversed and remanded.

Footnote: 1 [1]*Also listed as parties below were the Nicholas County Sheriff/Treasurer and the Gassaway Bank. These parties were originally named as respondents below for the purpose of unpaid and owed real property taxes and a deed of trust, the value of which was to be paid out of the jury verdict. By order of March 29, 1996, the Bank of Gassaway was dismissed as a respondent.*

Footnote: 2 [2]*Apparently this order also constitutes a denial of the appellant's motion for a new trial filed on February 10, 1998 although the order does not address the motion.*

Footnote: 3 [3]*The DOH supports its argument here by pointing, in part, to the following portion of the trial transcript:*

DOH counsel: [At the time you looked at the Butler property and considered buying it], did you have access

to any Division of Highways right-of-way maps, Petitioner's Exhibit No. 2 here [full size plan sheet], that showed the extent of the right of way and how much the Butlers actually owned?

Heater: At the first time I looked at the property, no. There weren't maps, to my knowledge, even

drawn up at the time.

Footnote: 4 [4]*It is important to note that when scientific evidence, in contrast to the specialized knowledge in the instant case, is proffered pursuant to Rule 702, circuit courts must take additional steps to guarantee the relevance and reliability of the evidence. In Syllabus Point 4 of Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995), we stated:*

When scientific evidence is proffered, a circuit court in its "gatekeeper" role under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and Wilt v. Buracker, 191 W.Va. 39, 443 S.E.2d 196 (1993), cert denied, [511] U.S. [1129], 114 S.Ct. 2137, 128 L.Ed.2d 867 (1994), must engage in a two-part analysis in regard to the expert testimony. First, the circuit court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science. Second, the circuit court must ensure that the scientific testimony is relevant to the task at hand.

We further explained in Syllabus Point 6 of Gentry that the question of admissibility under Daubert and Wilt:

only arises if it is first established that the testimony deals with "scientific knowledge." "Scientific" implies a grounding in the methods and procedures of science while "knowledge" connotes more than subjective belief or unsupported speculation. In order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. It is the circuit court's responsibility initially to determine whether the expert's proposed testimony amounts to "scientific knowledge" and, in doing so, to analyze not what the experts say, but what basis they have for saying it.

In the recent case of Kumho Tire Co., Ltd. v. Carmichael, ___ U.S. ___, ___, 119 S.Ct. 1167, 1174, ___ L.Ed.2d ___, ___ (1999), the United States Supreme Court held that the special obligation upon a trial judge recognized in Daubert to "ensure that any and all scientific testimony . . . is not only relevant, but reliable" applies to all expert testimony. We decline to adopt the Kumho analysis in this case.

Footnote: 5 [5]*The DOH also argues that the appellant waived the alleged jury instruction errors by failing to make a sufficiently specific objection at trial. Because we address these issues in order to give direction to the circuit court on remand, we do not find it necessary to consider the merits of this argument.*

Appraisal Report

File #201

Prepared by:
Lisa Lynn, Owner
Personal Property Evaluation and Appraisal, LLC
4800 Staunton Avenue, SE
Charleston, West Virginia 25304
Phone: (304) 549-2874
Fax: (304) 345-7925

Member: Certified Appraisers Guild of America

Table of Contents

Summary

Value

Fair Market Value

The Fair Market Value for the property in total is: [redacted]

Analysis

All items inspected were in good to excellent condition unless otherwise noted.

Conditions of Appraisal

The value stated in this Appraisal Report is based on the best judgment of the appraiser given the facts and conditions available at the date of the valuation.

The use of the report is limited to the purpose of determining the value of personal property for Equitable Distribution purposes.

Any additional research or testimony required by the client or the court will be billed at the current rates.

Disclosure of the contents of the report is governed by the Standards and Practices of the Certified Appraisers Guild of America.

Certification of Report

Neither Lisa Lynn, Personal Property Evaluation and Appraisal, LLC nor any of its employees have any present or future interest in the subject property. No prohibited fee was assessed for this report.

Lisa Lynn of Personal Property Evaluation and Appraisal, LLC has successfully completed the personal property appraiser certification program with the Certified Appraisers Guild of America and is a member in good standing. This report was prepared in accordance with the Uniform Standards of Professional Appraisal Practice and with the Standards and Practices of the Certified Appraisers Guild of America which has review authority of this report.

Lisa Lynn has personally examined the subject property. The statements of fact contained in this report are true and correct to the best knowledge and belief of the appraiser.

By: Lisa Lynn, C.A.G.A
Personal Property Evaluation and Appraisal, LLC

$300 retainer
$75 per hour

Purpose of the Report

The purpose of this report is to determine the value for Equitable Distribution purposes for

Method of Valuation

The method of valuation used for this appraisal is the Fair Market Value.

Definition of Value

Fair Market Value

Under the United States Treasury regulation 1.170-1c Fair Market value is defined as:

The price at which the property would change hands between a willing buyer and a willing seller, neither being under compulsion to buy or compulsion to sell and both having reasonable knowledge.

Basis of Appraisal

Valuation Date

The date of valuation for determining the value estimation is July 24, 2009.

Date Appraisal Conducted

This appraisal was conducted on July 14, 2009.

Limitations of Property

There were no limitations on use or disposition of this property.

Description

An itemized list with descriptions is in Appendix A.

Lisa Lynn, Owner
Personal Property Evaluation and Appraisal, LLC
4800 Staunton Avenue, SE
Charleston, West Virginia 25304
Phone: (304) 549-2874
Fax: (304) 345-7925

Education

B. S. Mechanical Engineering

Designations

Certified Appraisers Guild of America
Personal property appraisers certification program
Certified Member

New England Appraisers Association
Certified Member

Experience

The Stock Exchange Co-Owner 1983-1996

Actively involved with personal property evaluation and pricing estates. Including furniture, clothing, jewelry, antiques, collectable's and household good. Facilitated household personal property organization, guidance and sales.

The Charleston Antiques Academy Co-Founder

Sponsored educational antiques seminars with featured speakers including Wendell Garrett of Sotheby's Academy and The Magazine Antiques. Seminars were held at The Cultural Center in Charleston.

Extensive library and computer data bases of major auction houses, Internet auction sites. Contacts with regional exposure concentrated in West Virginia, Tennessee and Charleston, South Carolina.

Appendix A

Fair Market Value

Dining Room

Family Room

Foyer

Guest Room

Guest Room-Bath

Hallway

140.00 [illegible]

[illegible] pcs, white

Kitchen

34.00 Dishes, Mikasa
26.00 Royal Dalton, 12 Gernuina, 1999
8.00 Plates, Hooker Fruit
32.00 Wedgwood, plates
44.00 Misc. plates and bowls, decorative tray
210.00 Silver plate flatware, Rogers, Oneida, service for 12 with 7 serving pieces
56.00 Vilroy and Bosche, 24 pieces
50.00 Nikko bowls, misc. Correll items
490.00 Royal Worcester, Contessa, set, aprx. 14 dinner plates, 8 cup and saucer, eight salad, small creamer, tea pot, coffee pot, covered dish, eight bowls
30.00 Misc. items, bowls, ramekins, silver coffee creamer, pewter
130.00 Four shelves mics. glassware, water, wine
120.00 Misc. serving items, pitchers, tea pot, cream sugar, glass bowl, misc. mugs, crock w/lid
98.00 Knives, set
140.00 Misc. food processor, Kitchen Aid mixer, blender
80.00 Misc. kitchen items, glass storage with plastic lids, casserole dishes, salad bowls, colander, salad spinner
90.00 Two-stove to oven copper core sauteuse pans with lids
160.00 Three Le Creuset enameled French ovens with lids
30.00 Marble mortar and pistil
250.00 Kirby Vacuum G Ultimate, orig. $1200.00

Living Room

[illegible]

Master Bathroom

[illegible]

Master Bedroom

Office

Outdoor

Pantry

Playroom

Powder Room

55.00 Misc. decorative items

Youth Bath Room

800.00 Bosche stacking washer and dryer

Youth Bath Room 2

150.00 Three drawer chest

Youth Room 1

620.00 Blond bunk beds, dresser, L shaped desk, small hutch (as is) Lexington

Youth Room 2

650.00 Bedroom suite, bed, hutch, dresser, corner cabinet

Youth Room 3

990.00 "Lea" bedroom suite, metal and wood bed, trundle, mirror door armoire, six drawer dresser, night stand, computer desk and hutch

90.00 Print rug, yellow floral

Youth Room 4

950.00 Bedroom suite, bed, desk, armoire, standing mirror

90.00 Large area rug, (as is)

55.00 Small side table

[redacted] Total

Children's Issues

Brittany Ranson Stonestreet

Lyne Ranson Law Offices, PLLC

Presented by Ashton Bias

CUSTODY & CHILD SUPPORT IN FAMILY LAW

- February 9, 2017 -

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CUSTODY

1. **SHARED PARENTING** – W.Va. Code § 48-1-239
   a. West Virginia uses "Shared Parenting" not necessarily "sole custody/joint custody"
   b. **Basic Shared** – one parent less than 35% of overnights of the year (127 or less).
   c. **Extended Shared** – each parent has the child overnight more than 35% of the year (128 or more).

2. **CUSTODIAL PARENT** - W.Va. Code § 48-9-603
   Solely for the purposes of all other state and federal statutes which require a designation or determination of custody, a parenting plan shall designate the parent with whom the child is **scheduled to reside the majority of the time** as the custodian of the child. However, this designation shall **not affect either parent's rights and responsibilities** under a parenting plan. In the absence of such a designation, the parent with whom the child is scheduled to reside the majority of the time is deemed to be the custodian of the child for the purposes of such federal and state statutes.
   - Does not grant "custodial parent" any special powers or additional decision making.
   - Does not *ipso facto* determine allocation of tax exemption (see W.Va. Code § 48-13-801).

3. **NEW CASE CHECKLIST**

   a. **FILE *VERIFIED* PARENTING PLAN** (W.Va. Code § 48-9-205(a))
      i. Note: Can file a "Joint Parenting Plan" if parties have an agreement

   b. **FILE WORKSHEET FOR INDIVIDUAL PROPOSED PARENTING PLAN** (W.Va. Code § 48-9-205(a))

   c. **ATTEND PARENT EDUCATION CLASS** (WVRPPFC[1] 37)
      i. **Mandatory** in all cases with minor children, *except* can be waived by the Court for good cause shown. Court must find *on the record* that attendance is not necessary and states the specific reasons.
      ii. **Sign up** through the Circuit Clerk's Office
      iii. **Cost: $25, unless financial affidavit/fee waiver approved** (WVRPPFC 9(d))
      iv. **Content of the Class:** Educates Parents (1) how to prepare a parenting plan; (2) mediation and other non-judicial methods available to assist parents in achieving agreement on a parenting plan; (3) the negative effects on children of divorce and family dissolution, and the ways in which parents can lessen those negative effects; (4) the negative effects on children of domestic abuse; (5) resources available for dealing with domestic abuse.
      v. **Timing of the Class/Effect of Failure to Comply:**
         1. If mediation or other non-judicial dispute resolution is not required, parent education shall be completed by both parents prior to the final hearing.

[1] "**WVRPPFC**" = West Virginia Rules of Practice and Procedure for Family Court.

2. Court may stop proceedings and enter a scheduling order setting a hearing for a date certain and require parties to complete parent education prior to hearing.
3. For good cause shown the court may conduct proceedings despite the failure of one or both parents to timely complete parent education.

4. CONTENTS OF THE COURT'S PERMANENT PARENTING PLAN (W.Va. Code § 48-9-205(b))

a. A provision for the **child's living arrangements** and each parent's custodial responsibility, which shall include either:
   i. A custodial schedule that designates in which parent's home each minor child will reside on given days of the year; OR
   ii. A formula or method for determining such a schedule in sufficient detail that, if necessary, the schedule *can be enforced* in subsequent proceedings by the court;
b. An **allocation of decision-making responsibility** as to significant matters reasonably likely to arise with respect to the child;
c. **Method for resolving disputes** and remedies for violation (see § 48-9-202); and
d. A plan for the custody of the child should one or both of the parents as a **member of the National Guard, a reserve component or an active duty component** be mobilized, deployed or called to active duty.
e. In the Court's discretion, may contain provisions that **address matters that are expected to arise** in the event of a party's relocation, or provide for **future modifications** in the parenting plan if specified contingencies occur. (e.g. when the child starts school...)

5. ALLOCATION OF TEMPORARY AND PERMANENT CUSTODY

a. **TEMPORARY PARENTING PLAN** (W.Va. Code § 48-9-203 and § 204)
   i. Determined at the temporary hearing.
   ii. Considerations**:** Court will consider proposed parenting plans and the following:
      1. ***Which parent has taken greater responsibility during the last 12 months for performing **caretaking functions** relating to the daily needs of the child.
      2. ***Which parenting arrangements will cause **the least disruption to the child's emotional stability** while the action is pending.
      3. Factors for allocation of custodial responsibility (W.Va. Code § 48-9-206)
         - Note: Relevant caretaking time period = 12 months.
      4. Existence of any **Limiting Factors** (W.Va. Code § 48-9-209)
         - Upon credible evidence, the court shall issue a temporary order limiting or denying access to the child, in order to protect the child or the other party, pending adjudication of the underlying facts. (48-9-204(c))
      5. Child's **Best Interests** (W.Va. Code § 48-9-102)
   iii. Content of a temporary parenting plan: (W.Va. Code § 48-9-204(b))
      1. Schedule for child's time with each parent when appropriate;
      2. Designate child's temporary residence

3. Allocate decision making authority. Absent allocation – neither parent shall make any decision for the child other than day-to-day decision or emergency care.
4. Restraining Orders, if applicable.

iv. Modifications of a Temporary Parenting Plan: (W.Va. Code § 48-9-204(d)) –
Upon motion, the court may amend a temporary parenting plan if the amendment conforms to the limitations/**limiting factors** in W.Va. Code § 48-9-209 and is in the **best interests** of the child (WV Code (W.Va. Code § 48-9-102)).
- Practice Tip: Family Courts will still typically modify based on a substantial change of circumstance or other basis for modifying a permanent parenting plan.

v. Family Court should use expedited procedures to facilitate prompt issuance of a parenting plan.

b. **PERMANENT PARENTING PLAN** – 24 months (W.Va. Code 48-9-205(b))
i. Determined following a final hearing(s).
ii. Considerations:
1. Factors for allocation of custodial responsibility (W.Va. Code § 48-9-206)
- Note: Relevant caretaking time period = 24 months. (§ 48-9-205(b))
2. Factors for allocation of decision making (W.Va. Code § 48-9-207)
3. Methods of Dispute Resolution (W.Va. Code § 48-9-208)
4. Existence of any Limiting Factors (W.Va. Code § 48-9-209)
5. Child's Best Interests (W.Va. Code § 48-9-102)

6. FACTORS FOR ALLOCATION OF CUSTODIAL RESPONSIBILITY (W.Va. Code § 48-9-206)

a. To be applied unless parties have an agreement OR manifestly harmful to the child.
b. Caretaking prior to the date of separation (or filing of the action if never married).
The Court will allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions…
i. **Temporary plan** = 12 months prior (W.Va. Code § 48-9-204(a)(1))
ii. **Permanent plan** = 24 months prior (W.Va. Code § 48-9-205(a)(3)
iii. Court shall not consider divisions of functions arising from temporary arrangements after separation, whether those arrangements are consensual or by court order. The court may take into account information relating to the temporary arrangements in determining other issues under this section. (W.Va. Code § 48-9-206(b))
iv. If Court cannot allocate custodial responsibility because (1) manifestly harmful to the child or (2) because there is no history of past performance of caretaking functions (i.e. newborn), or (3) because the history does not establish a pattern of caretaking sufficiently dispositive of the issues of the case, the court shall:
1. Allocate custodial responsibility based on the child's best interest, taking into account objectives below, existence of any limiting factors, and relocation factors in § 403(d).

2. Court shall preserve to the extent possible this section's priority on the share of past caretaking functions each parent performed.

c. Objectives:
   i. Permit the child to have a relationship with each parent who has performed a reasonable share of parenting functions;
   ii. Accommodate the **firm and reasonable preferences** of a child who is 14 or older
      1. If child is under 14, Court may give child's presence such weight as circumstances warrant, *if* child is **sufficiently matured** that he/she can intelligently express a voluntary preference for one parent.
   iii. **Keep siblings together** when doing so is necessary to their welfare.
   iv. Protect the child's welfare when, under an otherwise appropriate allocation, the child would be harmed because of a **gross disparity in the quality of the emotional attachments between each parent and the child** or in each parent's demonstrated ability or availability to meet a child's needs;
   v. Take into account **any prior agreemen**t of the parents that, under the circumstances as a whole including the reasonable expectations of the parents in the interest of the child, would be appropriate to consider;
   vi. **Avoid extremely impractical plans** or plans that would **interfere substantially with the child's need for stability** in light of economic, physical or other circumstances, including the distance between the parents' residences, the cost and difficulty of transporting the child, the parents' and child's daily schedules, and the ability of the parents to cooperate in the arrangement.
      1. Factor reiterated in W.Va. Code § 48-9-206(d) RE: Parenting Plan: In determining how to schedule the custodial time allocated to each parent, the court shall take account of the economic, physical and other practical circumstances.
   vii. **If applicable, apply relocation principles** set forth in W.Va. Code § 48-9-403(d); and
   viii. Consider the stage of a child's development.

7. CARETAKER & CARETAKING FUNCTIONS DEFINED (W.Va. Code § 48-1-210)

a. "Caretaking functions" means activities that involve interaction with a child and the care of a child. Caretaking functions also include the supervision and direction of interaction and care provided by other persons.
b. Caretaking functions include the following:
   i. **Daily caretaking:** Performing functions that meet the daily physical needs of the child. These functions include, but are not limited to, the following:
      1. Feeding;
      2. Dressing;
      3. Bedtime and wake-up routines;
      4. Caring for the child when sick or hurt;
      5. Bathing and grooming;
      6. Recreation and play;
      7. Physical safety; and
      8. Transportation.

ii. **Developmental needs:** Direction of the child's various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence and maturation;
iii. **Discipline:** Instruction in manners, assignment and supervision of chores and other tasks that attend to the child's needs for behavioral control and self-restraint;
iv. **Education:** Arrangements for the child's education, including remedial or special services appropriate to the child's needs and interests, communication with teachers and counselors and supervision of homework;
v. **Social:** The development and maintenance of appropriate interpersonal relationships with peers, siblings and adults;
vi. **Medical:** Arrangements for health care, which includes making medical appointments, communicating with health care providers and providing medical follow-up and home health care;
vii. **Moral/Religious Guidance**; and
viii. **Childcare:** Arrangement of alternative care by a family member, baby-sitter or other child care provider or facility, including investigation of alternatives, communication with providers and supervision.

8. LIMITING FACTORS (W.Va. Code § 48-9-209)

a. Credible information
b. **Examples of Limiting Factors:** Court shall determine whether a parent who would otherwise be allocated responsibility under a parenting plan has:
   i. **Abused, neglected or abandoned a child**, as defined by state law;
      1. "Abused child" (W.Va. Code § 49-1-201)
         A child whose health or welfare is threatened by one of the following:
         - A parent who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home. Physical injury may include an injury due to excessive corporal punishment;
         - Sexual abuse or sexual exploitation
         - The sale or attempted sale of a child by a parent, guardian or custodian in violation of W.Va. Code § 61-2-14(h); or
         - Domestic violence as defined in W.Va. Code § 48-27-202.
      2. "Neglected child" (W.Va. Code § 49-1-201)
         - Child whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when that refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or
         - Child who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian;

3. Abandonment of a child (W.Va. Code § 48-22-306)
    - For 6 month period prior to filing;
    - A parent fails to financially support a child (over 6 months old); and
    - A parent fails to visit or otherwise communicate with a child when he/she knows where child resides, is physically and financially able to do so and is not prevented from doing so by the person having care or custody of the child.

ii. **Sexually assaulted or sexually abused a child** (W.Va. Code § 61-8a and 61-8b)

iii. **Committed domestic violence** (W.Va. Code § 48-27-202)

iv. **Interfered persistently with the other parent's access to the child**
    1. Exception: Actions taken for the purpose of protecting the safety of the child or the interfering parent or another family member, *pending adjudication of the facts underlying that belief*;

v. Has made **one or more fraudulent reports of domestic violence or child abuse:**
    1. Exception: Withdrawal of or failure to pursue a report of domestic violence or child support shall not alone be sufficient to consider that report fraudulent.
    2. Award of Attorney's Fees*:* If the court determines that an accusation of child abuse or neglect, or domestic violence made during a child custody proceeding is false and the parent making the accusation knew it to be false at the time the accusation was made, the *court may order reimbursement to be paid by the person making the accusations of costs resulting from defending against the accusations*. Such reimbursement may not exceed the actual reasonable costs incurred by the accused party as a result of defending against the accusation and reasonable attorney's fees incurred.
    3. Defending Parent's Investigation: A parent who believes he or she is the subject of fraudulent child abuse reports, that parent may move the court pursuant to § 49-5-101(b)(4) for the Department of Health and Human Resources to disclose whether the other parent was the source of the allegation and, if so, whether the department found the report to be:
        - Substantiated;
        - Unsubstantiated;
        - Inconclusive; or
        - Still under investigation.
        - If the court grants a motion, disclosure by the DHHR shall be in camera. The court may disclose to the parties information received from DHHR *only* if reason to believe a parent knowingly made a false report.

c. **Limitations that may be imposed:** If a parent is found to have engaged in any limiting factor above, the court *shall* "impose limits that are reasonably calculated to protect the child or child's parent from harm." The limitations that the court shall consider include, but are not limited to:

i. An **adjustment of custodial responsibility**, including but not limited to:
    1. Increased parenting time with the child to *make up for any parenting time* the other parent lost as a result of the activity above;

2. An additional allocation of parenting time in order to *repair any adverse effect* upon the relationship between the child and the other parent resulting from the activity above; or
3. The *allocation of exclusive custodial responsibility* to one of the parents;

ii. **Supervision of the custodial time** between a parent and the child;
1. Practice Tip:
- "Supervised Parenting Time" = Parenting time supervised by an approved third party.
- "Monitored Parenting Time" = Parenting time that is monitored, typically by a facility, such as YWCA, Hudson Forensic, etc.

iii. **Exchanges through an intermediary, or in a protected setting** (e.g. through a family member, at a police station, or through a monitored visitation facility)

iv. **Restraints on communication with or proximity** to the other parent or the child.

v. A requirement that the **parent abstain from possession or consumption of alcohol or nonprescribed drugs** while exercising custodial responsibility and in the twenty-four hour period immediately preceding such exercise;

vi. **Denial of overnight** custodial responsibility

vii. **Restrictions on the presence of specific persons** while the parent is with the child;

viii. **Require the parent to post a bond to secure return of the child** following a period in which the parent is exercising custodial responsibility or to secure other performance required by the court;

ix. **Require the parent complete a program** of intervention for perpetrators of domestic violence, for drug or alcohol abuse, or a program designed to correct another factor; or

x. **Any other constraints or conditions** that the court deems necessary to provide for the safety of the child, a child's parent or any person whose safety immediately affects the child's welfare.

9. **Effect on Decision Making and Custody Allocation:** If a parent is found to have engaged in any limiting factors, the court may not allocate custodial responsibility or decision-making responsibility to that parent *without making special written findings* that the child and other parent *can be adequately protected from harm* by such limits as it may impose above.

a. Burden of Proof**:** Burden of showing that allocation of custodial responsibility and decision making will not endanger child or other parent is on the parent engaging in the behavior.

10. **BEST INTERESTS OF THE CHILD** (W.Va. Code § 48-9-102)

a. The West Virginia Supreme Court has recognized that the "best interests of the child is the polar star by which decision must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405 (1989).

b. The primary objective of article 9 is to serve the child's best interests, by facilitating:
i. Stability of the child;
ii. Parental planning and agreement about the child's custodial arrangements and upbringing;

iii. Continuity of existing parent-child attachments;
iv. Meaningful contact between a child and each parent;
v. Caretaking relationships by adults who love the child, know how to provide for the child's needs, and who place a high priority on doing so;
vi. Security from exposure to physical or emotional harm; and
vii. Expeditious, predictable decision-making and avoidance of prolonged uncertainty respecting arrangements for the child's care and control.

c. A secondary objective of article is to achieve fairness between the parents.

11. FACTORS FOR ALLOCATION OF SIGNIFICANT DECISION MAKING (W.Va. Code § 48-9-206)

a. Consideration for Significant Decisions: Unless otherwise agreed, the court shall allocate responsibility for making **significant life decisions on behalf of the child, including the child's education and health care, to one parent or to both parents jointly**, in accordance with the child's best interest**,** in light of:
   i. Allocation of custodial responsibility (see 48-9-206 above);
   ii. Level of each parent's participation in past decision-making on behalf of the child;
   iii. The wishes of the parents;
   iv. Level of ability and cooperation the parents have demonstrated in decision-making on behalf of the child;
   v. Prior agreements of the parties; and
   vi. The existence of any limiting factors (W.Va. Code § 48-9-206)
b. Presumption: If each parents has been exercising a **reasonable share of parenting functions for the child**, the **court shall presume** that shared/joint decision-making is in the child's best interests.
   i. *Presumption can be overcome* by showing a **history of domestic abuse**, or by a showing that it is not in the child's best interest.
c. Day-to-Day/Emergency Decisions: Unless otherwise provided or agreed by the parents, each parent who is exercising custodial responsibility shall be given sole responsibility for day-to-day decisions for the child, while the child is in that parent's care and control, including emergency decisions affecting the health and safety of the child.

12. MEDIATION

a. **Mandatory in Absence of Agreement:** Court is required to order both parties to complete pre-mediation screening no later than 5 days after scheduling conference or other hearing that Court determines there is no agreed parenting plan. (WVRPPFC 39)(See also W. Va. Code, § 48-9-202(b)).
b. **Cost:** Mediation services shall be ordered at hourly fees which are affordable to the parties and consistent with the approved sliding scale. The court may apportion the costs of mediation between the parties based on their abilities to pay. No mediator may charge a fee for court ordered mediation greater than the fee provided by the approved sliding scale. (WVRPPFC 41)

c. **Court Approval of a Mediated Agreement (WVRPPFC 44)**
   i. Court shall review the agreement to determine if it is knowing, voluntary, and in the best interests of the parties' children.
   ii. The court shall calculate child support based on the mediated parenting plan.
   iii. Parties will be informed of the mediated agreement's child support implications;
   iv. If the parties then assent to the agreement on the record, and if the court determines there is no impediment to the validity of the agreement, the court shall incorporate the mediated agreement in an order.

d. **Prohibition on Dual Roles (WVRPPFC 45):** No individual may serve in the same case in more than one of the following roles: parent educator, attorney, guardian ad litem, screener, mediator, or custody investigator.

13. PARENTING AGREEMENTS (W.Va. Code § 48-9-201)

a. The court shall adopt the parties' joint/agreed parenting plan, unless it makes specific findings that:
   (1) The agreement is not knowing or voluntary; or
   (2) The plan would be harmful to the child.

b. Hearing on Parenting Agreement:
   (1) Discretionary: In its discretion, the court may conduct an evidentiary hearing to determine whether there is a factual basis for either of the findings above.
   (2) Mandatory: When there is credible information that *child abuse* or *domestic violence* (§ 48-27-202) has occurred, a hearing is mandatory and if the court determines that abuse has occurred, appropriate protective measures shall be ordered.

c. **If agreement is not accepted (in whole or in part):** Court shall allow the parents the opportunity to negotiate another agreement.

14. TESTIMONY OF CHILDREN (WVRPPFC 17)

a. **Procedures for taking the testimony of children.** — Rules 8 and 9 of the Rules of Procedure for Child Abuse and Neglect Proceedings shall govern the taking of testimony of children.

b. **Motion to offer the testimony of a child.** — A motion to offer the testimony of a child under the age of 14 shall be in writing; and shall be filed with the circuit clerk, provided to the court, and served on all parties not less than 20 days before the hearing. The court shall rule on the motion no later than five days prior to the hearing.

c. **Response to a motion to offer the testimony of a child.** — Any response to a motion to offer the testimony of a child under the age of 14 shall be in writing, and shall be filed with the circuit clerk, provided to the court, and served on all parties within not less than 10 days before the hearing.

15. MODIFICATION OF PARENTING TIME

a. **Showing of Changed Circumstances or Harm (W.Va. Code § 48-9-401)**
   i. "substantial change of circumstances:" Court shall modify a parenting plan if it finds, on the basis of ***facts that were not known*** or **have arisen since the entry of the prior order** and ***were not anticipated*** therein, that a substantial change has occurred in the circumstances of the child or of one or both parents and a modification is necessary to serve the best interests of the child.
   ii. Circumstances that **do not** justify a significant modification of a parenting plan *except* where harm to the child is shown: (W.Va. Code § 48-9-401(c))
      1. Circumstances resulting in an **involuntary loss of income**, by loss of employment or otherwise, affecting the parent's economic status;
      2. A parent's **remarriage or cohabitation**; and
      3. Choice of **reasonable caretaking arrangements** for the child by a legal parent, including the child's placement in day care.
   iii. Circumstances that constitute a substantial change:
      1. **Occurrence or worsening of a limiting factor** as defined in 48-9-209, *after a parenting plan* has been ordered by the court. (W.Va. Code § 48-9-401(d))

b. **Without Showing of Changed Circumstances (W.Va. Code § 48-9-402)**
   i. In accordance with a parenting agreement (unless agreement is not knowing and voluntary or that it would be harmful to the child).
   ii. If the modification is in the child's best interests and:
      1. Reflects the de facto arrangements under which the child has been receiving care from the petitioner, *without objection*, in *substantial deviation* from the parenting plan, for the *preceding six months* before the petition for modification is filed, provided the arrangement is *not the result of* a parent's acquiescence resulting from the other parent's domestic abuse;
      2. Constitutes a minor modification in the plan; or
      3. Accommodates the reasonable and firm preferences of a child who is 14 years old.
   iii. In exceptional circumstances, a court *may* modify a parenting plan if it finds that the plan is not working as contemplated and in some specific way is manifestly harmful to the child, even if a substantial change of circumstances has not occurred. (W.Va. Code § 48-9-401 (b))

c. **Parent's Relocation (W.Va. Code § 48-9-403)**

CHILD SUPPORT

16. MANDATORY

a. When an action involves a minor child(ren), Court shall require either rparty to pay child support in the form of periodic installments in accordance with the support guidelines (W.Va. Code § 48-11-101 (b))

b. **Temporary Support:** When the action involves minor children, the Court shall:
   i. Require either party to pay temporary child support in the form of periodic installments for the maintenance of the minor children of the parties. §48-5-503(b)
   ii. Provide for medical support for any minor children. §48-5-503(c)

17. CHILD SUPPORT CALCULATION

a. **WORKSHEET**
   i. Basic Shared Worksheet - One parent has less than 127 overnights per year.
      1. **Worksheet A:** W.Va. Code § 48-13-403
      2. Use when both parents have 128 or more overnights per year.
   ii. Extended Shared Worksheet –
      1. **Worksheet B:** W.Va. Code § 48-13-502
      2. Use when both parents have 128 or more overnights per year.
      3. Specific overnights for each parent will be input into calculation.
      4. Quick Calculation of Overnights per Year:
         - ***If consistent weekly schedule****:* Parent A overnights multiplied by 52 = yearly overnights for Parent A.

           Example: Dad has 3 overnights every week. 3 x 52 = 156 overnights/year.
         - **If *two week alternating schedule*:** Parent A overnights in two week period multiple by 26 = yearly overnights for Parent A.

           Example: Dad has 2 overnights in alternating week 1 and 3 overnights in alternating week 2 for a total of 5 overnights every two weeks. 5 x 26 = 130 overnights per year.
   iii. See W.Va. Code § 48-1-239 for definition of extended vs. basic shared.

b. **GROSS INCOME (W.Va. Code § 48-1-228)**
   i. Includes, but is not limited to
      1. **Earnings** in the form of salaries, wages, commissions, fees, bonuses, profit sharing, tips and other income;
      2. Any **payment from a pension plan**, an **insurance contract**, an **annuity**, **social security** benefits, **unemployment** compensation, **supplemental employment benefits**, **workers' compensation** benefits and **state lottery winnings** and prizes
      3. **Interest, dividends or royalties**;
      4. **In kind payments** such as business expense accounts, business credit accounts and tangible property such as automobiles and meals, to the extent that they

provide the parent with property or services he or she would otherwise have to provide: *Provided*, That reimbursement of actual expenses incurred and documented shall not be included as gross income;

- *Hicks v. Hicks*, 206 W.Va. 492 (1999) – In Kind Payments for the benefit of the child (i.e. rental value of the marital home, mortgage payments, car payments, etc.) should be included in payee's gross income.

5. **Attributed income** of the parent (W.Va. Code 48-1-205)(see below).
6. **Overtime Compensation**
   - Only 50% of Overtime Compensation is used.
   - This income shall be averaged over 36 month period beginning with the month in which the parent first received such income, whichever period is shorter
   - Exception: Overtime may be excluded if parent with the overtime income demonstrates to the court that the overtime work is voluntarily performed and that he or she did not have a previous pattern of working overtime hours prior to separation or the birth of a nonmarital child;
   - ***Wilson v. Wilson***, 214 W.Va. 14 (2003) - "Shift Differential" or "Premium Hours" are not treated as "overtime" income.
7. **Income from self-employment or the operation of a business, minus ordinary and necessary expenses which are not reimbursable, and which are lawfully deductible in computing taxable income** under applicable income tax laws, and minus FICA and medicare contributions made in excess of the amount that would be paid on an equal amount of income if the parent was not self-employed:
   - This income shall be averaged over 36 month period beginning with the month in which the parent first received such income, whichever period is shorter
8. **Income from seasonal employment or other sporadic sources:**
   - This income shall be averaged over 36 month period beginning with the month in which the parent first received such income, whichever period is shorter
9. **Spousal support** and separate maintenance receipts.
10. Depending on circumstances, Court MAY include **severance pay, capital gains and net gambling, gifts or prizes** as gross income.

ii. Gross Income does not include:

1. Income received by other household members such as a new spouse;
2. Child support received for the children of another relationship;
3. Means-tested assistance such as temporary assistance for needy families, supplemental security income and food stamps; and
4. A child's income unless the court determines that the child's income substantially reduces the family's living expenses

c. **Attributed Income (W.Va. Code 48-1-205)**

i. Court can attribute income to a parent if:

1. Parent is unemployed
2. Parent is not working full time or working below earning capacity, or
3. Parent has nonperforming or underperforming assets.
   - Other than parent's primary residence
   - Qualify if doesn't produce income at a rate equivalent to the current 6 month CD rate or such other rate that the court determines is reasonable.
4. Court must evaluate parent's earning capacity in the local economy (consideration to evidence of parent's work history, qualifications, education and physical or mental condition).

ii. Amount to Attribute:

1. Can attribute income based on **previous income** if:
   - Voluntarily leaves employment or alters pattern so to be underemployed, unemployed, or below full earning capacity
   - Able to work and is available to work full-time; and
   - Is not seeking employment in a manner that a *reasonable prudent person in his or her circumstances would do*.
2. Can attribute income based on **federal minimum wage, 40hrs/week** if:
   - Cannot determine work history, qualifications, education or physical, mental condition or adequate record of previous employment
   - **Current Federal minimum wage: $7.25/hour = $1,256.67 per month.**
   - **BUT: W.Va. Minimum Wage: $8.75/hour = $1,516.67 per month**

iii. Fault or intent to evade child support not necessary to attribute income.

iv. Cannot attribute if:

1. Parent is **providing care to a pre-school aged or handicapped child** whom both parties owe legal responsibility for support.
   - *Melinda H. V. William R*, 230 W.Va. 731 (2013) – A family court may not attribute income to a parent who is providing such care to a child who the parties do not owe a joint legal responsibility under circumstances where a reasonable, similarly-situated parent would have devoted time to care for the child had the family remained intact, or if non-marital birth, had a household been formed.
2. Parent **pursuing plan of economic self-improvement** that will result in reasonable time, in an economic benefit to children whom support obligation is owed. Parent must be making substantial progress toward completion of the program.
3. Valid **medical reason** that prohibit parent from earning previous income
4. **Other circumstances exist that make it inequitable** (need written finding)
   - Court may decrease attributed amount to extent required to remove inequity.

d. **ADJUSTMENTS TO GROSS INCOME**
   i. Deduct any **spousal support paid** – W.Va. Code § 48-1-202 (a)
   ii. Deduct any **pre-existing child support payments** – W.Va. Code § 48-1-202 (a)
   iii. **Additional Dependent Deduction** – W.Va. Code § 48-1-202(b) and (c)
      1. Minor natural or adopted child who lives with the parent
      2. Natural or adopted adult child who is totally incapacitated because of physical or emotional disabilities for whom the parent owes a legal duty of support

e. **EXTRAORDINARY EXPENSES INCLUDED THE CHILD SUPPORT FORMULA**
   i. **Recurring, Uninsured Medical Expenses**
      1. Definition: Uninsured medical expenses in excess of $250/year that are recurring and can reasonably be predicted by the court at the time of establishment or modification. Expenses include, but not limited to, insurance copayments and deductibles, reasonable costs for necessary orthodontia, dental treatment, asthma treatments, physical therapy, prescription pharmaceuticals, vision therapy and eye care and any uninsured chronic health problem. W.Va. Code § 48-1-225.
      2. In basic shared cases, child's extraordinary expenses should be included in the child support formula. – W.Va. Code § 48-13-602(d)
   ii. **Extraordinary Expense Agreed by the Parties**
   iii. **Child's Portion of Monthly Insurance Premium** (W.Va. Code § 48-12-102(1)).
      1. Calculate by subtracting (1) monthly premium for employee only minus (2) monthly premium for an employee + child.
   iv. **Work-Related Child Care Costs (75% only)**

18. CHILD'S MEDICAL SUPPORT

a. Court shall determine whether appropriate medical coverage exists.
   i. "Appropriate health coverage" means coverage that is reasonable in cost, comprehensive in nature and reasonably accessible to the child. WV Code 48-12-101(1).
      1. *"Reasonable cost*" means the child's portion of medical insurance premiums does not exceed 5% of the gross income of the parent providing the coverage. W.Va. Code § 48-12-101(12)
      2. "*Reasonably accessible health insurance coverage*" means that the coverage will provide payment for the primary health care services within a reasonable distance from the child's primary residence. W.Va. Code § 48-12-101(11)
   ii. **If such insurance coverage exists**, the court shall order the appropriate parent to enroll the child in that coverage. W.Va. Code § 48-12-102(1).
      1. Child's portion of the premium shall be included in the formula; but
      2. If the cost of covering the child is *not included* in the formula, the Court can require the other parent to contribute to the cost of the monthly premium.

iii. **If neither parent has appropriate medical insurance coverage**, the Court shall:
    1. Order the parties to provide medical insurance coverage if it becomes available; AND
    2. Order the payment of cash medical support by either or other parties. Amount of cash medical support is within the discretion of the court, but total cash medical support and cost of insurance premiums may not exceed 5% of payor's gross income.
        - *Exception*: If obligor's gross income is less than 200% of the federal poverty level, the court shall set medical support at $0.

b. Payment of Non-Covered, Nonrecurring Medical Expenses: If the amount of the award of child support in the order is determined using the child support guidelines, the court shall order that nonrecurring or subsequently occurring uninsured medical expenses in excess of $250 per year per child shall be separately divided between the parties in **proportion to their adjusted gross incomes**. W.Va. Code § 48-12-102.

19. CHILD'S EXTRACURRICULAR ACTIVITIES

a. No statutory authority for awarding or including extracurricular activities, unless agreed to by the parents.
b. *Petruska v. Petruska*, 200 W.Va. 79 (1996): Mother argued that child's activities should not be curtailed by the divorce. WVSC said guidelines already contain a standard of living adjustment. A decision not to follow the SOLA percentages must be undertaken in light of the legislative preference that child support should be keyed to "the level of living such children would enjoy if they were living in a household with both parents present." However, in this case, Father no longer has overseas salary, plus incurs long distance visitation costs, so no error not to award additional money for extracurricular costs.

20. DISREGARD/DEVIATION FROM CHILD SUPPORT FORMULA

a. **Rebuttable presumption** that child support formula is correct. W.Va. Code § 48-13-701
b. Court may disregard the guidelines to accommodate the needs of the child or the circumstances of the parents. Any deviation must be supported by findings of fact and clearly stated on the record.
c. **Enumerated Reasons for Deviation:** These guidelines do not take into account the economic impact of the following factors that may be possible reasons for deviation:
    i. Special needs of the child or support obligor, including, but not limited to, the special needs of a minor or adult child who is physically or mentally disabled;
    ii. Educational expenses for the child or the parent (i.e. those incurred for private, parochial, or trade schools, other secondary schools, or post-secondary education where there is tuition or costs beyond state and local tax contributions);
    iii. Families with more than six children;
    iv. Long distance visitation costs;
    v. The child resides with third party;
    vi. The needs of another child or children to whom the obligor owes a duty of support;

vii. The extent to which the obligor's income depends on nonrecurring or nonguaranteed income; or

viii. Whether the total of spousal support, child support and child care costs subtracted from an obligor's income reduces that income to less than the federal poverty level and conversely, whether deviation from child support guidelines would reduce the income of the child's household to less than the federal poverty level.

21. INVESTMENT OF CHILD SUPPORT (W.Va. Code 48-13-802)

a. The court has the discretion, in appropriate cases, to direct that a portion of child support be placed in trust and invested for future educational or other needs of the child. The court may order such investment when all of the child's day-to-day needs are being met such that, with due consideration of the age of the child, the child is living as well as his or her parents.

b. If the amount of child support ordered per child **exceeds $2,000/month**, the court is required to make a finding, in writing, as to whether investments shall be made.

c. Management of the Trust: A trustee named by the court shall use the judgment and care under the circumstances then prevailing that persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. A trustee shall be governed by the provisions of the uniform prudent investor act as set forth in 44-6c-. The court may prescribe the powers of the trustee and provide for the management and control of the trust. Upon petition of a party or the child's guardian or next friend and upon a showing of good cause, the court may order the release of funds in the trust from time to time.

22. MODIFICATION OF CHILD SUPPORT

a. **Expedited Modification of Child Support** (W.Va. Code § 48-11-106, WVRPPFC 51)

i. An expedited process for modification of a child support order may be utilized if:

1. Either parent experiences a substantial change of circumstances resulting in a decrease in income due to loss of employment or other involuntary cause;
2. An increase in income due to promotion, change in employment or reemployment
3. Other such change in employment status; or
4. If a military parent is called to military service. (see also § 48-11-108)

b. **Modification of Child Support** (W.Va. Code § 48-11-105)

i. The court may modify a child support order, for the benefit of the child, when a motion is made that alleges a change in the circumstances of a parent or another proper person or persons. A motion for modification of a child support order may be brought by a custodial parent or any other lawful custodian or guardian of the child, by a parent or other person obligated to pay child support for the child or by the Bureau for Child Support Enforcement of the Department of Health and Human Resources of this state.

ii. "Substantial Change in Circumstances:" The provisions of the order may be modified if there is a substantial change in circumstances.
    1. If application of the guideline would result in a new order that is **more than 15% percent different**, then the circumstances are considered a substantial change.

c. **Retroactive modification of Child Support (WVRPPFC 23)**
Except for good cause shown, orders granting relief in the form of spousal support or child support shall make such relief retroactive to the date of service of the motion for relief.

23. CHILD'S TAX DEPENDENCY EXEMPTION (W.Va. Code § 48-13-801)

a. Unless otherwise agreed to by the parties, the court shall allocate the right to claim dependent children for income tax purposes as follows:
    i. Basic Shared Parenting Cases: To the payee parent, unless exception below.
    ii. Extended Shared Parenting Cases: Rights shall be allocated between the parties in proportion to their adjusted gross incomes for child support calculations. However, the tax exemptions for the minor child or children should be granted to the payor parent only if the total of the payee parent's income and child support is greater when the exemption is awarded to the payor parent.
    iii. Exception: In a situation where allocation would be of no tax benefit to a party, the court need make no allocation to that party.
b. *Spence v. Spence*, 199 W.Va. 609, 486 S.E. 2d 778 (1997): Court should weigh net effect on the child of allocating the tax exemption to either parent
c. *Eric M v. Laura M.,* 790 S.E.2d 929 (2016): Explaining financial analysis required in extended shared custody cases for payor parent to receive exemption.

Worksheet A: BASIC SHARED PARENTING

DRAFT

IN THE FAMILY COURT OF Kanawha COUNTY, WEST VIRGINIA
CASE NO. _____
Mother: _____ SS No.: _____ Primary Custodial Parent? Yes
Father: _____ SS No.: _____ Primary Custodial Parent? No

Children	SSN	Date of Birth	Children	SSN	Date of Birth
1					
2					

PART 1. CHILD SUPPORT ORDER	Mother	Father	Combined
1. MONTHLY GROSS INCOME (Exclusive of overtime compensation)	$3,250.00	$7,583.33	
a. Minus preexisting child support payment	$0.00	$0.00	
b. Minus maintenance paid	$0.00	$0.00	
c. Plus overtime compensation, if not excluded, and not to exceed 50%, pursuant to W. Va. Code §48-1-228(b)(6)	$0.00	$0.00	
d. Additional dependents deduction	$0.00	$0.00	
2. MONTHLY ADJUSTED GROSS INCOME	$3,250.00	$7,583.33	$10,833.33
3. PERCENTAGE SHARE OF INCOME (Each parent's income from line 2 divided by Combined Income)	30.00%	70.00%	100%
4. BASIC OBLIGATION (Use Line 2 combined to find amount from schedule)			$1,613.00
5. ADJUSTMENTS (Expenses paid directly by each parent) a. Work Related Child Care Costs Adjusted for Federal Tax Credit (0.75 x actual work-related child care costs)	$337.50	$0.00	
b. Extraordinary Medical Expenses (Uninsured only) and Children's Portion of Health Insurance Premium Costs	$0.00	$125.00	
c. Extraordinary Expenses (Agreed to by parents or by order of the court)	$0.00	$0.00	
d. Minus Extraordinary Adjustments (Agreed to by parents or by order of the court)	$0.00	$0.00	
e. Total Adjustments (For each column, add 5a, 5b, and 5c. Subtract Line 5d. Add the parent's totals together for Combined amount.)	$337.50	$125.00	$462.50
6. TOTAL SUPPORT OBLIGATION (Add Line 4 and Line 5e Combined)			$2,075.50
7. EACH PARENT'S SHARE OF THE TOTAL CHILD SUPPORT OBLIGATION (Line 3 x line 6 for each parent.)	$622.65	$1,452.85	
8. PAYOR PARENT ADJUSTMENT (Enter payor parent's line 5e)	$0.00	$125.00	
9. RECOMMENDED CHILD SUPPORT ORDER (Subtract line 8 from line 7 for the payor parent only. Leave payee column blank.)	$0.00	$1,327.85	
* Adjustment for obligator's social security benefits sent directly to the child	$0.00	$0.00	
** Net RECOMMENDED CHILD SUPPORT ORDER (Line 9 -Line 9*)	$0.00	$1,327.85	
PART II. ABILITY TO PAY CALCULATION (Complete if noncustodial parent's adjusted monthly gross income is below $1,550)			
10. Spendable Income (0.80 x line 2 for payor parent only)	$0.00	$0.00	
11. Self Support Reserve	$500	$500	
12. Income Available for Support (line 10-line 11. If less than $50, then $50)	$0.00	$0.00	
13. Adjusted Child Support Order (Lessor of line 9** and line 12.)	$0.00	$1,327.85	
Comments, calculations, or rebuttals to schedule or adjustments if payor parent directly pays extraordinary expenses.			
PREPARED BY: Ashton Bias, Esq.		Date:	

A Monthly Support would be $ 1,327.85

Worksheet B: EXTENDED SHARED PARENTING DRAFT

IN THE FAMILY COURT OF Kanawha COUNTY, WEST VIRGINIA

CASE NO. _____

Mother: _____ SS No.: _____

Father: _____ SS No.: _____

Children	SSN	Date of Birth	Children	SSN	Date of Birth
1					
2					

PART I. BASIC OBLIGATION	Mother	Father	Combined
1. MONTHLY GROSS INCOME (Exclusive of overtime compensation)	$3,250.00	$7,583.33	
a. Minus preexisting child support payment	$0.00	$0.00	
b. Minus maintenance paid	$0.00	$0.00	
c. Plus overtime compensation, if not excluded, and not to exceed 50%, pursuant to W. Va. Code §48-1-228(b)(6)	$0.00	$0.00	
d. Additional dependent deduction	$0.00	$0.00	
2. MONTHLY ADJUSTED GROSS INCOME	$3,250.00	$7,583.33	$10,833.33
3. PERCENTAGE SHARE OF INCOME (Each parent's income from line 2 divided by Combined Income)	30.00%	70.00%	100%
4. BASIC OBLIGATION (Use Line 2 combined to find amount from Child Support Schedule)			$1,613.00
PART II. SHARED CUSTODY ADJUSTMENT			
5. Shared Parenting Basic Obligation (line 4 x 1.50)			$2,419.50
6. Each Parent's Share (Line 5 x each parent's line 3)	$725.85	$1,693.65	
7. Overnights with Each Parent (must total 365)	183	182	365
8. Percentage with Each Parent (Line 7 divided by 365)	50.14%	49.86%	100%
9. Amount Retained (Line 6 x line 8 for each parent)	$363.92	$844.50	
10. Each Parent's Obligation (Line 6 - Line 9)	$361.93	$849.15	
11. AMOUNT TRANSFERRED FOR BASIC OBLIGATION (Subtract smaller amount on line 10 from larger amount on line 10. Parent with larger amount on line 10 owes the other parent the difference. Enter $0 for other parent.	$0.00	$487.21	
PART III. ADJUSTMENTS FOR ADDITIONAL EXPENSES (Expenses paid directly by each parent.)			
12a. Work Related Child Care Costs Adjusted for Federal Tax Credit (0.75 x actual work-related child care costs)	$337.50	$0.00	
12b. Extraordinary Medical Expenses (Uninsured only) and Children's Portion of Health Insurance Premium Costs	$0.00	$125.00	
12c. Extraordinary Additional Expenses (Agreed to by parents or by order of the court)	$0.00	$0.00	
12d. Minus Extraordinary Adjustments (Agreed to by parents or by order of the court)	$0.00	$0.00	
12e. Total Adjustments (For each column, add 12a, 12b, and 12c. Subtract Line 12d. Add the parent's totals together for Combined amount.)	$337.50	$125.00	$462.50
13. Each Parent's Share of Additional Expenses (Line 3 x line 12e combined)	$138.75	$323.75	
14. Each Parent's Net Share of Additional Direct Expenses (Each parent's line 13 - line 12e. If negative number, enter $0)	$0.00	$198.75	
15. AMOUNT TRANSFERRED FOR ADDITIONAL EXPENSES (Subtract smaller amount on line 14 from larger amount on line 14. Parent with larger amount on line 14 owes the other parent the difference. Enter $0 for the other parent.)	$0.00	$198.75	

A Monthly Support would be $ 685.96

Worksheet B: EXTENDED SHARED PARENTING

PART IV. RECOMMENDED CHILD SUPPORT ORDER	Mother	Father	
16. TOTAL AMOUNT TRANSFERRED (Line 11 + line 15)	$0.00	$685.96	
17. RECOMMENDED CHILD SUPPORT ORDER (Subtract smaller amount on line 16 from larger amount on line 16. Parent with larger amount on line16 owes the other parent the difference.)	$0.00	$685.96	
* Adjustment for obligor's social security benefits sent directly to the child	$0.00	$0.00	
** NET RECOMMENDED CHILD SUPPORT ORDER (Line 17- line 17*)	$0.00	$685.96	
Comments, calculations, or rebuttals to schedule or adjustments			
PREPARED BY: Ashton Bias, Esq.		Date:	

A Monthly Support would be $ 685.96

Military Issues in a Divorce

Major Scott Applegate

West Virginia Army National Guard

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Scott Applegate

West Virginia Army National Guard Member

DoD Disclaimer: The views presented are those of the speaker or author and do not necessarily represent the views of DoD, the WVNG or its Components (JER 2-207).


Freshly Signed
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THE SCENT OF FREEDOM

Introduction

- Military Family Law:
  - Costly +
  - Confusing +
  - Irrational +
  - Illogical =

Good Old Fashion

Government Bureaucracy

Number 1:
Know Thy Martial Share

- There are four potential options when considering a division of retired pay: a stated dollar amount, a percentage amount, a coverture fraction formula and a delayed order option.

- Therefore, unless the marriage lasts for the entire military career, you need to know about the “marital share.”

Number 2:
Know Thy SBP

- The Survivor Benefit Plan (SBP) is a survivor annuity that pays a specified beneficiary, typically the non-military former spouse, 55% of the selected base amount when the Retiree dies first.
- An election for a former spouse prevents payment of an annuity to a current spouse.
- Any former spouse SBP election must be made within 1 year of the date of the divorce, whether voluntary or in compliance with a court order.
- The form for a deemed (RC) election request is DD Form 2656-10

Number 3:
Thou Shall Include A VA Waiver Clause

- Because a disability award can reduce the amount of disposable retired pay, it is important to include a VA waiver clause.
- For example: “The Servicemember shall indemnify and pay directly all sums to the former spouse which they would have been entitled had the Servicemember not taken disability payments (or other reducing payment) as required by the divorce decree.”
- I recommend attorneys include this language in divorce orders.

Number 4:
Patience is a Virtue
(20-20-20)

- Don't Rush!
- Review the timing of the divorce or retirement:
  - 20-20-20 Rule: If there is military service of at least 20 years, a marriage that has lasted at least 20 years, and an overlap of at least 20 years, then the former spouse is entitled to TRICARE and military medical treatment
    - Medical coverage is valuable
    - Commissary and exchange privileges are a benefit
    - ID Card (The Golden Ticket) Requires certified copies of the divorce decree, marriage certificate, the service member's DD214 (if retired) and their Social Security number.

Number 5:
Thou Shall Garnish

- Ten years of marriage and military overlap means garnishment.
  - The 10-10 rule specifies that DFAS will send a check to the former spouse by garnishment of the retiree's pension as property division. If there is a 10-10 overlap, then DFAS sends out two checks (and withholds the appropriate tax amount from each). Without 10-10 compliance, the former spouse must look to the retiree for direct payments. Note that 10-10 overlap is not necessary for child support or alimony garnishment.
- Include in Divorce Decree -"The parties were married for 10 years or more while the member performed 10 years or more of military service creditable for retirement purposes" will satisfy the 10/10 requirement, unless the marriage certificate shows otherwise.


I had a really bad day. First, my ex got run over by a bus. Then I got fired from my job as a bus driver.
Bummer.
someecards.com

Number 6:
Enjoy COLA

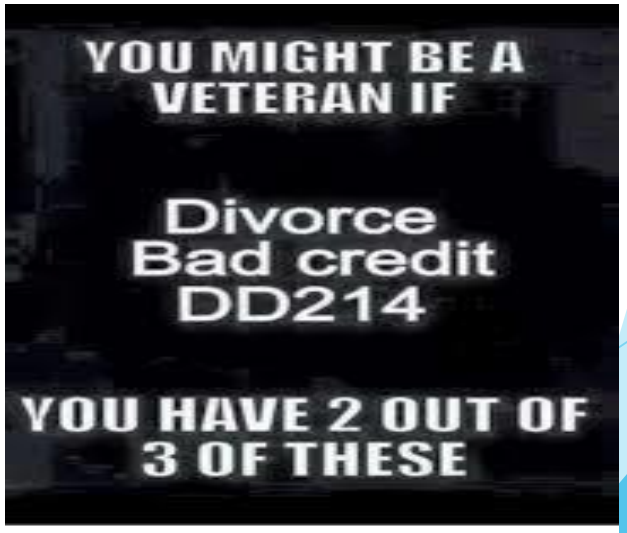
- A set dollar amount order leaves all the Cost-Of-Living-Adjustments (COLAs) to the retiree
- Because of the significant effect of COLAs over time, it is infrequent that an award is stated as a fixed dollar amount. The more common method of expressing the former spouse's award is as a percentage of the member's disposable retired pay. This has the benefit to the former spouse of increasing the amount of the former spouse's award over time due to periodic retired pay COLAs.

Number 7:
Thou Shall Not Forget TSP

- Don't overlook the TSP!
- TSP may be a valuable marital asset. The former spouse and her attorney need to get a copy of the TSP statement so as to decide whether to divide it between the parties or to allocate it entirely to the SM/retiree in exchange for some other asset.

Number 8:
Know Thy Status

- Multiple Employee Statuses in the Military and WVNG
- Different status = different entitlements
  - State Employees - State and Guard Retirement?
  - Active Duty
  - M-Day
  - AGR
  - Retirees
  - Federal Employees
  - Contractors



Number 9:
Know Thy Pay

- <u>Disposable retired pay is often a lower amount than gross retired pay; know the difference!</u>
  - Gross military retired pay includes all entitlements for the retiree,
  - DRP (Disposable Retired Pay) excludes medical retired pay, VA disability compensation, the SBP premium and Combat-Related Special Compensation.
  - For instance, in one case, acceptance of DRP instead of gross pay in the clarifying order changed the former spouse's share to from $1300 dollars a month to $300 dollars a month.

Number 10:
Don't Abandon Ship

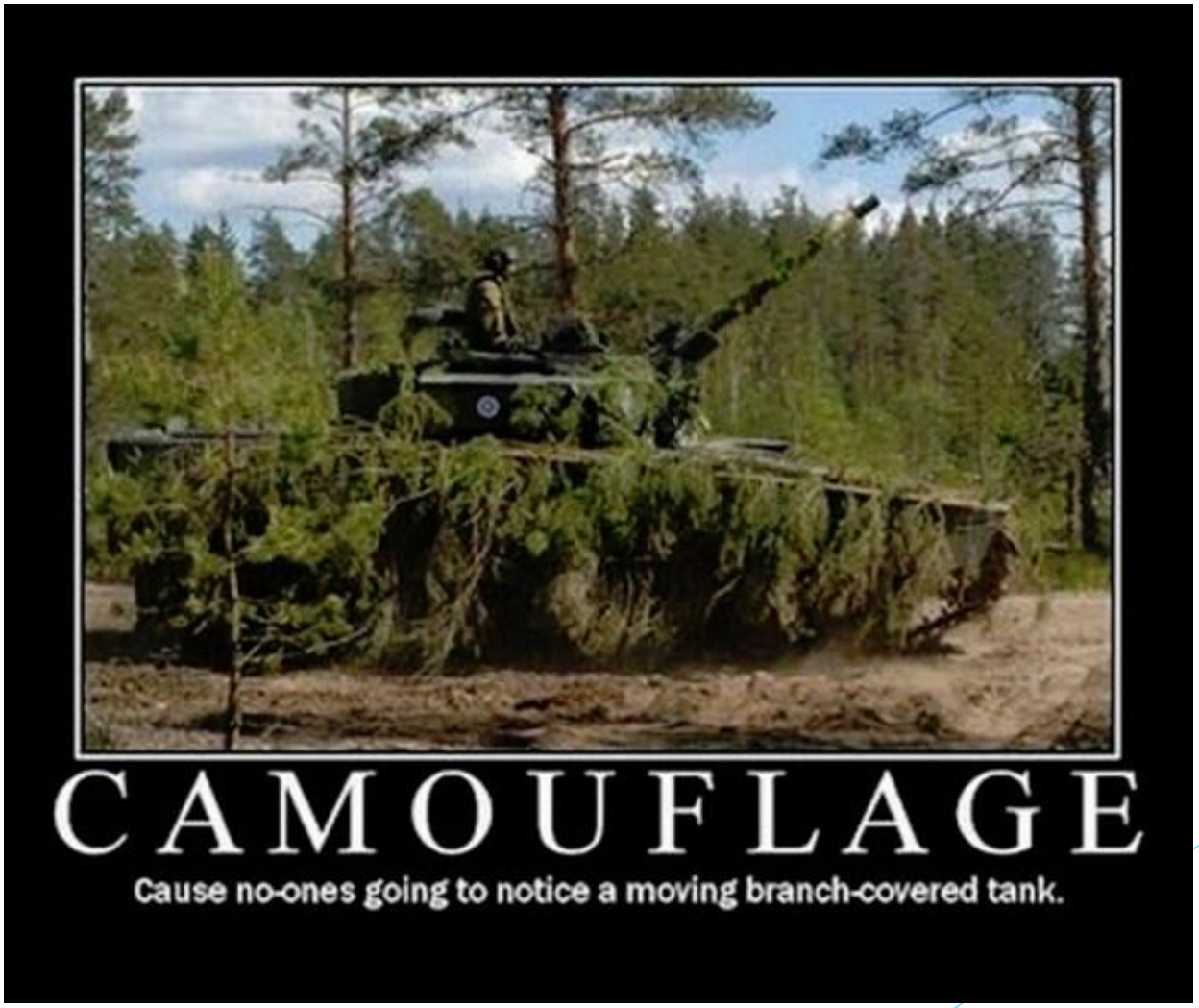
- To apply for payments under the Uniformed Services Former Spouses' Protection Act, a completed application form (DD Form 2293) signed by a former spouse together with a copy of the applicable court order certified by the clerk of court should be served either by facsimile or by mail, upon the:

Defense Finance and Accounting Service
Cleveland DFAS-HGA/CL
P.O. Box 998002
Cleveland, Ohio 44199-8002
Phone: 888-DFAS411 (1-888-332-7411)
Fax: 877-622-5930 (toll free)

Know Thy Venue

- State Jurisdiction
  - To enforce orders dividing retired pay as property, the state court must have had jurisdiction over the member by reason of
    - 1) the member's residence in the territorial jurisdiction of the court (other than because of military assignment),
    - 2) the member's domicile in the territorial jurisdiction of the court, or
    - 3) the member's consent to the jurisdiction of the court.
    - 4) the member indicates his or her consent to the court's jurisdiction by taking some affirmative action in the legal proceeding.

Bonus Awesomeness!



Uniformed Services Former Spouses' Protection Act (USFSPA)

The Uniformed Services Former Spouses' Protection Act (USFSPA) was passed by Congress in 1982. The USFSPA gives a State court the authority to treat military retired pay as marital property and divide it between the spouses. Congress' passage of the USFSPA was prompted by the United States Supreme Court's decision in *McCarty v. McCarty* in 1981

USFSPA Provisions for Retired pay

- Limits the amount of the member's retired pay which can be paid to a former spouse to 50% of the member's disposable retired pay (gross retired pay less authorized deductions).

- Since military retired pay is a Federal entitlement, and not a qualified pension plan, there is no requirement that a Qualified Domestic Relations Order (QDRO) be used.

- It requires that the parties must have been married 10 years or more while the member performed at least 10 years of service creditable towards retirement eligibility before a division of retired pay is enforceable under the USFSPA.

DFAS Acceptable Language

The language required for the division of a military retirement differs if it is AD v. reserve. For an AD retirement, this language will suffice:

Example 1: "The former spouse is awarded _____ percent [or dollars per month] of **the member's disposable military retired pay."**

(Note: blanks in the examples represent numbers that must be provided to us in the court order.)

See: http://www.dfas.mil/dam/jcr:1cbbab12-9765-4eee-8b5f-a6bab98b2e2c/AttorneyGuidance-03-07-2014%20(2).pdf

DFAS Acceptable Language

The following language is an example of an acceptable way to express a reserve retirement formula award:

Example 2. **“**The former spouse is awarded a **percentage of the member’s disposable** military retired pay, to be computed by multiplying _____% times a fraction, the numerator of which is _____ reserve retirement points earned during the period of the marriage, divided by the **member’s total number of reserve retirement points earned.”**


BUY ONE DIVORCE
GET THE NEXT ONE
1/2 OFF
CHEAP DIVORCES
Sean Simmons
24/7
Attorney At Law
[redacted]
PayPal
END THE MISERY TODAY!

QUESTIONS??

References: This class is based on The Legal Eagle Series "FACT OR 'WHACKED'? MYTHS AND MISTAKES IN MILITARY DIVORCES" by Mark E. Sullivan, a retired Reserve Colonel and author of the Military Divorce Handbook (AM. BAR ASSN., 2006).

Handling Domestic Violence

Maureen Conley

Legal Aid of WV

DOMESTIC VIOLENCE AND DIVORCE

Domestic violence frequently occurs before a divorce is filed but it can occur at any time during the pendency of a divorce or after a divorce is final. As many professionals have noted, domestic violence may be most dangerous at the time of separation, when a spouse realizes that a temporary separation may become permanent, that the other spouse intends to follow through with a divorce. This session will not focus on the basics of getting a Protective Order[1], but on the avenues in which a Protective Order may be obtained, the time periods a Protective Order may be in place, injunctive relief in divorce and divorce issues which are most affected by domestic violence. The goal is to best use the law to protect clients, children, and others, no matter when the violence occurs. Please remember that your safety and the safety of court personnel is always a concern in domestic violence situations.

I. Means of Obtaining a Protective Order (DVP)

A. DVP filed before divorce filed

a) **If a divorce has not yet been filed when an incident of domestic violence occurs, the spouse typically files a Petition for a Protective Order in Magistrate Court, under West Virginia Code 48-27-403(a). (But Circuit Courts, family courts and magistrate courts have concurrent jurisdiction over domestic violence proceedings. West Virginia Code 48-27-301(a)). The Magistrate issues an Emergency Protective Order and sets the case for hearing before a Family Court Judge, within 10 days. In Kanawha County, Magistrate Julie Yeager is usually assigned to hear Final Protective Order hearings in which the Respondent has also been charged with domestic battery or domestic assault.**

b) The Family Court Judge or Magistrate conducts a hearing and either issues the Protective Order or dismisses it. **West Virginia Code 48-27-*403(e), (g)***

c) The Protective Order remains in place upon filing for divorce, so long as no substantive Order has been entered.

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[1] Definition of domestic violence. *West Virginia Code* §48-7-202.
Family or household members. *West Virginia Code* §48-7-204.
Emergency Protective Order, Final Hearing, Burden of Proof. *West Virginia Code* §48-7-403.
Mandatory provisions of Protective Order. *West Virginia Code* §48-7-502.
Permissive provisions of Protective Order. *West Virginia Code* §48-7-503.

d) ***West Virginia Code*** §48-27-401(b) If *a person who has been granted relief under this article should subsequently become a party to an action for divorce, separate maintenance or annulment, such person shall remain entitled to the relief provided under this article including the right to file for and obtain any further relief, so long as no temporary order has been entered in the action for divorce, annulment and separate maintenance, pursuant to part 5-501, et seq.*

e) Immediately (within minutes) upon granting of an Emergency Protective Order and a Final Protective Order, the Magistrate Assistant or Family Court Assistant scans the Order and uploads it into the Domestic Violence Registry. The West Virginia State Police are required to maintain a registry of Protective Orders across the state and Courts are required to "immediately register" Orders in the database. (See ***West Virginia Code*** §48-27-802, and Rule 21, Rules of Practice and Procedure for Domestic Violence Civil Proceedings.) Although placement on the registry is not supposed to affect enforceability, as a practical matter, it does. Law Enforcement frequently won't enforce a Protective Order without it being on the registry, so it is critically important that the Orders get on the Registry.

f) What is the DV Registry?

(1) Magistrate and Family Courts scan the actual Protective Order. Per Lisa Tackett, West Virginia has the most real-time database in the country.

(2) In Kanawha County, the Magistrate Assistant typically scans the EPO, and the Family Court Judge's Assistant scans the Final Protective Order into the registry, unless the Final Protective Order hearing is held by Magistrate Yeager, in which case the Order is scanned by the Magistrate Assistant.

(3) Litigants and counsel are not able to access the DV Registry, nor is the Circuit Clerk. It is not a public registry.

(4) The Courts and law enforcement have access to the Registry, including 911 centers.

(5) In order to protect your client, confirm that the Protective Order is on the Registry, by asking the Family Court Assistant or Magistrate Court assistant.

(6) The Registry enables law enforcement, across the state and nationally, to be aware of the existence of a protective Order.

(7) Because WV does not have 24 hour courts, law enforcement was previously unable to confirm the existence of a Protective Order. The Registry allows confirmation around the clock.

g) Once a divorce is filed, nothing prevents either party from requesting a temporary hearing in the divorce, however the relief in the DVP will be continued until a temporary hearing. Some or all of the relief may be continued in a temporary order or final order issued by the Family Court Judge. In addition, in Kanawha County and multiple judge counties, a divorce or custody case will generally be assigned to the same judge who heard the DVP, even if the divorce or custody case has already been assigned to a different Judge. It is generally good practice to request that the Protective Order remain in effect at a hearing held after issuance of a Protective Order (if you are representing the DVP Petitioner, to make sure that this appears in the Order generated from the hearing, and to make sure that the Order is sent to the registry, if it changes the initial Protective Order.

h) **West Virginia Code** §48-27-401(d) *Notwithstanding the provisions set forth in section 27-505[§ 48-27-505], when an action seeking a divorce, an annulment or separate maintenance, the allocation of custodial responsibility or a habeas corpus action to establish custody, the establishment of paternity, the establishment or enforcement of child support, or other relief under the provisions of this chapter is filed or is reopened by petition, motion or otherwise,* ***then any order issued pursuant to this article which is in effect on the day the action is filed or reopened shall remain in full force and effect by operation of this statute until****: (1) A temporary or final order is entered pursuant to the provisions of 48-5-501 et seq., 48-6-601 et seq. of this chapter; or (2) an order is entered modifying such order issued pursuant to this article; or (3) the entry of a final order granting or dismissing the action.*

B. Protective Order filed as Separate Civil Action after Divorce filed but before Hearing in Divorce

A Protective Order may follow the same procedure for a regular Protective Order so long as there has not been a substantive order entered in the divorce.

During the pendency of a divorce action, a person may file for and be granted relief provided by this article ***until an order other than a procedural order is entered in the divorce action*** *pursuant to part 5-501[§§48-5-501 et seq.] West Virginia Code* §48-27-401(a).

C. Protective Order filed as Separate Civil Action after Substantive Order entered in Divorce

1. If a Protective Order is filed **after** a substantive Order is entered in a Divorce or Custody case, the Magistrate is supposed to enter a **Temporary Emergency Protective Order (TEPO)** and forward it to the Family Court Judge rather than set it for hearing on the regular DVP docket. For some reason, *West Virginia Code §48-27-402* applies only when temporary orders have been entered in a divorce, annulment or separate maintenance proceeding. (Statute does not include custody, child support, or other family court proceedings. This is not as much an issue now with the final DVP hearings generally taking place before a Family Court Judge, but if this does occur to your client, you may have to notify the Family Court Judge of the Protective Order. It is possible that a Protective Order could be issued in a different county than the divorce proceeding.)

2. ***West Virginia Code*** §48-27-402(b) *A person who is a party to an action for divorce, annulment or separate maintenance in which a temporary order has been entered pursuant to section 5-501 [§48-5-501] of this chapter may petition the magistrate court for a temporary emergency protective order pursuant to this section for any violation of the provisions of this article occurring after the date of entry of the temporary order pursuant to section 5-501 of this chapter.*

D. Protective Order within divorce

Family Courts have the authority to issue Protective Orders as part of the relief in a divorce proceeding.

1. ***West Virginia Code §48-5-608(c)*** *The court in its discretion, may enter a protective order, as provided by the provisions of article twenty-seven of this chapter, as part of the final relief in a divorce action, either as a part of an order for final relief or in a separate written order.*

2. ***West Virginia Code*** **§48-5-608(b)** *Any order entered by the court to protect a party from abuse may grant any other relief authorized to be awarded by the provisions of article twenty-seven of this chapter, if the party seeking the relief has established the grounds for that relief as required by the provisions of said article. The relief afforded by the provisions of this subsection may be ordered whether or not there are grounds for relief under subsection (c) of this section and whether or not an order is entered pursuant to subsection (c) of this section.* (See also **West Virginia Code §48-5-509(b), (c))**

II. Time Periods a Protective Order may be in effect

A. Protective Orders may be granted for 90 days or 180 days and may be automatically extended for a n additional 90 days upon filing Notice to Extend 90 day or 180 day Protective Order.

B. ***West Virginia Code*** §48-27-505(a) *Except as otherwise provided in subsection 27-401(d) of this article, a protective order, entered by the family court pursuant to this article, is effective for either ninety days or one hundred eighty days, in the discretion of the court. Upon receipt of a written request for renewal from the petitioner prior to the expiration of the original order, the family court shall extend its order for an additional ninety-day period.*

C. ***West Virginia Code*** §48-27-505(d) *To be effective, a written request to renew a ninety or one hundred eighty day order must be submitted to the court prior to the expiration of the original order period. A notice of the extension shall be sent by the clerk of the court to the respondent by first-class mail, addressed to the last known address of the respondent as indicated by the court file. The extension of time is effective upon mailing of the notice.*

D. Protective Orders may be granted for one year or longer, if additional criteria are met.

E. ***West Virginia Code*** §48-27-505(b) *Notwithstanding the provisions of subsection (a) the court may enter a protective order for a period of one year if the court finds by a preponderance of the evidence, after a hearing that any of the following aggravating factors are present:*

(1) That there has been a material violation of a previously entered protective order;

(2) That two or more protective orders have been entered against the respondent within the previous five years;

(3) That respondent has one or more prior convictions for domestic battery or assault or a felony crime of violence where the victim was a family or household member;

(4) That the respondent has committed a violation of the provisions of section nine-a[§ 61-2-9a] article two, chapter sixty-one of this code against a person protected by an existing order of protection;

(5) That the totality of the circumstances presented to the court require a one year period in order to protect the physical safety of the petitioner or those person for whom a petition may be filed as provided in subdivision (2), section three hundred five [§ 48-27-305] of this article.

F. ***West Virginia Code*** §48-27-505(c) *The court may extend a protective order entered pursuant to subsection (b) of this section for whatever period the court considers necessary to protect the physical safety of the petitioner or those persons for whom a petition may be filed as provided in subdivision (2), section three hundred five of this article, if the court finds by a preponderance of evidence, after a hearing of which respondent has been given notice, that:*

(1) A material violation of the existing protective order has occurred; or

(2) Respondent has committed a material violation of a provision of a final order entered pursuant to subsection (c), section six hundred eight [§ 48-5-608], article five of this chapter has occurred.

G. Statutory extended time periods for Protective Orders issued in a divorce are almost identical in language to those granted in a separate Protective Order proceeding.

H. ***West Virginia Code*** §48-27-608(c) *....A protective order entered pursuant to the provisions of this subsection shall remain in effect for the period of time ordered by the court not to exceed one hundred eighty days: Provided, That* ***the court may extend the protective order for whatever period the court deems necessary to protect the safety of the petitioner and others*** *threatened or at risk, if the court determines:*

(A) That a violation of a protective order entered during or extended by the divorce action has occurred; or

(B) Upon a motion for modification, that a violation of a provision of a final order entered pursuant to this section has occurred.

III. Injunctive Relief in Divorce

It is possible to obtain a non-Protective Order in a divorce.

A. **West Virginia Code §48-5-608(a)** *When allegations of abuse have been proved, the court shall enjoin the offending party from molesting or interfering with the other, or otherwise imposing any restraint on the personal liberty of the other or interfering with the custodial or visitation rights of the other. The order may permanently enjoin the offending party from entering the school, business or place of employment of the other for the purpose of molesting or harassing the other or from entering or being present in the immediate environs of the residence of the petitioner or from contacting the other, in person or by telephone, for the purpose of harassment or threats; or from harassing or verbally abusing the*

other. The relief afforded by the provisions of this subsection may be ordered whether or not there are grounds for relief under subsection (c) of this section and whether or not an order is entered pursuant to such subsection.

B. Historically, injunctions were permitted in divorce proceedings both on a temporary and permanent basis. The language cited above is in the final divorce relief section, while the (very similar) temporary authorization is set out in 48-5-509. It was not unusual for Judges to issue "mutual restraining orders" despite the language requiring proof of abuse. This issue came before the West Virginia Supreme Court in 2015, in the *Riffle* case.

C. ***Riffle v. Riffle, 235 W.Va. 430, 774 S.E.2d 511, 2015 W.Va. LEXIS 610*** (2015)

In the Riffle case (included in materials), the Family Court issued a mutual restraining Order without taking evidence from either party about abuse, as part of the final Divorce Order. This was appealed after Mrs. Riffle was later found in contempt of the mutual restraining Order. The Circuit Court dissolved the mutual restraining Order finding that the record did not meet the statutory criteria for issuance of a restraining order under West Virginia Code §48-5-608(a). This decision was affirmed.

The Supreme Court issued a prohibition of **entry of a "mutual protective order unless each party has filed a petition asserting allegations of domestic violence against the other and established those allegations by a preponderance of the evidence.**" (See Syllabus Point 2)

The Riffle decision quotes Justice Workman's dissent in *Pearson v. Pearson,* 200 W.Va. 139, 488 S.E.2d 414 (1997), *saying:*

"This practice of ***mutual restraining orders,*** while perhaps well-intentioned, causes more problems than it attempts to solve. It hinders rather than assists the enforcement of domestic violence laws. Judicial officers may believe they are addressing the issue of family violence, but ***mutual restraining orders*** can actually endanger, rather than protect, the victim. Boilerplate ***mutual restraining orders*** also diminish the principal goal of a restraining order, which is to provide protection from domestic violence to one who has been subjected to it. When a law enforcement officer at the scene of domestic violence learns of ***mutual restraining orders***, confusion obviously results, and the officer often resolves the dilemma by arresting both. This confusion was never intended by our Legislature." Id., at 153, 428.

D. §51-2A-2a. Family court jurisdiction to restrict contact between parties.

While *Riffle* was being decided, the Legislature decided to re-affirm the availability of Orders which are not called "restraining orders" but which would not be considered Protective Orders either. This is what they came up with:

(a) A family court in its discretion may, at any time during the pendency of any action prosecuted under chapter forty-eight of this code, ***restrict contact between the parties thereto without a finding of domestic violence under article twenty-seven of said chapter****. This order shall not be considered a protective order for purposes of section five hundred seven, article twenty-seven, chapter forty-eight of this code.* ***A court may enter a standing order regarding the conduct expected of the parties during the proceeding. Any standing order may restrict the parties from:***

(1) Entering the home, school, business or place of employment of the other for the purpose of bothering or annoying the other; (2) Contacting the other, in person, in writing, electronically or by telephone, for purposes not clearly necessary for the prosecution of the underlying action or any obligation related thereto or resulting therefrom;

(b) Upon a finding of misconduct by a party, the court shall enter an order against the offending party enjoining the conduct which disturbs or interferes with the peace or liberty of the other party so long as such conduct does not rise to the level of or constitute domestic violence as defined in article twenty-seven, chapter forty-eight of this code. ***The court shall not issue orders under this section in cases where the conduct of either party has previously risen to the level of domestic violence.***

(c) Nothing in this section shall preclude the court from entering an emergency protective order, or final protective order, as provided in article twenty-seven, chapter forty-eight of this code.

(d) Notwithstanding the provisions of section five hundred five, article twenty-seven, chapter forty-eight of this code, an order entered pursuant to the provisions of this section shall remain in effect for a period of time as specified in the order.

(e) The court may enforce orders under this section against the offending party through its powers of contempt, pursuant to section nine of this article.

(f) It is the express intent of the Legislature that orders issued pursuant to this section are to restrict behavior which is not of sufficient severity to implicate the provisions of article twenty-seven, chapter forty-eight of this code and 18 U. S. C. §922(g)(8).

IV. DIVORCE ISSUES AFFECTED BY DOMESTIC VIOLENCE

A. Custody and visitation

Custody and visitation of children are very difficult issues to contend with in domestic violence situations. Domestic violence is a limiting factor.

§48-9-209. Parenting plan; limiting factors

(a) If either of the parents so requests, or upon receipt of credible information thereof, the court shall determine whether a parent who would otherwise be allocated responsibility under a parenting plan: ...

(3) Has committed domestic violence, as defined in section 27-202;

(b) If a parent is found to have engaged in any activity specified by subsection (a) of this section, the court shall impose limits that are reasonably calculated to protect the child or child's parent from harm. The limitations that the court shall consider include, but are not limited to:

(1) An adjustment of the custodial responsibility of the parents, including but not limited to:

(A) Increased parenting time with the child to make up for any parenting time the other parent lost as a result of the proscribed activity;

(B) An additional allocation of parenting time in order to repair any adverse effect upon the relationship between the child and the other parent resulting from the proscribed activity; or

(C) The allocation of exclusive custodial responsibility to one of them;

(2) Supervision of the custodial time between a parent and the child;

(3) Exchange of the child between parents through an intermediary, or in a protected setting;

(4) Restraints on the parent from communication with or proximity to the other parent or the child;

(5) A requirement that the parent abstain from possession or consumption of alcohol or non-prescribed drugs while exercising custodial responsibility and in the twenty-four hour period immediately preceding such exercise;

(6) Denial of overnight custodial responsibility;

(7) Restrictions on the presence of specific persons while the parent is with the child;

(8) A requirement that the parent post a bond to secure return of the child following a period in which the parent is exercising custodial responsibility or to secure other performance required by the court;

(9) A requirement that the parent complete a program of intervention for perpetrators of domestic violence, for drug or alcohol abuse, or a program designed to correct another factor; or

(10) Any other constraints or conditions that the court deems necessary to provide for the safety of the child, a child's parent or any person whose safety immediately affects the child's welfare.

(c) If a parent is found to have engaged in any activity specified in subsection (a) of this section, the court may not allocate custodial responsibility or decision-making responsibility to that parent without making special written findings that the child and other parent can be adequately protected from harm by such limits as it may impose under subsection (b) of this section. The parent found to have engaged in the behavior specified in subsection (a) of this section has the burden of proving that an allocation of custodial responsibility or decision-making responsibility to that parent will not endanger the child or the other parent.

§48-27-509. Conditions of visitation in cases involving domestic violence.
(a) A court may award visitation of a child by a parent who has committed domestic violence only if the court finds that adequate provision for the safety of the child and the petitioner can be made.

(b) In a visitation order, a court may:

(1) Order an exchange of a child to occur in a protected setting;

(2) Order that supervision be provided by another person or agency;

(3) Order the perpetrator of domestic violence to attend and complete, to the satisfaction of the court, a program of intervention for perpetrators as a condition of the visitation;

(4) Order the perpetrator of domestic violence to abstain from possession or consumption of alcohol or controlled substances during the visitation and for the twelve hours that precede the visitation;

(5) Order the perpetrator of domestic violence to pay the costs of supervised visitation, if any;

(6) Prohibit overnight visitation;

(7) Impose any other condition that the court considers necessary to provide for the safety of the child, the petitioner or any other family or household member.

(c) Regardless of whether visitation is allowed, the court may order that the address of the child and the petitioner be kept confidential.

(d) If a court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation.

Mary Ann P. v. William R. P., 197 W.Va. 1, 475 S.E.2d 1 (1996)–Syllabus Point 2 provides "Children are often physically assaulted or witness violence against of their parents and may suffer deep and lasting emotional harm from victimization and from exposure to family violence; consequently, a family law master should take domestic violence into account. See also ***Henry v. Johnson,*** 192 W.Va. 82, 450 S.E.2d 779 (1994), ***Nancy Viola R. v. Randolph W.,*** 177 W. Va. 710, 356 S.E.2d 464 (1987)

B. Spousal support and domestic violence

It is important to get victim financially separated from perpetrator; this is an important tool to help an abused spouse. The Permissive Relief afforded the Petitioner in a Protective Order and in a divorce is critically important to the Petitioner's ability to live independently of the abuser. An advocate should advocate for enough spousal support to enable a Petitioner, at a minimum, to pay monthly bills.

C. Grounds for Divorce

Although most divorces are granted on the grounds of irreconcilable differences, it is worth pursuing the fault ground of cruel and inhuman treatment for victims who are in the process of becoming legal immigrants or citizens of the U.S. ***West Virginia Code §***48-5-203.

D. Domestic violence and immigration issues

Domestic violence plays a large role in immigration proceedings and allows a victim to obtain relief that otherwise would not be available. If you are representing a victim of domestic violence in a divorce and the victim is also an immigrant, it is very important to become education about your client's immigration status and how the abuse may affect her case for citizenship. In general, it is going to be helpful to have explicit court findings of abuse. It will also be helpful to make sure that the victim has all of her legal documents, birth certificates, marriage certificates, passports, diplomas, and those of her children. If the abuser signed an Affidavit to support the victim as part of her initial entry into the country, this Affidavit can be sued to support a claim for spousal support. (Please remember that non-citizens are not eligible for means-tested public benefits until they have been in the country for 5 years after getting a green card.) It is also helpful to obtain a provision in divorce Orders that the abuser will not interfere with the victim's immigration legal process, that the abuser must provide the victim with documents, etc.

The following immigration procedures may be available to a domestic violence victim:

1. **VAWA Self-Petition for Immigrant Status (I-360)**
   a. Person may adjust status if approved (I-485)
   b. A prima facie determination from USCIS can make the person eligible for certain public benefits
   c. Elements include: abuser's legal status, evidence that they shared a residence; evidence that they entered into the marriage in good faith; evidence of abuse; evidence of good moral character
2. **Battered Spouse waiver—Petition to Remove conditions on Residency—Waiver of Joint Filing (I-751)**

The conditional residency requirement was imposed to deter marriage fraud for immigration purposes.

To qualify for waiver, petitioner must show that: marriage entered into in good faith; Petitioner or child was battered or subjected to extreme cruelty; if the marriage has been terminated, evidence must be included; petitioner is of good moral character

3. **U-Visas**

Must how that victim suffered substantial physical or mental abuse as a result of certain criminal activity (including domestic violence); that victim possesses information concerning that criminal activity; that victim has been, is being or is likely to be helpful to law enforcement investigating or prosecuting the activity; the criminal activity violated U.S. law

4. **T-Visas**

Must show that the person is victim of severe form of trafficking; victim is physically present in the U.S.; person has complied with any reasonable request for assistance in the investigation and prosecution; person would suffer extreme hardship upon removal

V. Practice Tips:

A. Check with the Magistrate or Family Court Assistant to make sure that a Protective Order is entered on the registry.

B. If child support is ordered in a Protective Order, make sure that the Protective Order is sent to the Bureau for Child Support Enforcement for withholding from wages. Spousal support can also be withheld by the BCSE, even when there is no child support Order; however, it must be stated in the Order.

C. If your client is the Petitioner in a Protective Order, make sure that they are given the forms to extend a Protective Order for an additional 90 days or into a divorce/custody proceeding and ***make sure client is advised that form must be filed prior to expiration of the Order***. See enclosed forms.

D. Protect your non-citizen divorce client by consulting with an immigration attorney to find out what client's legal needs are.

IN THE FAMILY COURT OF WOOD COUNTY, WEST VIRGINIA

Petitioner (First/Middle/Last)

By: (Parent/Guardian/Next Friend)

v.

Respondent (First/Middle/Last)

Magistrate Court Case No.: _____

Family Court Civil Action No.: _____
(same as divorce, separate maintenance, or annulment)

Family Court Civil Action No.: _____
(DVPO, If different than above)

NOTICE OF AUTOMATIC EXTENSION OF PROTECTIVE ORDER PURSUANT TO W.Va. CODE § 48-27-401

I, the Circuit Clerk of Wood County hereby certify that a Petition for divorce, separate maintenance, annulment, the allocation of custodial responsibility or a habeas corpus action to establish custody, an action to establish paternity, the establishment or enforcement of child support or other relief under the provision of Chapter 48 of the W.Va. Code was filed or reopened in the Family Court of Wood County, W.Va. on _____ (Date) involving the above-named parties.

☐ I have verified that a case is pending in this County or

☐ If a pending case is in a different County, I have verified that a case is pending in that County.

As such, the parties are hereby notified that pursuant to W.Va. Code § 48-27-401(d), the Protective Order entered on _____ (Date) **remains in effect** until a non-procedural Temporary Order or a Final Order is entered in the pending action by the Wood County Family Court.

Issued this _____ (Date/Time) _____ CIRCUIT CLERK

This Notice shall be served by the Circuit Clerk on the party present when issued; a copy of this NOTICE shall be served upon the parties by law enforcement; copies of this NOTICE shall be transmitted immediately but no later than the next business day to any law enforcement agency having jurisdiction to enforce this NOTICE, including the county sheriff, the local office of the state police, and any municipal police force, to be placed in a confidential file by such law enforcement agencies pursuant to W.Va. Code § 48-27-403(b) and subject to W.Va. Code § 48-27-601. A copy of this NOTICE shall be transmitted immediately to Magistrate Court. Magistrate Court shall immediately electronically enter the Notice for inclusion in the National Domestic Violence Registry and the WV Domestic Violence State Database immediately upon issuance. This NOTICE shall be filed in the Domestic Violence Action and the Chapter 48 Action.

Magistrate Court Case No.: _____

Family Court Civil Action No.: _____
(same as divorce, separate maintenance, or annulment)

Family Court Civil Action No.: _____
(DVPO, If different than above)

File Transmission

Copy has been transmitted to the Family Court on _____ and filed in the Family Court case file
(Date)

and Domestic Violence case file on _____.
(Date)

SERVICE BY CLERK:

Served on Petitioner on this _____ day of _____, _____, by _____

☐ Clerk / ☐ Clerk's Designee.

_____
(Signature)

Served on Respondent on this _____ day of _____, _____, by _____

☐ Clerk / ☐ Clerk's Designee.

_____
(Signature)

SERVICE BY LAW-ENFORCEMENT (If party not present)

Served on Petitioner by _____ in _____ County,

W.Va., on _____, at _____.
(Date) (Time)

_____
(Law-Enforcement Signature)

Served on Respondent by _____ in _____ County,

W.Va., on _____, at _____.
(Date) (Time)

_____
(Law-Enforcement Signature)

(Return of Service to Circuit Clerk within 5-days)

Magistrate Court Case No.: _____

Family Court Civil Action No.: _____
(same as divorce, separate maintenance, or annulment)

Family Court Civil Action No.: _____
(DVPO, If different than above)

SERVICE BY THE CIRCUIT CLERK BY MAIL

If Petitioner is not served by law enforcement:

Petitioner served on _____ by certified mail, restricted delivery, return receipt to the Petitioner's last
(Date)

known address: _____.
(Address)

_____
(Circuit Clerk's Signature)

If Respondent is not served by law enforcement:

Respondent served on _____ by certified mail, restricted delivery, return receipt to the Respondent's
(Date)

last known address: _____.
(Address)

_____
(Circuit Clerk's Signature)

SERVICE BY PUBLICATION (if Service by mail unsuccessful)

This Order was publicized on the _____ day of _____, _____ in the

_____ newspaper circulated in the county of

_____ of the last known address of ☐ Petitioner / ☐ Respondent

_____
(Circuit Clerk's Signature)

IN THE FAMILY COURT OF _____ COUNTY, WEST VIRGINIA

_____ Magistrate Court Case No.: _____
Petitioner (First/Middle/Last)

_____ Family Court Civil Action No.: _____
By: (Parent/Guardian/Next Friend)

v.

_____
Respondent (First/Middle/Last)

_____

_____
Address

REQUEST TO EXTEND 90-DAY or 180-DAY PROTECTIVE ORDER

I, _____, the Petitioner in the above-referenced case hereby request that this Court extend the Protective Order entered on the _____ day of _____, 20_____, for an additional 90 days, pursuant to W.Va. Code *§ 48-27-505*. The 90-day or 180-day Protective Order is in effect at the time this Request is made.

_____ _____
Date **Petitioner's Signature**

CERTIFICATE OF SERVICE

CLERK: You must serve a copy of this "Request to Extend 90-Day or 180-Day Protective Order" on the RESPONDENT by one of the methods below.

State of West Virginia
County of _____

I, _____, hereby certify that I have served a copy of the
(Clerk)

Request to Extend 90-Day or 180-Day Protective Order on the **(check one)** ☐ Respondent by first class mail to the Respondent's last known address; **OR** ☐ delivery to Respondent's attorney by facsimile, hand delivery, or first class mail at the address of _____,

on the _____ day of _____, 20_____.

_____ _____
Date **Circuit Clerk's Signature**

File Transmission

Case file and this Request sent to Family Court on _____ by _____.
(Date) (Clerk)

Riffle v. Riffle

Supreme Court of Appeals of West Virginia

March 11, 2015, Submitted; May 13, 2015, Filed

No. 14-0042

Reporter
235 W. Va. 430 *; 774 S.E.2d 511 **; 2015 W. Va. LEXIS 610 ***

DAVID J. RIFFLE, Petitioner Below, Petitioner v. SHIRLEY I. RIFFLE (now MILLER), Respondent Below, Respondent

Prior History: [***1] Appeal from the Circuit Court of Harrison County, Honorable James A. Matish. Civil Action No. 12-D-459-5.

Riffle v. Miller, 2014 W. Va. LEXIS 1275 (W. Va., Nov. 24, 2014)

Disposition: AFFIRMED.

Core Terms

mutual, restraining order, parties, domestic violence, protective order, orders, circuit court, family court, twenty-seven, allegations, divorce, issuance, provisions, contempt, amici, aimed, family court judge, trial court, evidentiary, harassment, statutes, issuing, decree, terms

Case Summary

Overview

HOLDINGS: [1]-The circuit court properly dissolved a mutual restraining order within the agreed final decree of divorce because it properly applied the provisions of *W.Va. Code § 48-27-507* (2014) to determine that the predicate filings and evidentiary proof required by that statutory section were wholly missing, *W.Va. Code § 48-5-608(a)* (2014) did not provide the necessary authority for the issuance of the order, the record did not meet the statutory criteria, there was no language included in the divorce decree that addressed the issues of firearm possession or criminal penalties, as required by *W.Va. Code § 48-27-502* (2014).

Outcome

Order affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN1[] 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 Supreme Court of Appeals of West Virginia reviews the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN2[] The Supreme Court of Appeals of West Virginia reviews questions of law de novo.

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN3[] *W. Va. Code § 48-27-507* is aimed at jointly restricting the conduct of the parties in the aftermath of proven allegations of domestic violence.

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN4[] Through *W. Va. Code § 51-2A-2a* (2015), family courts may enter orders that restrict the parties from having contact with each other absent findings of domestic violence. Under the statute, the contemplated orders may address the conduct expected of the parties during the proceeding; however, the Legislature directed that these restrictions shall remain in effect for a period of time as specified in the order.

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN5[] Orders entered pursuant to *W. Va. Code § 51-2A-2a(f)* (2015) restrict behavior which is not of sufficient severity to implicate the provisions of W. Va. Code ch. 48, art. 27 and *18 U.S.C.S. § 922(g)(8)*.

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

Governments > Courts > Authority to Adjudicate

HN6[] Independent of the statutory criteria for issuing protective orders provided in the Prevention of Domestic Violence Act, *W.Va. Code §§ 48-27-501 to -510* (2014), the Legislature granted courts the authority to issue both temporary and permanent relief to interdict abuse, harassment, interference with visitation rights, or other restraints on a party's personal liberties.

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN7[] In providing for both injunctive relief and protective orders in the course of divorce proceedings, the Legislature directed that such relief may be ordered whether or not there are grounds for relief under *W. Va. Code 48-5-608(c)* (2014) and whether or not an order is entered pursuant to such subsection. *W.Va. Code § 48-5-608(a)* (2014).

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN8[] W.Va. Code § 48-5-608(a) (2014) addresses relief aimed at a singular "offending party" and that relief is proper only upon proof of the allegations of abuse.

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Penalties

HN9[] Violations of W.Va. Code § 48-5-608(a) (2014) do not carry the imposition of a criminal sanction. W.Va. Code § 48-27-502(e) (2014).

Criminal Law & Procedure > ... > Crimes Against Persons > Violation of Protection Orders > Penalties

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN10[] A W.Va. Code § 48-5-608(a) (2014) protective order is not entered on the domestic violence registry.

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN11[] Under the Prevention of Domestic Violence Act, W.Va. Code §§ 48-27-501 to -510 (2014), which addresses the prevention of domestic violence, the acts which qualify as "domestic violence" or "abuse" are statutorily specified as distinct from the abuse or harassment contemplated by W.Va. Code § 48-5-608 (2014).

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN12[] See W.Va. Code § 48-27-202 (2014).

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN13[] The conduct contemplated by W.Va. Code § 48-5-608(a) (2014) is molesting or interfering with the other party; restraining a party's personal liberty; interring with custodial or visitation rights; molesting or harassing a party at school, business, or place of employment; entering the party's home environs; and phone or verbal harassment.

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN14[] Under the Prevention of Domestic Violence Act, W.Va. Code §§ 48-27-501 to -510 (2014), the Legislature has expressly directed that mutual protective orders are prohibited unless both parties have filed a petition under W.Va. Code § 48-27-301 et seq. (2014), and have proven the allegations of domestic violence by a preponderance of the evidence. W.Va. Code § 48-27-507 (2014). That section further provides that singularly-aimed protective

orders are authorized under the Act. A separate protective order must be filed for each petition when relief is awarded.

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN15[] Orders issued pursuant to the Prevention of Domestic Violence Act, W.Va. Code §§ 48-27-501 to -510 (2014), must prohibit the affected parties from possessing any firearms. W.Va. Code § 48-27-502 (2014).

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN16[] Protective orders issued under the Prevention of Domestic Violence Act, W.Va. Code §§ 48-27-501 to -510 (2014), are required to contain language indicating that a violation of such order may result in confinement in a regional jail for up to one year and a fine of as much as $2,000.

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN17[] Police officers may refuse to enforce mutual orders when they arrive at the scene of a domestic dispute and learn that the orders are directed at each of the parties.

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN18[] Eligibility for federal funding under the Violence Against Women Act requires proof that mutual restraining orders are only issued where both parties file a claim and the court makes detailed findings of fact that both parties acted as aggressors. 42 U.S.C.S. § 3796hh(c)(1)(C).

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN19[] Mutual protective orders cannot be issued at the whim of a family court without qualifying allegations of domestic violence, or abuse, followed by evidentiary proof of those allegations. Absent those foundational predicates, a mutual protective order may not be issued under authority of W.Va. Code § 48-27-507 (2014).

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

Evidence > Burdens of Proof > Preponderance of Evidence

HN20[] Sound reasons exist for limiting the issuance of mutual protective orders to those cases where proper assertions of domestic violence or abuse have been established. Otherwise, the objectives sought by the issuance of such orders are more likely to be undermined than to be achieved. Accordingly, pursuant to the provisions of W.Va. Code § 48-27-507 (2014), a court is prohibited from entering a mutual protective order unless each party has filed a petition asserting allegations of domestic violence against the other and established those allegations by a preponderance of the evidence.

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN21[↓] In recently enacting *W.Va. Code § 51-2A-2a* (2015), the Legislature authorized family courts to restrict contact between the parties thereto without a finding of domestic violence and further to enter a standing order regarding the conduct expected of the parties during the proceeding. The new statute is clear in stating that this order shall not be considered a protective order for purposes of *W.Va. Code § 48-27-507* (2014). Those orders are designed to restrict contact between the parties but to do so outside the parameters of acts of domestic violence in the Prevention of Domestic Violence Act, *W.Va. Code §§ 48-27-501 to -510* (2014).

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

HN22[↓] An order that is aimed at restricting a party's conduct pursuant to *W.Va. Code § 51-2A-2a* (2015) should so specify and should not be casually denominated as a mutual restraining order. Instead, it should mirror the authorizing language and indicate that its purpose is to restrict conduct between the parties.

Syllabus

[*431] BY THE COURT

1. "In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*." Syllabus, *Carr v. Hancock, 216 W.Va. 474, 607 S.E.2d 803 (2004)*.

2. Pursuant to the provisions of *West Virginia Code § 48-27-507* (2014), a court is prohibited from entering a mutual protective order unless each party has filed a petition asserting allegations of domestic violence against the other and established those allegations by a preponderance of the evidence.

Counsel: For Petitioner: Jerry Blair, Esq., Clarksburg, West Virginia.

Shirley I. Miller, Pro se.

Judges: JUSTICE LOUGHRY delivered the Opinion of the Court.

Opinion by: LOUGHRY

Opinion

[512]** LOUGHRY, Justice:

The petitioner, David J. Riffle, appeals from the October 30, 2013, order of the Circuit Court of Harrison County, through which the circuit court reversed the February 13, 2013, order of the Family Court of Harrison County with regard to the inclusion of a mutual **[***2]** restraining order within the agreed final decree of divorce. The circuit court found that the record was devoid of a proper evidentiary showing of abuse to support the issuance of a mutual restraining order. As grounds for his appeal, Mr. Riffle argues that the circuit court violated his right to enter into a contractual agreement. Maintaining that the parties concurred that the entry of a joint restraining order was in their best interests, the petitioner asserts that the trial court abused its discretion in setting aside the restraining order. In responding, Ms. Miller disputes that a need for the restraining order was demonstrated to the family court. She further disavows having agreed to the entry of an order directed at governing the respective conduct of each of the

parties.[1] Upon careful review of the applicable statutes in conjunction with the record of this case,[2] we find that the trial court did not commit error. Accordingly, the decision of the circuit court is affirmed.

I. Factual and Procedural Background

The parties were married on December 30, 1988, and subsequently separated on August 10, 2012. That same month, the petitioner **[**513]** **[*432]** filed a complaint against the respondent seeking a divorce. He later filed a petition against the respondent requesting protection from domestic violence, which resulted in the entry of an emergency protective order.[3] Due to the temporary agreement reached by the parties as to both the underlying divorce action and the domestic violence petition, the protective order was terminated by entry of an order on October 22, 2012.[4] Through this ruling, the family court dismissed the pending domestic violence case and issued a mutual no contact order, which directed both parties to refrain from contacting or otherwise communicating with the opposing party other than as necessary for the court proceedings.

By entry of an order on February 19, 2013, the parties **[***4]** were divorced pursuant to an agreed final order of divorce. Included in the agreement, is the following proviso:

> A mutual restraining order is entered in this matter such that neither party may have any direct or indirect contact with the other party, nor may either party interfere with the other party's quiet enjoyment of their life, and the willful failure to abide by this ORDERED provision shall subject the violating party to contumacious contempt of this Court.

In May 2013, the petitioner sought to have Ms. Miller declared to be in contempt of court with regard to the provisions of the mutual restraining order. He asserted that Ms. Miller left a message on his answering machine on one occasion.[5] In addition, the petitioner avowed that Ms. Miller contacted a long-time friend of his, as well as his pastor, and requested that both of these individuals contact Mr. Riffle on her behalf.[6]

Following a hearing on August 6, 2013, the family court found Ms. Miller in contempt of court with regard to her attempts at contacting the petitioner.[7] Through its order, the family court permitted Ms. Miller to purge herself of the contempt ruling by refraining from any direct or indirect contact with the petitioner during the next two years.

On September 3, 2013, Ms. Miller filed a pro se petition for appeal, purportedly seeking to challenge the contempt ruling as well as the inclusion of a mutual restraining order in the final order of divorce.[8] On September 27, 2013, the circuit court held a hearing on the respondent's amended petition for appeal. Through its ruling entered on

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[1] *See infra* note 10.

[2] We wish to acknowledge the amicus curiae brief submitted, in response to the Court's invitation, by the West Virginia University College of Law Clinical Law Program and the joint amicus curiae **[***3]** brief submitted by Legal Aid of West Virginia and the West Virginia Coalition Against Domestic Violence.

[3] This order was entered by the family court on August 20, 2012.

[4] In this order, the family court found that the petitioner had voluntarily dismissed the domestic violence petition.

[5] According to the petition, the subject of the message was Ms. Miller's feelings toward the petitioner, including the fact that she missed him.

[6] While the petitioner asserted additional facts in his petition seeking contempt, those allegations are not relevant to the issue of the mutual restraining order as **[***5]** they concern the resolution of the sale and distribution of marital property.

[7] The contempt ruling, entered on August 27, 2013, also addressed Ms. Miller's act of contacting a realtor other than the individual previously selected by the petitioner.

[8] The pro se filing by Ms. Miller is admittedly imprecise in that it purports to be an appeal of the *nunc pro tunc* order that was entered on the same date as the contempt ruling. That ruling did nothing other than to correct a typographical error pertaining to which party was charged with the responsibility of placing the former marital home on the market.

October 30, 2013, the circuit court affirmed the entry of the nunc pro tunc order[9] but reversed the family court's issuance of a mutual restraining order through the final decree of divorce. It is the circuit court's decision to dissolve the mutual restraining order **[***6]** that the petitioner now appeals.

II. Standard of Review

Our review of this matter is governed by the standard we adopted in the syllabus of *Carr v. Hancock, 216 W.Va. 474, 607 S.E.2d 803 (2004)*:

> *HN1*[↑] In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an **[**514]** **[*433]** abuse of discretion standard. *HN2*[↑] We review questions of law *de novo*.

Bearing this standard in mind, we proceed to determine whether the trial court committed error in setting aside the mutual restraining order.

III. Discussion

The regular practice of inserting language in domestic relations orders aimed at restricting the conduct of each party towards the other is at the center of this appeal.[10] While **[***7]** the need for specific directives aimed at protecting individuals is not itself in question, the issuance of mutual protective orders is clearly governed by statute. *See W.Va. Code § 48-27-507* (2014). This case involves the issuance of an order outside the requirements of *West Virginia Code § 48-27-507*, *HN3*[↑] a statute aimed at *jointly* restricting the conduct of the parties in the aftermath of *proven* allegations of domestic violence. In recognition of the existing tension between the practices employed by the family court judges and the statutes that address domestic violence,[11] we examine the interplay between the governing statutes and the recognized need to assist the family court with legitimate concerns rooted in the potential for hostility and volatility.

As the amici both observe, the terms "protective" and "restraining" are often used interchangeably in this area.[12] In this case, the family court judge imposed a "mutual restraining order"[13] to limit contact between the parties. To

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[9] *See supra* note 8.

[10] The circuit court noted in its ruling that the family court judge "stated in the final hearing on Mr. Riffle's divorce petition . . . that 'neither party has requested a restraining order against the other, although there will be language in the decree that mutually orders them to stay away from one another.'"

[11] During the pendency of this litigation, legislation aimed at addressing these issues was considered by our Legislature. Senate Bill 430, which passed on March 13, 2015, and took immediate **[***8]** effect, affirmed the provisions of *West Virginia Code § 48-27-507* with regard to the continuing need for joint allegations *and* proof of domestic violence prior to entering a mutual protective order. *HN4*[↑] Through that same bill, in legislation codified as *West Virginia Code § 51-2A-2a*, family courts may enter orders that restrict the parties from having contact with each other absent findings of domestic violence. Under the new statute, the contemplated orders may address "the conduct expected of the parties *during the proceeding*;" however, the Legislature directed that these restrictions "*shall remain in effect for a period of time as specified in the order.*" *Id.* (emphasis supplied). The orders authorized by each statute address specific types of conduct; the Legislature clarified that *HN5*[↑] orders entered pursuant to *West Virginia Code § 51-2A-2a* "restrict behavior which is not of sufficient severity to implicate the provisions of article twenty-seven, chapter forty-eight of this code and ***18 U.S.C. § 922(g)(8)***." *W.Va. Code § 51-2A-2a (f)*.

[12] One of the two amici posits that protective orders, as compared to restraining orders, "are more limited in terms of the serious behaviors they address, whom they can be issued against, . . . the behaviors that they prohibit and how violators may be punished." The other amicus represents that "there is no inherent conceptual distinction between the terms . . . 'restraining orders' or 'protective orders,' all of which are used almost interchangeably in cases and statutes."

[13] While unnecessary for purposes of addressing the concerns presented in this matter, we do note that one of the amici suggested the use of terminology that may prove useful in the future. In those matters that clearly arise under *West Virginia*

resolve whether the circuit court correctly ruled that the family **[***9]** court's issuance of a mutual restraining order under the facts of this case was improper, we turn to our statutes to identify the requisites for issuing relief in the form of a protective or restraining order. As a starting point, we examine the availability of protective relief outside the provisions of this state's Prevention of Domestic Violence Act, *W.Va. Code §§ 48-27-501 to -510* (2014) ("article twenty-seven").

HN6[↑] Independent of the statutory criteria for issuing protective orders provided in article twenty-seven, the Legislature granted courts the authority to issue both temporary and permanent relief to interdict abuse, harassment, **[**515] [*434]** interference with visitation rights, or other restraints on a party's personal liberties. ***HN7***[↑] In providing for both injunctive relief and protective orders in the course of divorce proceedings, the Legislature directed that such relief may be ordered "whether or not there are grounds for relief under subsection (c) [referencing chapter 48, article 27] and whether or not an order is entered pursuant to such subsection." *W.Va. Code § 48-5-608(a)* (2014).[14] By its language, ***HN8***[↑] section 608(a) addresses relief aimed at a singular "offending party" and that relief is proper only upon proof of the "allegations of abuse."[15] *Id.*

Turning to ***HN11***[↑] article twenty-seven, which addresses the prevention of domestic violence, we note initially that the acts which qualify as "domestic violence" or "abuse" are statutorily specified as distinct from the abuse or harassment contemplated by *West Virginia Code § 48-5-608*.[16] By definition, those acts subject to relief under article twenty-seven involve the following conduct:

> (***HN12***[↑] 1) Attempting to cause or intentionally, knowingly or recklessly causing physical harm to another with or without dangerous or deadly weapons;
> (2) Placing another in reasonable apprehension of physical harm;
> (3) Creating fear of physical harm by harassment, stalking, psychological abuse or threatening acts;
>
> (4) Committing either sexual **[***12]** assault or sexual abuse as those terms are defined in article eight-b [§§ 61-8B-1 et seq.] and eight-d [§§ 61-8D-1 et seq.], chapter sixty-one of this code; and
> (5) Holding, confining, detaining or abducting another person against that person's will.

W.Va. Code § 48-27-202 (2014).

HN14[↑] Under article twenty-seven, the Legislature has expressly directed that mutual protective orders are prohibited "unless both parties have filed a petition under part 3 [§§ 48-27-301 et seq.] of this article and have proven the allegations of domestic violence by a preponderance of the evidence." *W.Va. Code § 48-27-507*. That section further provides that singularly-aimed protective orders are authorized under article twenty-seven. *See id.* A separate protective order must be filed for each petition when relief is awarded. *Id.*

Code § 48-27-507 because of the allegations and proof of domestic violence, those orders could be referred to as "Article **[***10]** 27 protection orders." For those matters that are less serious and present the "garden variety" need to limit contact between the parties, those orders could be labeled as "non-DV conflict prevention orders." What appears critical to this Court is the need to clearly demarcate those orders which arise under and necessarily invoke the requirements of *West Virginia Code § 48-27-507*, and those that do not.

[14] Note that the extent of the relief available **[***11]** in the non-domestic violence cases is more limited. For example, there is no restriction regarding the possession of firearms (*cf. W.Va. Code § 48-27-502(b)*). In contrast to article twenty-seven relief, ***HN9***[↑] violations of *West Virginia Code § 48-5-608(a)* do not carry the imposition of a criminal sanction. *See W.Va. Code § 48-27-502(e)*. Additionally, in clear contrast to article twenty-seven protective orders, ***HN10***[↑] an article five, section 608(a) protective order is not entered on the domestic violence registry.

[15] *West Virginia Code § 48-5-608(a)* does not provide the necessary authority for the issuance of the mutual restraining order in this case.

[16] ***HN13***[↑] The conduct contemplated by *West Virginia Code § 48-5-608(a)* is molesting or interfering with the other party; restraining a party's personal liberty; interring with custodial or visitation rights; molesting or harassing a party at school, business, or place of employment; entering the party's home environs; and phone or verbal harassment.

As the basis for its dissolution of the mutual restraining order awarded by the family court, the circuit court looked to the provisions of West Virginia Code § 48-27-507. The circuit court reasoned that "allegations **[***13]** of abuse have not been proven by either party by a preponderance of the evidence." Opining further, the circuit court stated:

> The record merely provides allegations of non-abusive contact by Ms. Miller such as a voice mail message to Mr. Riffle and attempted contact through a mutual colleague. Such conduct does not rise to the level of abuse so as to justify the issuance of a restraining order. As such, a proper evidentiary showing of abuse has not been sufficiently made to support the issuance of a mutual restraining order.

Relying on the language of West Virginia Code § 48-27-507, the trial court concluded that the record of this matter did not meet the statutory criteria. We agree.

Echoing the dissent authored by Justice Workman in Pearson v. Pearson, 200 W.Va. 139, *[*435]* 488 S.E.2d 414 (1997), **[**516]** the circuit court observed that "mutual protective orders are disfavored." Commenting that "[m]utual restraining orders are a common but very bad practice," Justice Workman expounded on the perils of issuing mutual restraining orders "without a proper evidentiary foundation:"

> This practice of mutual restraining orders, while perhaps well-intentioned, causes more problems than it attempts to solve. It hinders rather than assists the enforcement of domestic violence laws. Judicial officers may **[***14]** believe they are addressing the issue of family violence, but mutual restraining orders can actually endanger, rather than protect, the victim. Boilerplate mutual restraining orders also diminish the principal goal of a restraining order, which is to provide protection from domestic violence to one who has been subjected to it. When a law enforcement officer at the scene of domestic violence learns of mutual restraining orders, confusion obviously results, and the officer often resolves the dilemma by arresting both. This confusion was never intended by our Legislature.

Id. at 153, 488 S.E.2d at 428 (Workman, Chief Justice, dissenting).

The concerns articulated in the *Pearson* dissent have gone unheeded as family courts continue to include this boilerplate mutual restraining language in divorce decrees—even when the language has not been specifically requested.[17] In addition to the unwelcome neutralizing effect on law enforcement,[18] the amici have called to our attention that, with the enactment of federal laws directed at preventing domestic violence, there are compliance-related concerns that arise when a mutual restraining order is improperly issued.[19] Our state laws require that ***HN15***[↑] orders issued pursuant to article twenty-seven **[***15]** must prohibit the affected parties from possessing any firearms. *See* W.Va. Code § 48-27-502 (2014). In addition, ***HN16***[↑] protective orders issued under article twenty-seven are required to contain language indicating that a violation of such order may result in confinement in a regional jail for up to one year and a fine of as much as $2,000.[20] *See id.*

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[17] *See supra* note 10.

[18] As noted in *Pearson*, ***HN17***[↑] police officers may refuse to enforce mutual orders when they arrive at the scene of a domestic dispute and learn that the orders are directed at each of the parties. *200 W.Va. at 153, 488 S.E.2d at 428* (Workman, Chief Justice, dissenting). Because "[l]aw enforcement authorities do not take mutual orders as seriously as orders directed against a single offender," the amici further observe that such orders "can become an instrument of control through which the offending party can continue to dominate the true victim."

[19] The amici represent that "permitting mutual orders to be entered in cases involving domestic violence may jeopardize literally millions of dollars of federal funding under the Violence Against Women Act currently being received by police, prosecutors, court systems, and others in West Virginia." *See 42 U.S.C. § 3796hh (2012).* ***HN18***[↑] Eligibility for these federal funds requires **[***16]** proof that mutual restraining orders are only issued where both parties file a claim and the court makes detailed findings of fact that both parties acted as aggressors. *See 42 U.S.C. § 3796hh(c)(1)(C).*

[20] There was no language included in the divorce decree that addressed the issues of firearm possession or criminal penalties, as required by West Virginia Code § 48-27-502.

HN19[↑] Mutual protective orders cannot be issued at the whim of the family court without qualifying allegations of domestic violence, or abuse, followed by evidentiary proof of those allegations. Absent those foundational predicates, a mutual protective order may not be issued under authority of *West Virginia Code § 48-27-507*.[21] As discussed at length in the *Pearson* dissent, and further addressed by the amici in this case, ***HN20***[↑] sound reasons exist for limiting the issuance of mutual protective orders to those cases where proper assertions of domestic violence or abuse have been established. Otherwise, the objectives sought by the issuance of such orders are more likely to be undermined than to be achieved. Accordingly, we hold that pursuant to the provisions of *West Virginia Code § 48-27-507*, a court is prohibited from entering a mutual protective order unless **[**517]** **[*436]** each party has filed a petition asserting allegations of domestic violence against the **[***17]** other and established those allegations by a preponderance of the evidence.[22] In this case, the trial court properly applied the provisions of *West Virginia Code § 48-27-507* to determine that the predicate filings and evidentiary proof required by that statutory section were wholly missing. Accordingly, the circuit court acted within its discretion in setting aside the mutual restraining order issued by the family court.

IV. Conclusion

Based on our determination that the circuit court properly dissolved the improperly issued mutual restraining order, the October 30, 2013, order of the Circuit Court of Harrison County is affirmed.

Affirmed.

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[21] We wholly reject the petitioner's contention that he had a right to enter into a contract that violates the provisions of *West Virginia Code § 48-27-507*.

[22] We specifically framed our new point of law in terms of a "mutual protective order" to track the statutory language of article twenty-seven. This does not mean that the family courts may circumscribe this ruling by continuing to issue "mutual *restraining* orders." ***HN21***[↑] In recently enacting *West Virginia Code § 51-2A-2a* (see *supra* note 11), the Legislature authorized family courts to "restrict contact between the parties thereto without a finding of domestic violence" and further to "enter a standing order regarding the conduct expected of the parties during the proceeding." The new statute is clear in stating that "[t]his order shall not be considered a protective order for purposes of section five hundred seven, article **[***18]** twenty-seven, chapter forty-eight of this code." *Id.* Those orders are designed to restrict contact between the parties but to do so *outside* the parameters of article twenty-seven acts of domestic violence. We caution the courts to choose the governing language of their orders carefully, and to specifically refer to the authorizing statutory language pursuant to which the order is being issued. ***HN22***[↑] An order that is aimed at restricting a party's conduct pursuant to *West Virginia Code § 51-2A-2a* should so specify and should not be casually denominated as a "mutual restraining order." Instead, it should mirror the authorizing language and indicate that its purpose is to restrict conduct between the parties. *See id.*