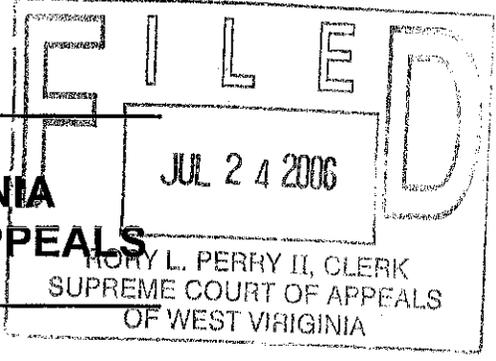


33004

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**IN THE WEST VIRGINIA
SUPREME COURT OF APPEALS**



MARTHA F. RYAN,
Plaintiff/Appellant,

v.

CHARLES E. RYAN,
Defendant/Appellee.

**On Appeal from a July 13, 2005
Order of the Circuit Court of
Kanawha County, 92-C-8910**

DOCKET NO. 33004

APPELLEE CHARLES E. RYAN'S BRIEF

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TYPE OF PROCEEDING

This is Charles E. Ryan's (hereinafter "Appellee") brief in response to Martha F. Ryan's (hereinafter "Appellant") Petition for Appeal, which was also designated by her as her appeal brief, from a Final Order of the Circuit Court of Kanawha County entered by the Honorable Louis H. Bloom on July 13, 2005, refusing her petition for appeal to the Kanawha County Circuit Court *and* affirming the Final Order of the Kanawha County Family Court.

NATURE OF THE PROCEEDING AND RULING BELOW

Appellant and Appellee were divorced by Order of the Circuit Court of Kanawha County, West Virginia, dated December 27, 1993. Subsequent thereto, the parties executed a Property Settlement Agreement (hereinafter sometimes "Agreement") on or about March 1, 1994. 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 Agreement.

Nearly a decade later, and on or about January 12, 2004, Appellant filed a Petition for Modification of the Agreement seeking to extend the period during which Appellee was required to pay alimony to Appellant. The Family Court held a hearing on said Petition.

By Order dated April 1, 2005, the Family Court held that the terms of the Property Settlement Agreement and an Amendment thereto, coupled with Petitioner's own testimony at the Final Hearing during which the Agreement was ratified by then Family Law Master Phalen, left no room for argument regarding alimony payments, to-wit: the parties had agreed they could not be modified.

The Family Court also determined that no mutual mistake of fact had been proven and therefore declined to modify the Agreement on that basis.

On May 3, 2005, Appellant filed her Petition for Appeal in the Circuit Court of Kanawha County. On July 13, 2005, Circuit Court Judge Louis H. Bloom concluded that Appellant's "appeal to this Court was *not* timely filed." (See Final Order Refusing Appeal and Affirming Family Court Final Order at 6) (Emphasis added). The Circuit Court Judge held that "[t]he final Order was filed with the circuit clerk's office on April 1, 2005. [Appellant]'s petition for appeal was not filed until May 3; thirty-two days later. The last day to file a timely appeal was May 2, 2005." *Id.*

Nevertheless, Judge Bloom went on to rule on the merits of the Petition for Appeal and held that, "[e]ven assuming that the petition for appeal was timely filed, this Court concludes that Judge Snyder was not clearly wrong and did not abuse his discretion in denying [Appellant]'s Petition for Modification." *Id.*

On October 28, 2005, Appellant filed her Petition for Appeal with this Court. However, due to Appellant failing to perfect her appeal in Circuit Court, not only did the Circuit Court lack subject matter jurisdiction, but likewise the West Virginia Supreme Court of Appeals lacks subject matter jurisdiction over this matter as well. In any event, this Court should affirm the judgment entered by the Circuit Court of Kanawha County because the orders made below are correct.

STATEMENT OF THE FACTS

Appellant filed a Petition for Modification in the Family Court of Kanawha County. It was heard at a hearing held on January 14, 2005. This Petition requested that the family court "enter an order modifying the prior orders of the Court so as to extend the

period during which the Husband . . . is required to make spousal support payments." At the hearing, when things were not going particularly well, the Petitioner asked the Court to nullify the entire Property Settlement Agreement so that the parties could essentially start over again with support and equitable distribution issues some 12 or 13 years down the road from the Bifurcated Divorce and Final Orders. Not surprisingly, the Family Court declined the invitation to start over.

In a nutshell, all of Petitioner's arguments have in substance derived from the following mantra: I thought my investments would do better than they have so I want more money from my ex-husband. The Petition for Modification sought more alimony for more years, and at the Family Court hearing Petitioner's counsel was arguing for more assets too.

Of particular importance to the Petition for Appeal is Paragraph 13 of the Agreement which provided for the payment of alimony from Appellee to Appellant as follows:

Husband shall pay unto Wife as alimony, the sum of \$6,000.00 per month, commencing on the 1st day of March 1994, and continuing thereafter on the first day of each and every month for a period of twelve (12) years, or until the Wife dies, whichever occurs earlier. ***The parties have agreed that Wife may not petition the Court for an increase in the monthly alimony payment for said twelve (12) year period.*** Likewise, the parties have agreed that Husband, for and in consideration of the Wife accepting alimony for a twelve (12) year period, shall not, in any manner, petition a Court to decrease said monthly alimony payment. Said alimony payment of \$6,000.00 per month shall automatically terminate, without judicial intervention, once said twelve (12) year period has expired or if the Wife dies, whichever occurs earlier.

The twelve (12) year period of alimony can be automatically reduced to a period of ten (10) years in the event of the following "triggering events": (a) Wife disposes of her R-M, Inc. stock in a transaction within the first ten (10) years following execution of this Agreement; and (b) Wife receives an amount of \$80,000.00 or more from the transaction. Only under the two

(2) criteria set forth as "triggering events" may Husband's alimony term be decreased from a period of twelve (12) years to a period of ten (10) years. (Emphasis added).

Of further importance to the Petition for Appeal is Paragraph 7(c) of this Agreement which provides as follows:

Husband and Wife acknowledge that they each own thirty percent (30%) of the issued and outstanding stock of R-M, Inc. The remaining forty percent (40%) of the R-M, Inc. stock is owned by Daniel C. McGinn. Husband and Wife will each retain their thirty (30%) interest in the issued and outstanding stock of R-M, Inc. ***In the event that Wife disposes of her stock in arms-length transaction to a third party within ten (10) years from the date of this Agreement and receives a cash payment therefore equal to or greater than \$80,000.00 for her thirty percent (30%) stock interest, Wife shall forego, relinquish and release any and all claims of alimony for years eleven (11) and twelve (12) which are set forth in paragraph 12 hereafter.*** By Wife agreeing to forego years eleven (11) and twelve (12) of alimony for a one time payment of at least \$80,000.00, Wife is not, in any manner, agreeing to stipulate that her thirty percent (30%) interest in R-M, Inc., is worth only \$80,000.00. Wife's stock value is not restricted by this \$80,000.00 floor. By this provision, Husband does not acknowledge that Wife's stock value is at least \$80,000.00. *The \$80,000.00 is in lieu of the present value of her alimony for years eleven (11) and twelve (12).*

The forbearance identified herein relates only to alimony and shall become effective only on the disposition of Wife's stock in R-M, Inc. Any transaction not resulting in a cash payment of at least \$80,000.00 to Wife shall not relieve Husband from the alimony payments for years eleven (11) and twelve (12). (Emphasis added).

A hearing before Family Law Master Phalen was held on the 25th day of February, 1994. The following exchange between Appellant and her then lawyer, now Justice Robin Davis, is reported in the transcript of that hearing, and is the best contemporaneous evidence of Appellant's expectations and intent regarding the subject of spousal support as provided in the Agreement.

MS. DAVIS: *And do you understand that your alimony, whether it is contained within the ten years or is extended for twelve years, cannot be judicially modified?*

MS. RYAN: Yes.

MS. DAVIS: So that you *can never*, ever after the twelve year period come back in and seek additional alimony from Mr. Ryan?

MS. RYAN: Yes.

MS. DAVIS: Do you request that the Court affirm, approve and ratify the settlement as we have placed it on record and negotiated last evening?

MS. RYAN: Yes.

Trans., pp. 6 and 7, (Emphasis added).

As stated above, the Court ratified and confirmed the Agreement in its final order of May 2, 1994.

Appellant sold her R-M, Inc. stock within the ten years, and received well over \$80,000.00 for the stock. IRS issues subsequently arose and the parties executed an Amendment to the Agreement on May 28, 1999. This amended Agreement specifically states at Paragraph 6 of page 7 that

The parties understand and agree that the "triggering events" in Section 13 of the Agreement have occurred and therefore alimony will cease after the February, 2004 payment.

Accordingly, the last alimony payment was made on or about February 1, 2004.

In addition, the Amendment also provided that:

It is the intention of the parties hereto that by the signing of this Amendment, neither the Circuit Court of Kanawha County, West Virginia, nor any other Court of competent jurisdiction shall have jurisdiction to change, amend, modify or entertain litigation or lawsuit between the parties hereto concerning the issues set forth in this Amendment.

This proviso was entirely consistent with Petitioner's 1994 testimony as to her understanding that, except for the 12 years provided for at paragraph 14, she was waiving alimony for all time.

Furthermore, the express terms of the Agreement at paragraph 13, which is laid out above, provided for a waiver of years 11 and 12 of alimony if certain events occurred. Ignoring for the moment the waiver of alimony after the 12 years of payments that were required by paragraph 13 of the Agreement, paragraph 13 expressly precludes both parties from seeking a modification, either up or down, of the payments required by paragraph 13. The year 2004 was year 11; year 12 began May of 2005. Thus, the 12 year ban on petitions to modify would also, standing alone, bar the Petitions filed in the Circuit Court and the Supreme Court.

In direct contravention of the terms of the Agreement, on or about January 12, 2004, Appellant filed a Petition for Modification of the Agreement seeking to extend the period during which Appellee was required to pay alimony to Appellant. No further written Petition was filed to enlarge or extend the scope of the relief sought.

STANDARD OF REVIEW

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. The Supreme Court of Appeals of West Virginia reviews questions of law de novo. W.Va.Code § 51-2A-15(b). *Carr v. Hancock*, 607 S.E.2d 803, 2004 W. Va. LEXIS 204.

POINTS, AUTHORITY AND DISCUSSION OF LAW

- I. THE JUDGMENT AT ISSUE BECAME FINAL AND UNASSAILABLE MANY YEARS BEFORE THE APPELLANT FILED HER PETITION.**

As stated in Appellant's brief and as stated above, the parties were divorced by a bifurcated order dated December 27, 1993. Subsequent thereto, the parties executed a property settlement agreement on or about March 1, 1994. The Circuit Court of Kanawha County entered a Bifurcated Order of Divorce on December 27, 1993 and a Final Order on May 2, 1994, approving, confirming and ratifying the parties' Property Settlement Agreement.

Nearly ten years later, on January 27, 2004, Appellant filed a Petition for Modification. The Petition for Modification initially sought to modify (a) the terms of the Final Order ratifying the Agreement concerning alimony payable to the Appellant, and ultimately was expanded by Appellant to also seek modification of (b) the equitable distribution as provided by the said 1994 Agreement.

The terms of the 1994 Agreement regarding the equitable distribution of the marital estate became final four months after the Final Order ratifying same was entered in the Circuit Court, as provided by W.Va. Code § 58-5-4, which fixes the time for appeal to the Supreme Court of Appeals. Because of the Agreement(s) of the parties that the alimony terms were contractual and non-modifiable, coupled with the testimony of the Appellant that she understood this to be the case, those alimony terms became non-modifiable and, therefore, final upon entry of the 1994 Final Order.¹

In 1994, there was no W.Va. Code provision² and/or procedural rule³ that specifically addressed motions to reconsider in the context of family court orders or

¹ For example see: *Banker v. Banker*, 196 W. Va. 535, 474 S.E.2d 465 (1996).

² See W.Va. § 51-2A-10 (2001).

³ See Rule 25, Rules of Practice and Procedure for Family Court. This Court has noted that "the grounds for relief under W. Va. Code § 51-2A-10(a) are almost identical to those contained in Rule 60(b)." *Ray v. Ray*, 216 W. Va. 11, 15, 602 S.E.2d 454, 458 (2004).

recommended orders. The procedural mechanism to obtain relief from a final order was then, in 1994, essentially as provided in Rule 60 of the West Virginia Rules of Civil Procedure. Rule 60 provides in material part as follows:

(b) *Mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud, etc.* — On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, petitions for rehearing, bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (Emphasis supplied.)

In January of 2005, the Family Court heard, considered and denied "the Petition for Modification [filed January 12, 2004] and subsequent prayer, made orally during the proceedings, to void the entire Agreement and [Final] Order."⁴ The Petition and subsequent prayer came roughly ten years after the Final Order at issue was entered. Pursuant to Rule 60, any motion made thereunder must be made within a reasonable time of entry of the order from which relief is sought and for the reasons described at (b)(1)—mistake, (2)—newly discovered evidence, or (3)—misrepresentation, within one

⁴ Paragraph 33, page 10 of Family Court Order.

year of entry. It is obvious that any motion seeking relief from a Final Order entered on May 2, 1994 was required to be filed by May 2, 1995. Thus, Appellant's claims of entitlement to relief under Rule 60 based on mistake, mutual or otherwise, misunderstandings, misrepresentations and unfulfilled expectations were barred roughly eight and a half years before she filed her motion.

In *Great Coastal Express, Inc. v. Int'l Brotherhood of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982) the Fourth Circuit observed that:

Respect for the finality of judgments is deeply engrained in our legal system. As Justice Story observed, "it is for the public interest and policy to make an end to litigation . . ." so that "suits may not be immortal, while men are mortal." *Ocean Ins. Co. v. Fields*, 18 F.Cas. 532, 539, F. Cas. No. 10406 (No. 10,406) (C.C.D.Mass.1841) (Story, J. sitting as Circuit Judge). See also *Southern Pacific RR Co. v. United States*, 168 U.S. 1, 49, 18 S. Ct. 18, 27, 42 L. Ed. 355 (1897).

Federal Rule of Civil Procedure 60 . . . allows a court to relieve a party from final judgment on the grounds of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." **A motion under 60(b)(3), however, must be made within one year after the judgment was entered. Thus, the Rule suggests that equitable considerations prevail in such cases for one year, and that the interest in finality of judgments prevails thereafter.**

(Emphasis added).

Other Courts also embrace this principle. *J & J Timber Co. v. Broome*, 2006 Miss. LEXIS 225 ("[p]ublic policy favors finality"); *Wells v. Wells*, 2005 SD 67, 698 N.W.2d 504, 508 (2005) ("[p]ublic policy is best served when litigation has a finality").

In *In re Marriage of Weber*, 2004 MT 211, 322 Mont. 341 (2004), the Montana Supreme Court held

There must be some point at which litigation ends and the respective rights between the parties are forever established. Thus, because of the public policy underlying the finality of judgments, courts look with a jealous

eye upon suits which have for their object setting aside a judgment at law. Rule 60 constitutes an exception to the doctrine of finality of judgments.

As a matter of sound public policy, Appellant should not be able to come through the back door by way of an appeal and alter a judgment that has been in place for a decade. It is well settled that "the interest in finality of judgments is a weighty one that may not be casually disregarded." *State ex rel. Richey v. Hill*, 216 W. Va. 155, 163, 603 S.E.2d 177, 185 (2004) quoting *United States v. Rankin*, 1 F.Supp. 2d 445, 453 (E.D.Pa. 1998).

In an apparent effort to dodge the consequences of the application of the one year limit imposed by Rule 60, Appellant argues "a change of circumstances." ***A change of circumstances is not, however, a basis for relief under Rule 60.***⁵ Accordingly, this matter is not addressed herein.

Rule 60(b) does provide as a last resort the possibility that a court may "entertain an independent action to relieve a party from a judgment." This option requires an independent action in equity—not here commenced.

Strictly speaking, such an action is not limited to cases involving true fraud upon the court, but may be maintained to redress other especially egregious wrongdoing. See 12 MOORES FEDERAL PRACTICE § 60.81[1][b][v]. But the prerequisites to relief by way of an independent equitable action are strict, and this Appellant does not meet them.

⁵ If the Appellant had not by her Agreement agreed that Appellee's alimony obligation was non-modifiable, she could have petitioned the family court to modify the alimony order(s) upon the ground of a substantial change of circumstances not reasonably within the contemplation of the parties and the family court at the time the final order was made. Of course, having contracted to make the Agreement permanent and non-modifiable, she gave up this right in 1994. All of this ignores the argument that stock market advances and declines are acknowledged by one and all, except Appellant and her counsel, to be well known and foreseeable as such.

In the first place, the independent action contemplated by Rule 60 (b) is available "only to prevent a grave miscarriage of justice." *United States v. Beggerly*, 524 U.S. 38, 47, 141 L. Ed. 2d 32, 118 S. Ct. 1862 (1998). The party seeking relief must show that it would be "manifestly unconscionable" to allow the judgment to stand. *Pickford v. Talbott*, 225 U.S. 651, 657, 56 L. Ed. 1240, 32 S. Ct. 687 (1911). As *Beggerly* indicates, the one-year time limit in Rule 60(b) on motions to set aside wrongly procured or allegedly mistaken judgments strikes a balance that is not to be disregarded lightly. For that reason, courts typically require flagrant misconduct to support an independent action in equity—more than an alleged mutual mistake or misunderstanding. Courts require flagrant misconduct, i.e., more than "perjury at trial or in discovery proceedings or presentation of false documents in evidence." 12 MOORE'S FEDERAL PRACTICE § 60.81[1][b][ii]; see, e.g., *Geo. P. Reintjes Co., Inc. v. Riley Stoker Corp.*, 71 F.3d 44, 48-49 (1st Cir. 1995).

II. LACK OF SUBJECT MATTER JURISDICTION.

As argued in Appellee's Response to the Petition for Appeal and in his Motion to Dismiss and Supporting Memorandum of Law, the West Virginia Supreme Court of Appeals lacks subject matter jurisdiction over this case because Appellant did not timely file her petition for appeal with the Clerk of the Circuit Court of Kanawha County. Consequently, both the Circuit Court and the West Virginia Supreme Court of Appeals lack subject matter jurisdiction to entertain either a petition for appeal or an appeal. Having failed to timely file her petition for appeal to the Kanawha County Circuit Court (most certainly a condition precedent to this undertaking in this Court), Appellant is not at liberty to petition for an appeal in the West Virginia Supreme Court of Appeals.

The matter of lack of subject matter jurisdiction has heretofore been briefed in detail. See Appellee's Response to Petition for Appeal and Motion to Dismiss Appeal.

III. ISSUES RAISED BY APPELLANT IN HER PETITION FOR APPEAL—WHICH NOW SERVES AS HER APPEAL BRIEF.

A. Assignments of error 1 and 2.

Petitioner's first two assignments of error are related. They are:

- 1. A motion to dismiss admits the allegations of the petition; and**
- 2. Courts may not disregard uncontroverted evidence [a reference to the allegations of the petition].**

The problem with both of these arguments is that the Family Court actually held a hearing on January 14, 2005, when the parties offered their proffers and arguments. Facts were presented by both sides at this hearing. Two weeks after the hearing, counsel for the Petitioner submitted further items to the Court for its consideration. These items are cataloged at paragraph 15 of the Family Court Order.

At the hearing, Mr. Ryan denied he had made any mistake—to counter the claim that some kind of mutual mistake had been made. A portion of the transcript made of the February 25, 1994 hearing was also offered and discussed. The focus was on the former Mrs. Ryan's testimony that she understood that she could "never, ever" come back in and seek additional alimony. Relevant terms of the March 1, 1994 Property Settlement Agreement were specifically considered as were further relevant terms of an Amendment signed on or about May 28, 1999.

The highest hurdle though, even if we assume the Petitioner has got the Rules applicable to a consideration of a motion to dismiss mostly right, is the fact that the Family Court did not grant the Respondent's Motion to Dismiss. The Family Court

heard, considered and denied "the Petition for Modification and subsequent prayer to void the entire Agreement and [Final] Order."⁶

B. Assignments of error 1 through 5 generally.

Mr. Harley E. Stollings'⁷ Petition for Appeal to the Circuit Court stated four grounds for appeal. Mr. Douglas' Petition at issue here lists five. When these two petitions are even casually compared, it is immediately obvious that they are not congruent. Assignments 1, 2, 4, and 5 are entirely new creations of facile counsel. The only assignment of error on this Petition which remotely resembles anything which was addressed in the abortive appeal to the Kanawha County Circuit Court is issue 3. The mutual mistake issue is now framed as a legal question: can mutual mistake be a basis to void a contract? No one was really arguing about this point of law below; the argument was rather whether as a matter of fact anyone had made a mistake of legal consequence. The grounds as framed by Mr. Stollings asserted that the Family Court had got the facts wrong when it determined as a matter of fact that "wife had not proven a mutual mistake of fact."⁸ New counsel, Mr. Douglas, understandably, would prefer to talk about the law—not the uncooperative facts.

It is well known that in order "[t]o preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." *W.Va. Univ./Ruby Mem. Hosp. v. W.Va. Human Rights Comm'n ex rel. Prince*, 617 S.E.2d 524, 2005 W. Va. LEXIS 35 quoting Syllabus Point 2, *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 470 S.E.2d 162 (1996). Because Appellant

⁶ Paragraph 33, page 10 of Family Court Order.

⁷ Mr. Stollings was Petitioner's counsel of record until Mr. Douglas appeared and filed this Petition for Appeal to the Supreme Court.

⁸ See page 2, Ground 3 of Mr. Stollings' tardy Petition to the Circuit Court.

failed to raise these issues in the Circuit Court, she failed to preserve them for appellate review.

In West Virginia the rule

is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace. The forfeiture rule that we apply today fosters worthwhile systemic ends and courts will be the losers if we permit the rule to be easily evaded. It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely.

State v. Miller, 197 W.Va. 588, 597, 476 S.E.2d 535, 544 (1996) quoting *Caperton*, 196 W.Va. at 216.

Not only did Appellant fail to speak clearly, but she failed to "speak" at all regarding the issues now raised in this Appeal.

C. Assignment of error 3.

As noted above, the actual debate in the Family Court and on Petition to Appeal to the Circuit Court was not whether if you could persuade the court that a mutual mistake had been made it would make a difference, but rather whether a mistake of legal consequence had been made and, if so, whether it was mutual. The mutual mistake issue is reconstituted on this Appeal as a question of law to deflect attention from the adverse factual findings below.

To refocus on the debate as framed by the Petition for Modification and the Petitioner at the hearing in the Family Court on her Motion, it was Petitioner's contention that she had assumed that the money and property she received under the Agreement would, if invested, support her in style forever. She claimed that because of the actual performance of her investments this had not turned out to be the case. Mr. Ryan denied that this was discussed with him. He further denied that he shared any such

illusions regarding the predictability of stock market performance. Mr. Ryan's counsel argued that a mutual mistake, to be of legal consequence, must pertain to a then existing fact or circumstance—not to an opinion about future events.

The Circuit Court properly held that “Judge Snyder was not clearly wrong and did not abuse his discretion in denying [Appellant]’s Petition for Modification, wherein she averred that a mutual mistake of fact existed at the time of the Agreement.” (See Final Order Refusing Appeal and Affirming Family Court Final Order at 6).

The Family Court Judge correctly determined and the Circuit Court properly held that there was *no evidence of a mistake of fact*, relying upon the language in *McGinnis v. Cayton*, 173 W. Va. 102, 312 S.E.2d 765 (1984), wherein the West Virginia Supreme Court of Appeals states that, “[m]istakes that make contracts voidable or reformable must be about existing facts (past or present) when the contract was made and not be simply poor predictions of future events.” *Id.* at 105. Further, the Supreme Court noted that, “[n]either is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover.” *Id.* at 111.

The Circuit Court also correctly determined that Appellant had failed to prove by a preponderance of the evidence that there was a *mutual* mistake of fact, i.e., one shared by both parties in the formation of the contract.

Appellant incorrectly contends that *Stanley v. Stanley*, 201 W. Va. 174, 495 S.E.2d 273 (1997) is of relevance. In *Stanley*, during the pendency of a divorce, a certified public accountant was appointed to value the husband's pension plan. Based upon the valuation, the parties entered into a settlement agreement, wherein the wife

was to receive a certain amount. The trial court incorporated the agreement. Prior to the trial court's ruling, the husband discovered that the valuation of the pension plan was inaccurate. Thereafter, the husband moved the trial court to amend his previously filed petition. His motion was denied and a final decree adopting the pension plan value was entered. Subsequently, the husband filed a motion seeking to set aside the final decree due to the valuation mistake. On appeal, the Supreme Court of Appeals ruled that the trial court erred by denying the motion.

The Ryan case is clearly distinguishable from *Stanley*. First, in *Stanley*, there was a factual mistake of legal consequence, i.e., the inaccurate valuation of a pension plan as of the time of the agreement. Here, there is no argument that the values assigned to the assets in the marital estate at the time this Agreement was made were in error—rather, the argument is that the assets received by the Petitioner have not produced the income and or growth that she wrongly assumed would inevitably occur. In the current case, the Circuit Court could not have stated it any better when it held

the only 'mistake' that this Court can find in this case is the possible 'mistake' of believing that the market would perform in a certain way. This 'mistake' was not about a past or then-present fact; it was a mistake about future events based on investment[s] in the market, which is hardly predictable and certainly never certain.

(See Final Order Refusing Appeal and Affirming Family Court Final Order at 6).

Webb v. Webb, 171 W. Va. 614, 301 S.E.2d 570 (1983) is indeed highly pertinent to the case at hand. In *Webb*, the Supreme Court noted that "[a] mistake of fact consists of an unconscious ignorance or forgetfulness of a material fact, *past or present*, or of a mistaken belief in the *past or present* existence of a material fact which did not or does not actually exist." (Emphasis added). It is clear that, assuming there was a

mistake of fact, it must be in the past or in the present and not an assumption about future events.

The Circuit Court correctly determined that

it seems impossible to say that the parties['] assumptions about the value of the equitable distribution w[ere] not tied to an expectation or belief about future returns on investments of the money. However, the parties certainly knew of the amounts and the possibility of what returns may be possible from the investment of those amounts. What occurred was one of those possibilities; the market did not perform as well as had been hoped. The Court notes that the risk was known at the time of the agreement and such risk was allocated to [Appellant].

(See Final Order Refusing Appeal and Affirming Family Court Final Order at 7).

Furthermore, the law set forth in *McGinnis* is directly on point wherein it was noted that a rise or a collapse in the stock market itself is *not* a justification that renders a contract voidable or reformable. 173 W.Va. at 111. Further, similar to *Webb*, *McGinnis* plainly states that mistakes which render a contract voidable *must* concern existing past or present facts when the contract was made and not merely poor predictions of future events. *Id.* at 105.

D. Assignment of error 4.

As noted above, this is a new complaint not raised or addressed below by anyone: to-wit: that the Petitioner was not "rehabilitated." Neither the Property Settlement Agreement nor the Final Order use the word rehabilitative to classify the alimony payments required by the Agreement. Significantly, we heard nothing at all in the Petition for Modification or at the hearing on said Petition. In the Supplement to the Record that the former Mrs. Ryan filed, she stated in her affidavit that:

I did not pursue further education or employment after the divorce because I believed the investments would support me after the alimony payments ended until it was too late. I am now 59 years of age.

This does not sound much like a rehabilitation plan; it sounds just like a retirement plan implemented in 1994.

W.Va. Code § 48-6-201, provides in pertinent part:

(b) Any award of period payments of spousal support shall be deemed to be judicially decreed and subject to subsequent modification **unless there is some explicit, well expressed, clear, plain and unambiguous provision to the contrary set forth in the court-approved separation agreement or the order granting the divorce.** (Emphasis added).

The above Code provision simply codified the common law on whether or not payments of spousal support are subject to modification. Agreements to bar subsequent modification of alimony awards have been enforceable as either part of a judicially approved separation agreement or an order granting divorce. In either situation, the language of the agreement must be clear and unambiguous. *Banker v. Banker*, 196 W. Va. 535, 474 S.E.2d 465 (1996).

The Circuit Court properly found that "Judge Snyder was not clearly wrong and did not abuse his discretion in denying [Appellant]'s Petition for Modification." (See Final Order Refusing Appeal and Affirming Family Court Final Order at 6). Further, the Circuit Court correctly determined that

Judge Snyder found that the transcript of proceedings before the Family Law Master in February of 1994 includes [Appellant]'s affirmation that **she understood that alimony could not be judicially modified and that she could not, ever, seek additional alimony. At that time, [Appellant] indicated that she desired that the Court adopt the settlement agreement.** *Id.* at 2 (Emphasis Added).

E. Assignment of error 5.

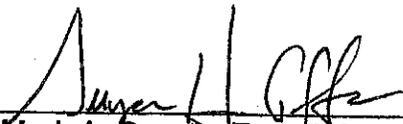
Mr. Stollings, who was counsel of record before, during and after the hearing on Mrs. Ryan's Petition for Modification, never complained to the Family Court or the

Circuit Court that he was denied an opportunity to offer every bit of evidence he wished the Family Court to consider by proffer, by testimony and/or by supplementing the record post hearing.

We have yet another issue invented exclusively for this Appeal. As discussed above, this is not how the process works. If you have a complaint about the way a hearing is conducted, you cannot participate without complaint and sucker punch the trial court later. You need to complain during the hearing. If you want to ultimately raise an issue on petition to the Supreme Court of Appeals, you need raise it first in the trial court and then in the Circuit Court. Otherwise, you are foreclosed from first raising such issues on appeal.

WHEREFORE, Appellee prays that this Honorable Court will affirm the Final Order of the Circuit Court of Kanawha County in its entirety.

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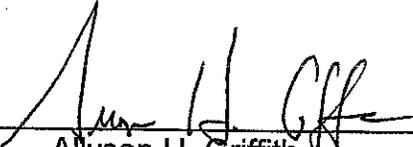
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Appellee's Brief** was served upon the following via regular mail, postage prepaid, to:

James Wilson Douglas, Esq.

181B Main Street
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the 21st day of July 2006.



Allyson H. Griffith