

IN THE SUPREME COURT OF APPEALS, STATE OF WEST VIRGINIA
FREDERICK CECIL DAMRON,

Defendant below/Appellant,

v.

APPEAL NO. 33185

CAROLE E. DAMRON SHORTT,

Plaintiff below/Appellee.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY

BRIEF OF APPELLANT

**To the Honorable Justices of the
Supreme Court of Appeals
of West Virginia**

December 22, 2006

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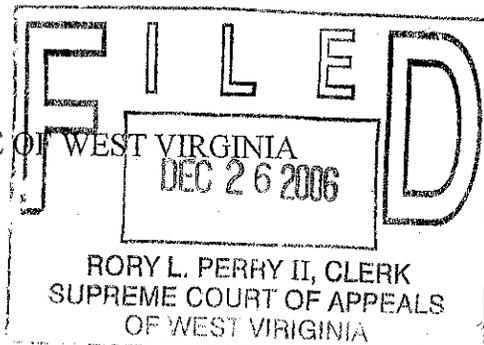


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III. Whether the Circuit Court abused its discretion or was otherwise clearly erroneous when it affirmed the Family Court's Order that it [Family Court] has jurisdiction to enforce a contract independent of a Final Divorce Order.

IV. Whether the Circuit Court abused its discretion or was otherwise clearly erroneous in requiring the Appellant to pay college expenses against clear evidence that Appellant is financially unable to do so.

V. Whether the Circuit Court abused its discretion or was otherwise clearly erroneous when it affirmed the award of Appellee's attorneys fees, expenses and costs in the matter while ruling that the Appellant was not in contempt and the Appellant ultimately prevailed on his Motion to Vacate and the relative financial abilities of the parties was not considered.

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Petitioner Below, Appellant

v.

APPEAL NO. 33185

CAROLE E. DAMRON SHORTT,

Respondent Below, Appellee

BRIEF OF APPELLANT

KIND OF PROCEEDING

Comes now the Appellant, Frederick Cecil Damron [hereinafter referred to as "Appellant" or "Mr. Damron"], by counsel, Charles R. Webb of The Webb Law Firm, PLLC, and pursuant to Rule 10 of the *West Virginia Rules of Appellate Procedure* and by Order of this Honorable Court of November 30, 2006 hereby files his *Appellant's Brief* challenging the *Final Order* entered on December 14, 2005, by the Honorable Tod Kaufman, affirming the *Order* of the Family Court entered on the 24th day of October, 2005.

ASSIGNMENTS OF ERROR

- I. **Whether the Circuit Court abused its discretion or was otherwise clearly erroneous when it affirmed the Family Court Order requiring the Appellant to pay the college expenses of the parties' son in direct contravention of an unambiguous statute.**
- II. **Whether the Circuit Court abused its discretion or was otherwise clearly erroneous when it affirmed the Family Court's decision finding an enforceable contract independent from the divorce decree.**
- III. **Whether the Circuit Court abused its discretion or was otherwise clearly erroneous when it affirmed the Family Court's Order that it [Family Court] has jurisdiction to enforce a contract independent of a Final Divorce Order.**

- IV. Whether the Circuit Court abused its discretion or was otherwise clearly erroneous in requiring the Appellant to pay college expenses against clear evidence that Appellant is financially unable to do so.
- V. Whether the Circuit Court abused its discretion or was otherwise clearly erroneous when it affirmed the award of Appellee's attorneys fees, expenses and costs in the matter while ruling that the Appellant was not in contempt and the Appellant ultimately prevailed on his Motion to Vacate and the relative financial abilities of the parties was not considered.

STATEMENT OF THE FACTS

The parties separated in 1987. The Appellee filed for divorce. She was represented by counsel William B. Murray. The Appellant was *pro se*. The parties entered into a *Property Settlement Agreement* on May 14, 1987. The final hearing was conducted on the 13th day of July, 1987. Subsequent thereto, on the 3rd day of August, 1987, the parties were divorced by *Final Decree* which incorporated the *Property Settlement Agreement*. The *Final Divorce Decree* incorporated the provision regarding the support of the subject children for "post high school education" found in the *Property Settlement Agreement*.

Paragraph thirteen of the *Property Settlement Agreement* read as follows:

Husband agrees to underwrite the expense of providing the minor child/children of the parties with a post high-school education and to pay all tuition, fees, books, costs and expenses relative to said child/children attending an accredited college, university, vocational or trade school of said child/said children's choice, provided said child/children are full time students; provided they maintain at least a 2.0 grade point average after their freshman year; provided that the cost of said education does not exceed the cost of said children attending West Virginia University.

That on the date of the entry of the *Divorce Order*, the two subject children were ages four and one.

Apparently, six years later, the West Virginia Legislature, pursuant to Acts of the Legislature, 1993, Chapter 39, revised the law relating to the requirement of payment of child support for college education during the regular session in 1993. The statute was amended in 1994 by Acts 1994, Chapter 43. That amended statute, the formerly enacted as §48-2-15d [and now *West Virginia Code* §48-11-103(c)], states in pertinent part as follows:

(c) The reenactment of this section during the regular session of the Legislature in the year one thousand nine hundred ninety four shall not, by operation of law, have any effect upon or vacate any order or portion thereof entered under the prior enactment of this section which awarded educational and related expenses for an adult child accepted or enrolled and making satisfactory progress in an educational program at a certified or accredited college. **(Any such order or portion thereof shall continue in full force and effect until the court, upon motion of a party, modifies or vacates the order upon a finding that):** [emphasis added]

(1) The facts and circumstances which supported the entry of the original order have changed, in which case the order may be modified;

(2) The facts and circumstances which supported the entry of the original order no longer exist because the child has not been accepted or is not enrolled in and making satisfactory progress in an educational program at a certified or accredited college, or the parent ordered to pay such educational and related expenses is no longer able to make such payments, in which case the order shall be vacated;

(3) **The child, at the time the order was entered, was under the age of sixteen years, in which case the order shall be vacated;** [emphasis added]

According to the Appellee, the youngest of the parties' children, Alexander T. Damron, entered Clemson University, a private university located in South Carolina in the fall of 2004. The parties oldest child is not at issue in this matter.

On or about the 30th day of August, 2004, the Appellee [hereinafter referred to as "Appellee" or "Ms. Shortt"] filed a *pro se Petition for Contempt* in the Family Court of Kanawha County seeking to find the Appellant in contempt of the *Final Divorce Order* as it related to college expenses and requested a judgment in the amount of Thirteen Thousand One Hundred Eighty Six Dollars (\$13,186.00). (It should be noted that

Appellee intentionally mailed the *Petition* by certified mail to an address that she knew was not the address of the Appellant and where the Appellant has never lived.) A hearing was set in the matter and a *Rule to Show Cause* was issued on the 24th day of August, 2004, to the wrong address referenced by the Appellee, which included a notice of hearing for the 4th day of October, 2004, on the *Petition and Rule to Show Cause*.

The show cause hearing was conducted on the 4th day of October, 2004, without the participation of the Appellant, who failed to appear as he was not given notice. The Family Court was unaware that the Appellee had forwarded the *Petition for Rule in Contempt* to the Appellant at an address which the Appellant did not live. Having failed to advise the Court of her actions, the Court deemed the service of process proper and entered an *Order* requiring that the Appellant be arrested, set a cash bond of Six Thousand Dollars (\$6,000.00) and required the Appellant to submit a plan for payment of the college expenses.

On November 19, 2004, the Appellant filed a *Motion to Vacate* the original *Divorce Order* based upon the nondiscretionary language of *West Virginia Code* §48-11-103(c) [formerly *West Virginia Code* §48-2-15(d)].

On the 6th day of December, 2004, the Appellee, now represented by counsel, filed her *Response in Opposition to Motion to Vacate*.

On or about the 11th day of February, 2005, the Appellee filed a *Petition for Judgment and Contempt*.

On the 14th day of February, 2005, the Family Court entered a *Rule to Show Cause* ordering that a hearing be conducted on the earlier *Petition for Judgment and Contempt* on the 12th day of April, 2005.

On February 22, 2005, the Appellant filed his *Response to Petition for Judgment and Contempt* essentially alleging that he could not be held in contempt of an *Order* that must, by operation of law, be vacated upon application.

On April 12, 2005, the matter came on for hearing on the Appellee's *Petition for Judgment and Contempt* and the Appellant's *Motion to Vacate*. On October 24, 2005, the Family Court entered its *Order* which, *inter alia*, made pertinent findings of fact and conclusions of law from which this Appeal was ultimately taken.

In its *Order*, the Family Court recited the language of the *Property Settlement Agreement* relating to the payment of post high-school education. The Court noted that at the time the parties executed the separation agreement, that the Appellant appeared *pro se* while the Appellee was represented by counsel McKittrick, Murray and Paar [sic]. The Court acknowledged that on the date the parties executed the *Property Settlement Agreement*, that West Virginia statutes regarding child support imposed a child support obligation for educational and related expenses of a child over the age of eighteen and attending college. The Court further noted that it was not disputed that effective 1994, seven years after the parties divorced, the legislature amended West Virginia law to eliminate the statutory award for college expenses. Moreover, the Family Court acknowledged that the legislature provided that any previous order awarded such expenses

shall continue in full force and effect until the Court, upon motion of a party, modifies or vacates the order upon the finding that (3) the child, at the time the order was entered, was under the age of sixteen years, in which case the order **shall be vacated** [*West Virginia Code* §48-11-103(c) (formerly §48-2-15(d))] [emphasis added]

That at the time the *Order* was entered in this case Alexander was one year old. Stuart is not an issue in this matter. The Family Court found that during the instant

proceedings, Alexander was then attending Clemson University and had completed his freshman year. The Court noted that the Appellee sought reimbursement of Thirteen Thousand One Hundred Eighty Six Dollars (\$13,186.00) in expenses for Alexander's freshman year and a prospective award of One Thousand Dollars (\$1,000.00) per month for future college expenses.

In its conclusions of law, the Family Court concluded "by its plain terms, *West Virginia Code* §48-11-103(c)(2) provides that any order imposing an obligation to pay educational expenses shall be, upon motion, vacated if the children were under the age of sixteen at the time the order was entered."

The Court further found that the subject child at issue was under the age of sixteen at the time the *Final Order* was entered and, therefore, "the Court has no choice but to vacate the provisions of the *Order* requiring Mr. Damron to pay college expenses." However, the Court noted that the Appellee's second argument was that, regardless of the existence of *West Virginia Code* §48-11-103(c)(2), that the Appellant should be held to his contractual obligation to pay college expenses as evidenced by the parties' separation agreement. In support of her argument, the Court suggested that the Appellee "correctly notes that *West Virginia Code* §48-11-103(c) repeatedly references the modification or vacation of an order and there is no mention whatsoever of the separation agreement. While the *Order* must, indeed, be vacated, she argues that the separation agreement survives as an independent contractual obligation to which Mr. Damron remains bound." The Family Court accepted the argument of bifurcating the *Separation Agreement* from the *Order* and noted that the statute does not address *Separation Agreements*. The Family Court found that in a separation agreement a party may contractually agree to undertake an obligation that the law would not otherwise impose upon him and be bound

by the agreement. The Family Court found that there was no evidence that Mr. Damron's agreement to pay college expenses was procured through fraud, duress, or other unconscionable conduct.

The Family Court concluded as a matter of law that *West Virginia Code* §48-11-103(c) does not require that a separation agreement providing for the payment of college expenses be vacated and, therefore, the separation agreement may be enforced against Mr. Damron. The Family Court found that the Appellant breached his agreement to pay college expenses and that Appellee was entitled to a remedy.

In its *Order*, the Family Court ordered a judgment against the Appellant in favor of the Appellee in the amount of Seven Thousand Eight Hundred Twenty Two Dollars (\$7,822.00) for the school year 2004-2005 plus interest at a rate of ten percent per annum from the date of the entry thereof. The Family Court further ordered that for the school year 2005-2006 and all subsequent years which the adult child was enrolled as an undergraduate and meeting the terms of the *Separation Agreement* [attaining a 2.0GPA] that the Appellant shall pay a minimum of Three Hundred Dollars (\$300.00) per month to Ms. Shortt and she would be entitled to a judgment in the amount of the difference between Seven Thousand Eight Hundred Twenty Two Dollars (\$7,822.00) and the amount paid. [This is the difference between in-state tuition and room and board versus the cost of Clemson]. The Family Court ordered the Appellant to file, within thirty days of the entry of the *Order*, and serve a verified financial disclosure which lists and itemizes all of his assets. The Family Court further afforded the Appellee the opportunity to submit an itemized petition for fees and costs to the Court within thirty days of the entry of the *Order*. The Family Court granted the *Motion to Vacate* the *Order* requiring the Appellant to pay college expenses. The Family Court found that the Appellant was

not in contumacious contempt of the earlier *Order* and the *Petition for Contempt* was denied.

Thereafter, on November 18, 2005, the Appellant herein filed a *Petition for Appeal* to the Circuit Court of Kanawha County.

On November 22, 2005, the Court entered an *Order* setting a hearing on the *Petition for Appeal* filed by the Appellant for December 13, [sic], 2005. The hearing was never held before the Circuit Court.

On December 12, 2005, the Appellee herein filed a *Response to the Petition for Appeal*.

On December 14, 2005, the Circuit Court entered the *Final Order* affirming the Family Court *Order* from which the Appellant seeks this *Petition for Appeal*.

STANDARD OF REVIEW

In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, the court reviews 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 court reviews questions of law *de novo*. *Ryan v. Ryan*, December 1, 2006, (WVSC Appeal No. 33004).

ARGUMENT

- I. The Circuit Court abused its discretion or was otherwise clearly erroneous when it affirmed the Family Court Order requiring the Appellant to pay the college expenses of the parties' son in direct contravention of an unambiguous statute.**

This is a case of first impression in this Court. Since the enactment of *West Virginia Code* §48-2-15(d) [now §48-11-103(c)(2)] there have been no decisions by this Court relating to an interpretation and effect of said statute.

In construing a statute, this Court commences with the rule that Courts are not at liberty to construe any statute so as to deny effect to any part of its language. "Indeed, it is a cardinal rule of statutory construction that significance and effect shall, if possible, be afforded to every word." See *Kokoszka v. Belford*, 417 U.S. 642, 650 94 S. Ct. 2431, 2436, 41 L.Ed.2d 374, 381 (1974).

When interpreting a statute, the Court will not look merely to a particular clause in general words which may be used, but will take in connection with the whole statute... and the objects and policy of the law, as indicated by its various provisions, and give to it such construction as will carry into execution the will of the legislature.

Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all parts harmonized, if possible, and to give meaning to each. Syl. Pt. 1, *Mills v. Van Kirk*, 192 W.Va. 695, 453 S.E.2d 678 (1994); *Pristavec v. Westfield Ins. Co.*, 184 W.Va. 331, 400 S.E.2d 579 (1990). That is to say, every word used is presumed to have meaning and purpose, for the legislature is thought by courts to not have used language idly.

The provisions of *West Virginia Code* §48-11-103(c) [formerly §48-2-15(d)] are clear and unambiguous: any [divorce order] or portion thereof shall continue in full force and effect until the Court, upon motion of a party, modifies or vacates the order upon the finding that ... (3) the child, at the time the order was entered, was under the age of sixteen years, in which case the order shall be vacated."

When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the Court, and in such case it is the duty of the Courts not to construe but to apply the statute. *Wachter v. Wachter*, 216 W.Va. 489, 607 S.E.2d 818; Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*,

144 W.Va. 137, 107 S.E.2d 353 (1959); Syl. Pt. 4, *Perito v. County of Brooke*, 215 W.Va. 178, 597 S.E.2d 311 (2004.)

The legislature, when it enacts legislation, is presumed to know its prior enactments. Syl. Pt. 4, *In Re: Grandparent Visitation of Kathy L. (R.) M. v. Mark Brent R. and Carla Anne R.*, 217 W.Va. 319 617 S.E.2d 866 (2005), Syl. Pt. 12, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953), Syl. Pt. 5, *Pullano v. City of Bluefield*, 176 W.Va. 198, 342 S.E.2d 164 (1986).

As a general rule of statutory construction, if several statutory provisions cannot be harmonized, controlling effect must be given to the last enactment of the legislature. Syl. Pt. 2, *State ex rel Department of Health and Human Resources v. West Virginia Public Employees Retirement System*, 183, W.Va. 39, 393 S.E.2d 677 (1990).

The Family Court Judge was correct in granting the *Motion to Vacate* the Order requiring the Appellant to pay college expenses. However, what the Family Court Judge was unable to grant through the “front door” the Family Court attained through the “back door”. The Family Court Judge bifurcated the *Separation Agreement* from the divorce order in an effort to grant the Appellee her contractual remedies and then proceeded to compel compliance with a contract which the Family Court does not have jurisdiction to do.

This bifurcation of the *Separation Agreement* from the *Divorce Order* by the Family Court Judge is not well-founded in the law. In all domestic relations cases where the final order is entered there shall be no specific legal affect in the divorce decree attached to the words “merged”, “ratified”, “confirmed”, “approved”, “incorporated”, etc, and where the parties and the Court wish to do something other than award judicially decreed periodic payments for alimony or alimony and child support enforceable by

contempt and subject to modification by the Court, the parties must expressly set forth the different terms to which they agree and the Court must expressly indicate his [sic] approval for their agreement. Syl. Pt. 5, *In Re Estate of Frank Morton Hereford*, 162 W.Va. 477, 250 S.E.2d 45 (1978).

II. The Circuit Court abused its discretion or was otherwise clearly erroneous when it affirmed the Family Court's decision finding an enforceable contract independent from the divorce decree.

The Appellee argued, the Family Court granted, and the Circuit Court affirmed the existence of a contract independent of the Divorce Decree relating to college expenses. Relying on no case law from West Virginia but instead case law from other jurisdictions such as Virginia, Wisconsin, and Arkansas, the Appellee convinced the Family Court that even though the statute denied the relief requested by the Appellee, that the contract between the parties stood as an independent contract enforceable in that Court. Regardless, this Honorable Court has been consistent since 1869 in its declaration that contracts or agreements which have for their effect anything which is repugnant to justice, or against the general policy of common law, or contrary to the provisions of any statute, are void. *Capehart v. Rankin*, 3 W.Va. 571 (1869).

In 1886, in the case of *Exchange Bank of Virginia v. County of Lewis*, 28 W.Va. 273, this Court stated that,

Every act done against a prohibitory statute is not only illegal but absolutely void, and the courts can not assist an illegal transaction in any respect or permit to be set up as a protection. All contracts contrary to the provisions of a statute prohibiting the same are void; and it is a general rule, that the courts will not aid either party in enforcing illegal executory contract, nor, if executed, will they aid either party in setting it aside or in recovering back what has passed under it.

See also Poling v. Board, 56 W.Va. 251, 49 S.E. 148 (1904) "Neither a court of equity nor law will enforce a contract in violation of laws "enacted for the public good."

See further, *Shonk Land Co. v. Joachim*, 96 W.Va. 708, 123 S.E. 444 (1924) “The litigation now before us is based upon the claim that the contract now in existence is void under the statute, and its fruition should be prohibited as one made contrary to the Constitution, the statute, and public policy. The court, if it found the contracts void, as it should have done, could not make a new contract for the parties.”

Interpreting a statute as against a teaching contract, this Court held in *Cochran v. Brown Trussler, County Superintendent of Upshur County Schools*, 141 W.Va. 130, 89 S.E.2d 306 (1955), that a teaching contract entered into between a board of education and a teacher, in direct contravention of the prohibitive provisions of a valid statute, was void *ab initio*, and cannot be subsequently validated by ratification, nor can execution thereof be made the basis of an equitable estoppel.

Your Appellant is aware of the case of *Beard v. Worrell*, 158 W.Va. 248, 212 S.E.2d 598 (1974) where this Court “observed” that “probably” if a party has an otherwise enforceable property settlement agreement awarding alimony, she may enforce the contract in a regular action at law on the contract.

Later, in 1977, this Court reaffirmed well settled law that Courts will not enforce contracts contrary to the provisions of statute. *Fry Racing Enterprises, Inc., v. Chapman*, 201 W.Va. 391, 497 S.E.2d 541 (1997).

The most recent discussion of this issue from this Honorable Court came on December 2, 2005, in the case of *Dairyland Insurance Company v. Conley*, Appeal No. 32704. In this controversial decision upholding a statutory provision and substantial windfall in favor the Plaintiff automobile driver, this Court relied substantially on the legislative intent behind the enactment and the modification of that statute granting relief to the Plaintiff. In doing so, this Court stated that “the legislature is plainly empowered

to alter the common law... by virtue of the authority of Article 8, Section twenty one of the Constitution of West Virginia of Code, 1931, 2-1-1... it is within the province of the Legislature to enact statutes which abrogate the common law.” *Id.*

III. The Circuit Court abused its discretion or was otherwise clearly erroneous when it affirmed the Family Court’s Order that it [Family Court] has jurisdiction to enforce a contract independent of a Final Divorce Order.

Once the Family Court determined that it must vacate that portion of the divorce decree relating to the obligation of the Appellant to pay child support for the subject child, the Court no longer had jurisdiction to make any additional rulings or require the Appellant to comply with the “contract”. The jurisdiction of the Family Court is purely statutory. According to Article VIII, Section 16 of the *West Virginia Constitution*, Family Courts “have original jurisdiction in the areas of family law and related matters as may hereafter be established by law.” Family Court jurisdiction is specifically established by law in *West Virginia Code* §51-2A-2 (2003). According to *West Virginia Code* §51-2A-2(d), “a [Family Court] is a Court of limited jurisdiction. A Family Court is a Court of record only for the purpose of exercising jurisdiction in the matters for which the jurisdiction of the Family Court is specifically authorized in this section and in Chapter 48 [§§48-1-101, *et seq.*] of this Code.” Circuit Courts, in contrast, have original and general jurisdiction “except in cases confined exclusively by the Constitution to some other tribunal.” The jurisdiction of Family Courts is limited to only those matters specifically authorized by the legislature, while Circuit Court’s have original and general jurisdiction and other powers set forth in Article VIII, §6 of the Constitution of West Virginia.

Neither *West Virginia Code* §51-2A-2 nor §48-1-101, *et seq.*, authorizes Family Courts to hear “contract” disputes.

Even before the implementation of *West Virginia Code* §48-2A-2, this Court, as early as 1946, determined in *State ex rel Watson v. Rodgers*, 129 W.Va. 174, 176, 39 S.E.2d 268, 269 (1946) that Circuit Court's have no inherent powers in divorce cases but, rather, purely statutory powers in such cases. Later, in 1958, this Court affirmed that the jurisdiction of Courts of equity to entertain suits of divorce exists only by virtue of the statute which confers such jurisdiction. *State ex rel Woodrow Wilson Cecil v. Norman Knapp*, 143 W.Va. 896; 105 S.E.2d 569 (1958). In *Starcher v. Crabtree*, 176 W.Va. 707, 348 S.E.2d 293, 294 (1986), this Court held that the jurisdiction of a Family Law Master is purely statutory; he or she has no inherent powers. When the Family Law Master system was in effect, this Court found that the powers possessed by a Family Law Master were restricted to those conferred by statute. A "circuit Court shall not follow the recommendation, findings, and conclusions of a master found to be: ... (3) In excess of statutory jurisdiction, authority, or limitations, or Shortt of statutory right[.]" See also *Feit v. Feit*, 183 W.Va. 206, 394 S.E.2d 901 (1990).

More recently, in a decision authored by Justice Maynard, relating directly to the issue of jurisdiction of the Family Court [visitation between half siblings], this Court found in *Lindsie D.L. v. Richard W.S.*, 214 W.Va. 750, 591 S.E.2d 308 (2003) that although it would appear at first glance that a family court would naturally have jurisdiction on issues related to visitation between half siblings, that the jurisdiction of the family court is limited to only those matters specifically authorized by the Legislature. In a well reasoned decision, this Court gave great weight to the right of the natural parent in making decisions regarding the custody of his or her child, this Court nonetheless acknowledged and reasserted that before the legal and factual issues are to be decided by

a family court, the family court must first have jurisdiction to hear such an issue. 214

W.Va. at 756. This Court stated that:

According to Article VIII, Section 16 of the State Constitution, Family Courts 'shall have original jurisdiction in the areas of family law and related matters as hereafter be established by law. Family courts may also have such further jurisdiction as established by law.' Family court jurisdiction is specifically established by law and *W.Va. Code* §51-2A-2 (2003). According to *W.Va. Code* §51-2A-2(d), '[a] family court is a court of limited jurisdiction. A family court is a court of record only for the purpose of exercising jurisdiction in the matters for which the jurisdiction of the family court is specifically authorized in this section and in chapter forty-eight [ss48-1-101 et seq.] of this code.' Circuit courts, in contrast, have original and general jurisdiction 'except in cases confined exclusively by the Constitution to some other tribunal[.]' *W.Va. Code* §51-2-2 (1978). Accordingly, we now hold that the jurisdiction of family courts is limited to only those matters specifically authorized by the Legislature, while circuit courts have original and general jurisdiction and other powers as set forth in Article VIII, §6 of the Constitution of West Virginia. Therefore, circuit courts have jurisdiction of sibling visitation and all other domestic or family law proceedings concurrent in all respects with the jurisdiction of family courts. Any ambiguity concerning which court properly has jurisdiction of a matter should be resolved in favor of recognizing jurisdiction in the circuit court." *Id.*

Having determined that the *Order* incorporating the *Property Settlement Agreement* of the parties was vacated, the Family Court had no additional jurisdiction to compel the Appellant to pay any additional monies nor use its contempt power nor require the Appellant to provide additional financial information.

IV. The Circuit Court abused its discretion or was otherwise clearly erroneous in requiring the Appellant to pay college expenses against clear evidence that Appellant is financially unable to do so.

Finally, without waiving the prior arguments and defenses in this matter, your Appellant states, as his final argument, that no record was developed as to the Appellant's ability to pay. This Court has held in *Trembly v. Whiston*, 159 W.Va. 298, 220 S.E.2d 690 (1975), that Court commit error if it fails to inquire as to the income of the Appellant and/or his reasonable living expenses. A father may be required to provide his minor

child with a college education, if his financial condition would not make such expenditures unreasonable. *24 Am.Jur.2d Divorce and Separation Section 843*, page 956; 56 Alr.2d 1207. Thus, the Court's failure to inquire as to the ability to pay the college education of the son was further abuse of discretion.

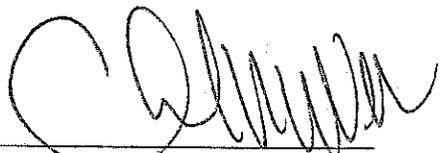
V. The Circuit Court abused its discretion or was otherwise clearly erroneous when it affirmed the award of Appellee's attorneys fees, expenses and costs in the matter while ruling that the Appellant was not in contempt and the Appellant ultimately prevailed on his Motion to Vacate and the relative financial abilities of the parties was not considered.

That the circumstances in this matter are consistent with *Bettinger v. Bettinger*, 396 S.E.2d 709 (1990); *Banker v. Banker*, 196 W.Va. 535, 474 S.E.2d 465; and most recently *Arneault v. Arneault*, 216 W.Va. 215, 605 S.E.2d 590, and the factors set forth therein. In these actions, an award of attorney's fees rests initially within the sound discretion of the family law master and should not be disturbed on appeal absent an abuse of discretion. In determining whether to award attorney's fees, the family law master should consider a wide array of factors including the party's ability to pay his or her own fee, the beneficial results obtained by the attorney, the parties' respective financial conditions, the effect of the attorney's fees on each party's standard of living, the degree of fault of either party making the divorce action necessary, and the reasonableness of the attorney's fee request. The Family Court made no inquiry as to these factors. The factors of this case indicate that the Appellant has little ability to pay his attorney's fees, that the parties respective financial conditions are such that the Appellee has had a disproportionately and substantially larger income than that of the Appellant and is in a better financial position to pay the attorney's fees of the Appellant, and that the payment

by the Appellant of Appellee's attorney's fees would effectively devastate his standard of living. The Appellant **prevailed** on the legal issue before the Family Court.

REQUEST FOR RELIEF

WHEREFORE, your Appellant prays that he be granted an appeal from the Order of the Circuit Court of Kanawha County, West Virginia, entered December 14, 2005, and that the same be reversed; and for all such other and further relief as this Honorable Court may deem just and proper.



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FREDERICK CECIL DAMRON
By Counsel

IN THE SUPREME COURT OF APPEALS, STATE OF WEST VIRGINIA

FREDERICK CECIL DAMRON,

Appellant,

v.

APPEAL NO. 33185

CAROLE E. DAMRON SHORTT,

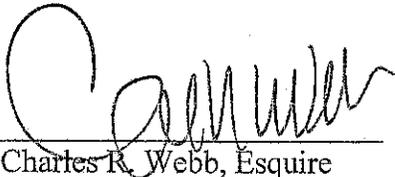
Appellee.

CERTIFICATE OF SERVICE

I, Charles R. Webb, counsel for Appellant, Frederick Cecil Damron, do hereby certify that service of the foregoing *Brief of Appellant* in the above styled case has been made upon the following:

Mark A. Swartz, Esquire
SWARTZ & STUMP, L.C.
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Charleston, WV 25323-0673

this the 22nd day of December, 2006, via United States Mail.



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