

33004

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

FILED

2005 OCT 31 AM 9:04

CATHY S. CATSON, CLERK
KANAWHA CO. CIRCUIT COURT

AT CHARLESTON

MARTHA F. RYAN,

Petitioner,

Petitioner below.

vs.

Case Action No. _____

(Appeal from a **July 13, 2005**

Order of the Circuit Court of
Kanawha County, 92-C-8910)

CHARLES E. RYAN,

Respondent,

Respondent below.

MEMORANDUM OF PARTIES

CHARLES E. RYAN,

Respondent.

MARTHA F. RYAN

By Counsel

NATURE OF THE PROCEEDING AND RULING BELOW

Petitioner and the Respondent, who were formerly husband and wife for a period in excess of twenty-eight (28) years and the parents of two (2) adult children, were divorced by a Bifurcated Order from the Circuit Court of Kanawha County, West Virginia, dated December 27, 1993. Subsequent thereto, the Parties executed a Property Settlement Agreement on or about March 1, 1994, which treated issues of equitable distribution and spousal support or alimony, ostensibly on a rehabilitative or term basis. The Circuit Court of Kanawha County, West Virginia, entered a Final Order on May 2, 1994 approving, confirming and ratifying the Parties' aforesaid March 1, 1994 Property Settlement Agreement.

Due to the Respondent's intentional and arguably improperly motivated filing of an IRS Form 1099 with the Internal Revenue Service (hereafter IRS) in 1997 reporting as income to the Petitioner the equitable distribution payments she received under the terms of the aforesaid March 1, 1994 Property Settlement Agreement, an extensive IRS audit occurred; and following protracted and costly negotiation, the Petitioner subscribed to a dictated and unfavorable May 28, 1999 Amendment to the Parties original March 1, 1994 Property Settlement Agreement that left her responsible for a portion of the tax liability generated by the Respondent's machinations.

Nearing the time (February 29, 2004) when the Petitioner's

rehabilitative alimony was to terminate under the aforesaid March 1, 1994 Property Settlement Agreement and the May 28, 1999 Amendment thereto, Petitioner executed a January 27, 2004 Petition for Modification seeking *to extend and not increase* her monthly rehabilitative alimony payments on the grounds of mutual mistake of fact and misunderstanding in connection with the Parties execution of the aforesaid original Property Settlement Agreement and its 1999 Amendment, and a material change of circumstances subsequent to the entry of the May 2, 1994 Final Order.

In response thereto, Respondent did not contest the allegations of the Petitioner's Petition to Modify, but on March 19, 2004, he lodged a Motion to Dismiss Petitioner's aforesaid Petition to Modify.

A hearing before the assigned Family Court Judge D. Mark Snyder on January 14, 2005 was held wherein proffers were made, but no testimonial or documentary evidence was adduced. The Family Court Judge had indicated on January 14, 2005 that a second evidentiary hearing would be scheduled at a later time, but the same did not occur. Without an evidentiary hearing on the merits, the Family Court Judge entered a final Order on April 1, 2005 granting the Respondent's Motion to Dismiss.

Believing that the Order of the Family Court Judge was in error, Petitioner filed a timely Petition for Appeal of the Family Court Judge's April 1,

2005 Order, with a supporting memorandum, to the Circuit Court of Kanawha County on May 3, 2005, citing four (4) grounds for error. The issues raised were: (a) mutual mistake of fact in the formation and execution of the Parties' aforesaid March 1, 1994 Property Settlement Agreement; (b) the improper invocation of West Virginia Code §48-6-201 as a device to bar an extension of rehabilitative alimony; (c) failure to consider Petitioner's affidavit as evidence in support of her Petition, when there was no evidentiary hearing on said Petition; and, (d) the inapplicability of Rule 60, WVRCP, utilized by the Family Court Judge as a procedural device to defeat treatment of Petitioner's Petition to Modify on its merits.

On May 9, 2005, the Respondent lodged his Response to the Petitioner's said Petition for Appeal. Disregarding the need for an oral presentation, the Circuit Court of Kanawha County, the Honorable Louis H. Bloom, Judge, presiding, entered a July 13, 2005 Final Order Refusing Appeal and Affirming the Family Court Final Order on the points raised by your Petitioner, thereby necessitating this Petition for Appeal.

PRAYER

WHEREFORE, Petitioner prays that this Honorable Court order this Petition filed; that the same be promptly accepted, properly docketed and duly considered; that upon the facts stated, the reasons given and the authority cited,

the July 13, 2005 Final Order, Etc., of the Circuit Court of Kanawha County, West Virginia, the intermediate appellate trial court below, and the April 1, 2005 (Final) Order of the Family Court Judge in the captioned proceedings, be **reversed**, set aside and held for naught; or in the alternative, that the same be **remanded with instructions**; that the aforesaid July 13, 2005 Final Order, Etc., of the Circuit Court of Kanawha County, West Virginia and the April 1, 2005 (Final) Order of the Family Court Judge in the captioned proceedings be **stayed** pending appeal, pursuant to Rule 6 of the Rules of Appellate Procedure for the West Virginia Supreme Court of Appeals; and that Petitioner be granted such other and further relief as this Court may deem equitable, proper and just, and in the premises, meet, she will ever pray, etc.

ISSUES

1. For the purposes of a motion to dismiss, are the allegations of the opposing party deemed to be admitted?
2. May a Family Court Judge disregard the uncontroverted evidence of a party in rendering a decision on modification?
3. Does the doctrine of mutual mistake of fact render unenforceable or null a contract upon which the mutual mistake of fact is based?
4. Is rehabilitative alimony subject to modification if the rehabilitation plan has failed within a reasonable time after the divorce?
5. May a party to a domestic relations matter be compelled to utilize the device of proffer at a final hearing on the merits of a petition to modify?

FILED

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

2005 OCT 31 AM 9:04

EMILY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

AT CHARLESTON

MARTHA F. RYAN,

Petitioner,
Petitioner below.

vs.

CHARLES E. RYAN,

Respondent,
Respondent below.

FILED
DEC 14 2005

RORY L. PERRY II, CLERK
WEST VIRGINIA SUPREME COURT OF APPEALS
Case Action No. _____
(Appeal from a July 13, 2005
Order of the Circuit Court of
Kanawha County, 92-C-8910)

PETITION FOR AN APPEAL FROM A FINAL ORDER

Comes now the Petitioner, MARTHA F. RYAN, Petitioner below,
by her attorney, James Wilson Douglas, pursuant to Rule 4 of the Rules of
Appellate Procedure of the West Virginia Supreme Court of Appeals, and in and
for her Petition, does aver, depose and say, as follows:

STANDARDS OF REVIEW

Petitioner maintains that the appropriate standards of review for the
issues presented hereinafter are *abuse of discretion* and *de novo*.

NATURE OF THE PROCEEDING AND RULING BELOW

Petitioner and the Respondent, who were formerly husband and wife for a period in excess of twenty-eight (28) years and the parents of two (2) adult children, were divorced by a Bifurcated Order from the Circuit Court of Kanawha County, West Virginia, dated December 27, 1993. Subsequent thereto, the Parties executed a Property Settlement Agreement on or about March 1, 1994, which treated issues of equitable distribution and spousal support or alimony, ostensibly on a rehabilitative or term basis. The Circuit Court of Kanawha County, West Virginia, entered a Final Order on May 2, 1994 approving, confirming and ratifying the Parties' aforesaid March 1, 1994 Property Settlement Agreement.

Due to the Respondent's intentional and arguably improperly motivated filing of an IRS Form 1099 with the Internal Revenue Service (hereafter IRS) in 1997 reporting as income to the Petitioner the equitable distribution payments she received under the terms of the aforesaid March 1, 1994 Property Settlement Agreement, an extensive IRS audit occurred; and following protracted and costly negotiation, the Petitioner subscribed to a dictated and unfavorable May 28, 1999 Amendment to the Parties original March 1, 1994 Property Settlement Agreement that left her responsible for a portion of the tax liability generated by the Respondent's machinations.

Nearing the time (February 29, 2004) when the Petitioner's rehabilitative alimony was to terminate under the aforesaid March 1, 1994 Property Settlement Agreement and the May 28, 1999 Amendment thereto, Petitioner executed a January 27, 2004 Petition for Modification seeking *to extend and not increase* her monthly rehabilitative alimony payments on the grounds of mutual mistake of fact and misunderstanding in connection with the Parties execution of the aforesaid original Property Settlement Agreement and its 1999 Amendment, and a material change of circumstances subsequent to the entry of the May 2, 1994 Final Order.

In response thereto, Respondent did not contest the allegations of the Petitioner's Petition to Modify, but on March 19, 2004, he lodged a Motion to Dismiss Petitioner's aforesaid Petition to Modify.

A hearing before the assigned Family Court Judge D. Mark Snyder on January 14, 2005 was held wherein proffers were made, but no testimonial or documentary evidence was adduced. The Family Court Judge had indicated on January 14, 2005 that a second evidentiary hearing would be scheduled at a later time, but the same did not occur. Without an evidentiary hearing on the merits, the Family Court Judge entered a final Order on April 1, 2005 granting the Respondent's Motion to Dismiss.

Believing that the Order of the Family Court Judge was in error, Petitioner filed a timely Petition for Appeal of the Family Court Judge's April 1, 2005 Order, with a supporting memorandum, to the Circuit Court of Kanawha County on May 3, 2005, citing four (4) grounds for error. The issues raised were: (a) mutual mistake of fact in the formation and execution of the Parties' aforesaid March 1, 1994 Property Settlement Agreement; (b) the improper invocation of West Virginia Code §48-6-201 as a device to bar an extension of rehabilitative alimony; (c) failure to consider Petitioner's affidavit as evidence in support of her Petition, when there was no evidentiary hearing on said Petition; and, (d) the inapplicability of Rule 60, WVRCP, utilized by the Family Court Judge as a procedural device to defeat treatment of Petitioner's Petition to Modify on its merits.

On May 9, 2005, the Respondent lodged his Response to the Petitioner's said Petition for Appeal. Disregarding the need for an oral presentation, the Circuit Court of Kanawha County, the Honorable Louis H. Bloom, Judge, presiding, entered a July 13, 2005 Final Order Refusing Appeal and Affirming the Family Court Final Order on the points raised by your Petitioner, thereby necessitating this Petition for Appeal.

STATEMENT OF THE FACTS OF THE CASE

Martha and Charles Ryan were divorced after 28 years of marriage and the rearing of two (2) children to adulthood. Petitioner Martha Ryan was 19 years of age when the Parties married. She was 48 years of age at the time their divorce became final. Petitioner, who had raised the two children virtually single-handedly, had never worked outside the home, with the exception of in-kind labors, voluntary contributions of time and advice, and the discharge of social obligations in furtherance of the Respondent Husband's various businesses and commercial interests. Petitioner's formal education consisted only of a high school degree.

Acknowledging that reconciliation was not possible, the Parties hereto entered into a March 1, 1994 Property Settlement Agreement that required Mr. Ryan, the Respondent, to pay alimony to Mrs. Ryan, the Petitioner, in the nature of what was understood by both Parties to be rehabilitative alimony payments for a period of ten years (10) at the rate of \$6,000.00 per month. At the end of ten (10) years, which would prove to be February 29, 2004, all such alimony was to terminate.

The rehabilitative alimony period of ten (10) years was determined by the Parties' expectations that, at the end of that time, the income from and growth

of the marital assets allotted to the Petitioner Wife would be sufficient to support her after the rehabilitative alimony payments ceased.

At the time the March 1, 1994 Property Settlement Agreement was executed and approved, the stock equity markets were booming and growing at a rate which the Parties believed was sufficient to allow for returns and stability to the point that the income from those investments would be at levels and in amounts ample to support Petitioner beyond her senior years. In addition, neither of the Parties believed Petitioner Wife would have to return to school for retraining or rejoin the work force in order to support herself.

Subsequent to the confirmation of the Parties' March 1, 1994 Property Settlement Agreement by the Circuit Court of Kanawha County on or about May 2, 1994, the Respondent's accountant, presumably with the consent, approval and/or under the direction of the Respondent Husband, violated the explicitly stated intention of the Parties' agreement to make Petitioner's equitable distributions non-taxable, by the filing of an IRS Form 1099 with the IRS in 1997, thereby reporting her aforesaid equitable distribution payments under the agreement as ordinary income. This ill-conceived device and engine of oppression triggered an extensive audit of the Parties by the IRS over a two year period. A March 16, 1998 memorandum from Petitioner Wife's accountant during this dark

period suggests that the IRS agent in charge of the investigation believed that Respondent Husband had taken advantage of Petitioner in this regard. A copy of said memorandum is attached hereto as Exhibit "A", and incorporated herein by and for reference.

The tax issues were finally resolved after extensive and expensive negotiation between the Parties and the IRS when Husband's counsel on the tax matter insisted that the terms of their settlement be accepted by the Petitioner, or her rejection thereof would be reported to the IRS, leaving her to suffer the financial consequences. A copy of said coercive letter is attached hereto as Exhibit "B". This one-sided demand led to a May 28, 1999 Amendment to the March 1, 1994 Property Settlement Agreement, which, in essence, discounted the remainder of the equitable distribution obligation of the Respondent Husband and committed Petitioner not to seek further alimony.

The divorce investment and rehabilitation (through alimony) plan for Mrs. Ryan, the Petitioner, failed. The decline can not only be attributed to the nefarious designs of the Respondent Husband's 1099 debacle, but also the fall in value of the stock market as a whole and the bleak outlook of investors compared to the investment climate at the time of the parties divorce. All of these factors conspired to cause Petitioner's holdings to depreciate considerably in value, as

opposed to appreciating and growing as had been expected, anticipated and envisioned by the Parties hereto when they entered into the March 1, 1994 Property Settlement Agreement that contemplated such appreciation would obviate the need for alimony. In brief, the Parties' plan that Petitioner's investments would neutralize the need for alimony, terminated the same after ten (10) years.

Petitioner, as corroborated by her financial affidavit below, has a monthly financial need of \$4,927.72, exclusive of the tax liability generated by alimony income. Although Petitioner has a net monthly income of \$475.00 from a rental home in Summersville and a small return from the residue of her investments, said resources only meet a fraction of her need.

The Parties' understanding of the tax consequences of the March 1, 1994 Property Settlement Agreement occurred through no fault of Petitioner Wife. Moreover, the Parties' mistaken belief that Petitioner would be self-supporting from her investments within a ten (10) year period now leaves her with minimal monthly income and no overt means to support herself within any standard approaching her former station and comfort while married to Respondent.

For the foregoing reasons, Petitioner filed her January 27, 2004 Petition for Modification based upon the aforesaid mutual mistake of fact and the

concept that rehabilitative alimony was subject to extension, if unforeseen and material changes in circumstance had occurred, that were not in contemplation of the Parties at time of the entry of the original May 2, 1994 Final Order.

Respondent interposed his Motion to Dismiss grounded in the termination language of the March 1, 1994 Property Settlement Agreement and the May 28, 1999 Amendment thereto, and the statutory language of West Virginia Code §48-6-201 (b). Accepting only proffers at hearing on January 14, 2005, and conducting no evidentiary hearing thereafter, the Family Court Judge nevertheless made factual findings and granted Respondent's Motion to Dismiss through an Order drafted by the Respondent's counsel and entered on April 1, 2005.

Citing clearly erroneous and *de novo* standards of review and requesting oral argument, the aforementioned issues, and the adverse determinations made thereon, were appealed in a timely manner to the Circuit Court of Kanawha County, the Honorable Louis H. Bloom, Judge, presiding, who affirmed the pertinent rulings of Family Court Judge by his Final Order, Etc. of July 13, 2005. Hence, Petitioner advances this Petition for Appeal.

ERRORS ASSIGNED

1. For the purposes of a motion to dismiss, are the allegations of the opposing party deemed to be admitted?

2. May a Family Court Judge disregard the uncontroverted evidence of a party in rendering a decision on modification?

3. Does the doctrine of mutual mistake of fact render unenforceable or null a contract upon which the mutual mistake of fact is based?

4. Is rehabilitative alimony subject to modification if the rehabilitation plan has failed within a reasonable time after the divorce?

5. May a party to a domestic relations matter be compelled to utilize the device of proffer at a final hearing on the merits of a petition to modify?

POINTS, AUTHORITY AND DISCUSSION OF LAW

I

A MOTION TO DISMISS ADMITS ALLEGATIONS OF PETITION

Generally speaking, upon a Motion to Dismiss, a plaintiff's complaint is to be construed in the light most favorable to the plaintiff, and the allegations of the complaint, for the purposes of the Motion to Dismiss, are to be deemed as true. *Lodge v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978) and *Sticklen v. Kittle*, 168 W.Va. 147, 287 S.E.2d 148 (1981). Consequently, the burden of proof in a Motion to Dismiss is on the moving party or parties. *Lodge, supra*.

In the case before the Court, Petitioner Ryan's January 27, 2004 Petition for Modification to extend her rehabilitative spousal support made

allegations of (a) mutual mistake of fact regarding the Parties March 1, 1994 Property Settlement Agreement and the May 28, 1999 Amendment thereto; (b) material changes of circumstance arising from the Respondent's 1997 1099 scheme; and (c) the inadequacy of her rehabilitative alimony. The Respondent Husband's responsive pleading was a March 19, 2004 Motion to Dismiss which primarily invoked the termination provisions of said Property Settlement Agreement and its Amendment.

Therefore, for the purposes of the Respondent's aforesaid Motion to Dismiss, every allegation of Petitioner's aforementioned Petition, including the averments as to mutual mistake, must have been deemed by the Family Court below to have been established fact, as a matter of law. *Sticklen and Lodge, supra*. The April 1, 2005 decision of the Family Court Judge, herein complained of, and the July 13, 2005 affirming Order of the Circuit Court of Kanawha County reveal that that construction was not applied.

II

COURTS MAY NOT DISREGARD UNCONTROVERTED EVIDENCE

If all allegations of the Petitioner's Petition were to have been considered to have been admitted for the purposes of the Respondent Husband's Motion to Dismiss, then those factual averments appearing therein centering on

mutual mistake of fact in the intention and expectations of the Parties in the drafting, execution, and undertaking of the Parties' March 1, 1994 Property Settlement Agreement, as well as, the Respondent's creation of the subsequent tax issues, and the unforeseen economic declines, stand as unrefuted, uncontested and unchallenged in the disposition of the Motion to Dismiss.

The Family Court Judge below failed to consider the Petitioner's allegations as admitted, thus compounding his error of construction by ignoring what was then essentially stipulated fact. Succinctly stated, in being deemed admitted, Petitioner's allegations of mutual mistake constituted uncontroverted testimony and evidence, which the Family Court is not free to disregard. See *Bettinger v. Bettinger*, 183 W.Va. 528, 396 S.E.2d 709 (1990), *Langevin v. Langevin*, 187 W.Va. 585, 420 S.E.2d 576, 577 (1992), *Coit v. Meadows*, 202 W.Va. 327; 504 S.E.2d 154 (1998).

III

MUTUAL MISTAKE OF FACT JUSTIFIES FURTHER ALIMONY

A property settlement agreement is a contract. The fact that it arises within a domestic relations context does not change that point. In the case of *McGinnis v. Cayton*, 173 W.Va. 102, 312 S.E.2d 765, (1984), at syllabus point 2, this Court adopted the recommendation of the Restatement of Contracts, Second,

by holding:

Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake.

This rule of law was found by the West Virginia Supreme Court of Appeals to be applicable to domestic relations matters in the case of *Stanley v. Stanley*, 201 W.Va. 174, 495 S.E.2d 273 (1997). In *Stanley*, the parties entered into a property settlement agreement. The husband later learned the accountant had made an error in the calculation of the value of his pension and filed to set aside the agreement in the form of a Rule 60(b) motion under the West Virginia Rules of Civil Procedure. This Court agreed that Mr. Stanley should have been permitted to set aside the final decree and the property settlement agreement under the mutual mistake doctrine.

In his concurring opinion in *McGinnis*, at page 109, 772, Justice Harshbarger wrote:

'Freedom of contract' means freedom to agree or assent; not freedom to be forced to agree, to be presumed to have assented, to be cornered into something that one has not remotely considered, or to be denied meaningful choice. This theoretical and philosophical argument underlies the evolution of contract law and this concurrence. 'Freedom of contract' does not vindicate tolerance of blatant inequities or unconscionable acts. Our society values

fundamental fairness, equality, honesty, cooperation and ethics.

Justice Harshbarger also noted the Restatement of Contracts opines that contracts may be set aside which have been affected by supervening events such as war, embargo, crop failure, and shutdowns of supply sources. To that list this Court should add economic recession, terrorist attacks on the commercial centers and the indomitable forces of nature, such as hurricanes.

In the case *sub judice*, it is more than unconscionable that Petitioner Martha Ryan should now be without income. Her “freedom of contract” should not be interpreted as cornering her into losing all financial stability and being forced to begin a spiraling decline in her standard of living by liquidating her assets until she has nothing. Meanwhile the Respondent Husband continues to prosper from the businesses Petitioner helped him build. Petitioner Wife’s income will never approach her former Husband’s potential or actual wages. But it is more than this finely honed sense of unconscionability and piercing cries of inequity—the Husband’s Machiavellian tactics of agreeing to an equitable distribution plan that would have no negative tax implications for the Petitioner Wife, and then causing her to be subjected to IRS scrutiny, procedures and ultimately penalty redefines outrage that only this Court can remedy. In short, the

Respondent Husband should not be able to invoke and seek refuge in a property settlement agreement that he himself or his minions violated. Petitioner should have been allowed to be heard below on her petition to reopen the rehabilitative alimony issue.

Finally, since the allegations of Petitioner's Petition for Modification are considered as admitted for the purposes of Respondent's Motion to Dismiss, as treated more fully *supra.*, then Respondent is deemed to have agreed with Petitioner's averments that the mistake under discussion was indeed mutual. *McGinnis, supra.* See also Sections I and II above.

IV

FAILURE OF REHABILITATIVE PLAN JUSTIFIES EXTENSION OF REHABILITATIVE ALIMONY

That a formerly dependent spouse will become financially self-supporting is the object and purpose of the rehabilitative alimony concept. *Wyant v. Wyant*, 184 W.Va. 454, 400 S.E.2d 869 (1990). Specifically, the rehabilitative alimony idea was formulated in West Virginia in an attempt to encourage a dependent spouse to become financially independent by providing spousal support for a limited period of time during which educational advancement and/or gainful employment could be achieved. *Molnar v. Molnar*, 173 W.Va. 200, 314 S.E.2d

73 (1984).

Moreover, West Virginia family and circuits courts have continuing jurisdiction to reconsider the amount and duration of rehabilitative alimony at a later time. *Id.* Naturally, modification or extension of rehabilitative alimony is only valid where there is evidence establishing a substantial change in the circumstances of the parties since the initial award; and if shown by the appropriate standard, the original rehabilitative alimony can be extended or modified to a permanent alimony award. *Wood v. Wood*, 190 W.Va. 445, 438 S.E.2d 788 (1993).

Although what is a “substantial change in circumstances” must be determined on a case by case basis, certain criteria acknowledged by this Court justifying such extension or modification of rehabilitative alimony include (a) a reassessment of the dependent spouse's potential work skills and the availability of a relevant job market; (b) the dependent spouse's age, health and skills; (c) the dependent spouse's inability to meet the terms of the rehabilitative alimony plan, as well as, any of the other factors set forth in West Virginia Code [citation omitted] (Emphasis supplied). *Pelliccioni v. Pelliccioni*, 214 W.Va. 28, 33, 585 S.E.2d 28, 33 (2003). Lastly, a . . . “trial court should not consider modifying a rehabilitative alimony award . . .until the dependent spouse has had a reasonable

amount of time to comply with the terms of the rehabilitative alimony award.” *Id.*

Applying these principles to the case at bar, Petitioner Wife has alleged and made a *prima facie* case showing by affidavit, as well as, the mere fact of the May 28, 1999 Amendment to the March 1, 1994 Property Settlement Agreement that: (1) there has been a substantial change of circumstances not in contemplation of the Parties at the time of the execution of the aforesaid 1994 Property Settlement Agreement; (2) partly from economic forces and now historical events beyond her control, and partly due to the malevolence and bad faith of the Respondent Husband in attempting to shift tax liability for equitable distribution to the Petitioner, the formerly dependent Petitioner’s inability to meet the terms of the 1994 rehabilitative alimony plan is made manifest; and (3) the Petitioner could not attain the objectives of the 1994 rehabilitative alimony plan within a reasonable time— in this case, a span of nine and eleven-twelfths (9 11/12) years, or one month before the rehabilitative alimony period of ten (10) years was to expire in February 2004.

V

PROFFERS MAY NOT BE COMPELLED AT A FINAL HEARING

West Virginia Rules of Practice and Procedure, Rule 16, provides that

a *temporary* hearing before a Family Court may be conducted by proffer, subject to the right of a party to call rebuttal witnesses. Rule 20, however, states that, aside from temporary hearings, *no hearing* (which includes a *final hearing*) shall be conducted exclusively by the presentation of evidence by proffer.

In the trial (family) court below, Petitioner was not afforded an opportunity to be heard or otherwise develop her case and fully prove the allegations of her Petition for Modification by testimonial, real or documentary evidence. Therefore, the April 1, 2005 Order of the Family Court Judge was, in essence, the granting of a motion for summary judgment in favor of the Respondent Husband. But the Family Court Judge's summary disposition was more than this. The denial of a final evidentiary hearing to the Petitioner Wife of nearly three (3) decades and the mother of two children, has the practical effect of denying her access to the courts of this State for the redress of her grievances, in violation of the Constitution of the State of West Virginia, Article 3, Section 17.

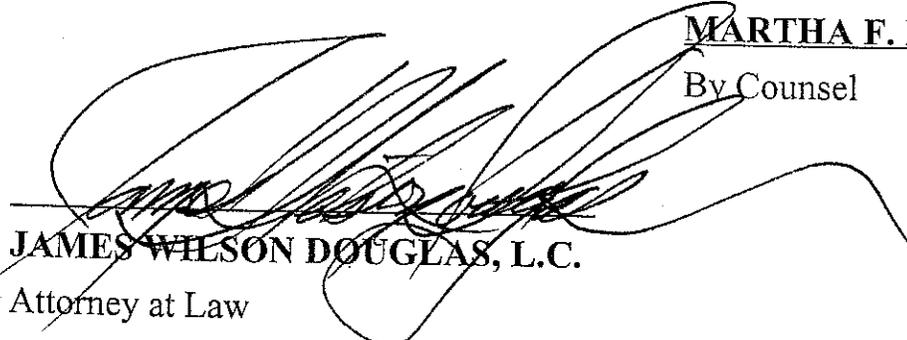
PRAYER

WHEREFORE, Petitioner prays that this Honorable Court order this Petition filed; that the same be promptly accepted, properly docketed and duly considered; that upon the facts stated, the reasons given and the authority cited, the July 13, 2005 Final Order, Etc., of the Circuit Court of Kanawha County, West

Virginia, the intermediate appellate trial court below, and the April 1, 2005 (Final) Order of the Family Court Judge in the captioned proceedings, be **reversed**, set aside and held for naught; or in the alternative, that the same be **remanded with instructions**; that the aforesaid July 13, 2005 Final Order, Etc., of the Circuit Court of Kanawha County, West Virginia and the April 1, 2005 (Final) Order of the Family Court Judge in the captioned proceedings be **stayed** pending appeal, pursuant to Rule 6 of the Rules of Appellate Procedure for the West Virginia Supreme Court of Appeals; and that Petitioner be granted such other and further relief as this Court may deem equitable, proper and just, and in the premises, meet, she will ever pray, etc.

MARTHA F. RYAN

By Counsel



JAMES WILSON DOUGLAS, L.C.

Attorney at Law

181 B Main Street

Post Office Box 425

Sutton, West Virginia 26601

W.V. State Bar # 1050

DIVPETRyanM - WVSUPC1Appeal.PET.wpd

ARNETT & FOSTER
P. L. L. C.

Accountants & Consultants
1000 Laidley Tower
Charleston, WV 25301
(304) 346-0441

Memorandum

To: File of Martha Ryan #1869
From: WHM
Date: March 16, 1998
Subject: IRS

Sue Milburn came to my office today and delivered the IRS report on Martha Ryan concerning CRA and Ryan-McGinn. Martha has 30 days to protest assessment.

Per Sue it has been treated as a whipsaw case so both sides have been combined together.

I discussed with her that the 30 days will run on a exactly April 15th, she made a comment as to bad timing. She said that she could probably extend it a week if I got in touch with her prior to the expiration date.

She said that her heart was really with Mrs. Ryan in the situation and felt that the other side had taken advantage of Martha since they had discussions about the Arnes case and the non-taxability and then turned around and sent her a 1099. She added that the 1099 is what triggered the exam of this situation.

She said that in her report analysis that she made a reference to the Arnes case and also that the Blatt case. She added that our analysis of West Virginia law was very helpful and she felt it was in favor of Martha and also that the two big stock transactions (CRA and RM) were treated differently and that Martha picked up the RM transaction as a fully taxable stock sale.

WHM/mgb

MAY-21-1999 08:21 AM KROGER#785

Exhibit B'1
304 343 6978

**BOWLES RICE
MCDAVID GRAFF & LOVE, PLLC**

ATTORNEYS AT LAW
600 QUARRIES STREET
POST OFFICE BOX 1368
CHARLESTON, WEST VIRGINIA 25325-1368
TELEPHONE 304-347-1100
www.bowlesrice.com

May 19, 1999

(304) 347-1107 • FAX: 343-3058

gmarkham@bowlesrice.com

John F. Allevalo, Esq.
Spilman, Thomas & Battle
300 Kanawha Boulevard, East
Charleston, WV 25301

HAND-DELIVERY

Dear Mr. Allevalo:

Re: Ryan v. Ryan /Property Settlement Agreement/
Amendment to Property Settlement Agreement

We are in receipt of your letter dated May 17, 1999, extending alternate settlement options to resolve this controversy.

This matter has gone on far too long. As you well know from the history of this case, prior agreements of counsel have not been honored by you, Mr. Tom Battle or your client. Based upon clear understandings by you, Mr. Ross Dionna and Mr. Battle that a settlement was agreed to in principal, Mr. Charles E. Ryan tendered to the Internal Revenue Service his check under cover letter dated December 29, 1998 in the amount of \$108,988.63 in payment of Martha F. Ryan's taxes and interest for 1994, 1995 and 1996.

Had Mr. Ryan's agreement in the prior settlement to Mr. Ryan

Mr. Ryan also tendered to you, in response to your letter dated January 11, 1999, his check no. 1005 payable to the IRS in the amount of \$6,140.01, his check no. 1006 payable to the West Virginia Department of Tax & Revenue in the amount of \$1,500.48, and his check no. 1007 payable to the California Franchise Tax Board in the amount of \$57.00, in payment of Martha F. Ryan's 1997 taxes. These payments were accepted without protest, comment or response by you on behalf of your client.

The above-referenced good faith actions were taken by Charles E. Ryan upon my assurances to him that settlement had been reached, based upon your assertions to me. Subsequently you and Mr. Battle indicated your desire to seek yet additional monies on behalf of your client, despite the existing agreements.

Your letter of May 17, 1999 escalates this matter of bad faith to one of harassment of Mr. Ryan. Your representation that Mrs. Ryan requests \$150,000 in addition to your previous demands to reimburse her for lost investment opportunities, is beyond reason. If anyone has lost investment opportunities it is Mr. Ryan, who has deposited with you and the IRS more than \$120,000 since December 1998.

Therefore, based upon:

~~Signature~~

BOWLES RICE
MCDAVID GRAFF & LOVE, PLLC

John R. Allevato, Esq.

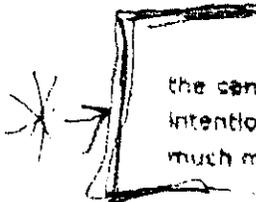
May 19, 1999

Page 7

- (1) The above described prior actions,
- (2) Mr. Ross Dionne's expression to Mr. David Rollins and me, in our meeting on April 20, 1999 on Martha Ryan's behalf, that she desired to aggravate Charles Ryan,
- (3) A settlement fraught with threats of litigation,
- (4) And to prevent yet another repudiation of an agreement with your oft-expressed explanation that Martha Ryan changes her mind daily and that today's deal may change tomorrow: *D. Dionne + ISSUES - Mar 10 forward, now all done*

we are compelled to submit the following firm and final offer.

- (1) All of the provisions set forth in that certain Amendment to Property Settlement Agreement submitted to you under my cover letter dated March 26, 1999, a copy of which is annexed to this letter, are accepted and agreed to by the parties. The parties understand and agree that there will be no further demands, claims or causes of actions brought by or against either of the parties as a result of the divorce and the surrender and redemption of Martha Ryans' common capital stock in Charles Ryan Associates, Inc.
- (2) The remaining balance on the note Charles Ryan Associates owes Martha F. Ryan shall be paid in full, exercising the 10% discount for early payment.
- (3) Charles E. Ryan shall pay legal and accounting fees incurred by Martha Ryan arising out of the surrender and redemption of her stock in Charles Ryan Associates, Inc. in the amount of \$54,147.67. No itemization of the bills will be required, although you and Mr. Dionne promised Mr. Rollins and me that you would provide itemized billing within 24 hours following our meeting of April 20, 1999.

 This settlement will allow Mrs. Ryan to be returned to the economic position that she was in at the conclusion of the divorce proceeding, which, as you stated in your letter of April 20, 1999, is her intention and desire. In fact, with payment in full of the remaining balance on the note, she will be in a much more favorable position than she was at the conclusion of the divorce. *Don't argue*

I hasten to add that neither Charles E. Ryan, nor Mr. Rollins, nor I take lightly Mr. Dionne's assertions that, even if settlement is reached, Martha Ryan may still sue Charles Ryan. In your role as counsel to Martha F. Ryan, we encourage you to have your client think seriously about the implications of such a suit. We advise you that a litigation team is in place and will take every conceivable legal measure to assert Mr. Ryan's position in this matter, including the assertion of appropriate counter and third-party claims.

**BOWLES RICE
MCDAVID GRAFF & LOVE, PLLC**

John R. Allevato, Esq.
May 19, 1999

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Please respond in writing on or before 5.00 o'clock p.m., on Friday, May 21, 1999, whether you accept or reject the offer of settlement as set forth in this letter. I remind you again that this is our final offer and we have notified Darrell Walden of the Internal Revenue Service of the same.

Should you fail to respond to this offer by the time and date set forth or should you respond in writing with a rejection of this offer, Charles Ryan's check numbers 1005, 1006 and 1007, referred to previously in this letter, should be returned to my attention by the time and date aforesaid. I will then promptly notify Darrell Walden of your rejection of a settlement and compromise of the tax assessments.

Walden Cur

Very truly yours,

BOWLES RICE MCDAVID GRAFF & LOVE, PLLC

Gary G. Markham
Gary G. Markham

GGM/HH

- cc Mr. Charles E. Ryan
- David Rollins, P.A.
- Michael Carey, Esq.
- Tom Battle, Esq.

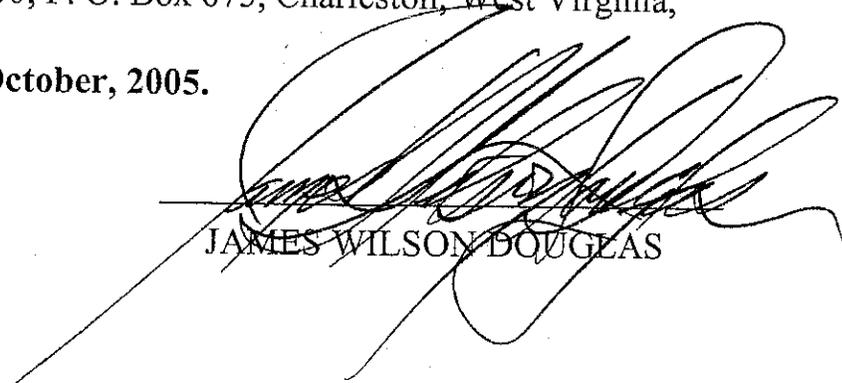
CERTIFICATE OF SERVICE

FILED

2005 OCT 31 AM 9:04

CLERK
W. VIRGINIA CO. CIRCUIT COURT

I, JAMES WILSON DOUGLAS, the undersigned attorney do hereby certify that true copies of the foregoing Petition for an Appeal from a Final Order and Designation of Record, were deposited in the regular United States mail in an envelope properly stamped and addressed to Mark A. Swartz, Swartz & Stump, L.C., 803 Quarrier Street, Suite 500, P. O. Box 673, Charleston, West Virginia, 25323-0673, on this 28th day of October, 2005.



JAMES WILSON DOUGLAS