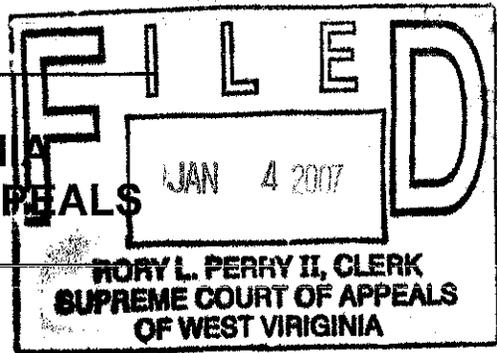


IN THE WEST VIRGINIA  
SUPREME COURT OF APPEALS



FREDERICK CECIL DAMRON,

Appellant,

v.

CAROLE E. DAMRON SHORTT,

Appellee.

On Appeal from a December  
14, 2005 Order of the Circuit  
Court of Kanawha County,  
87-C-1254

DOCKET NO. 33185

APPELLEE, CAROLE E. DAMRON SHORTT'S, BRIEF

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### **TYPE OF PROCEEDING**

This is a response to Frederick Cecil Damron's (hereinafter "Appellant or Mr. Damron") brief from a Final Order of the Circuit Court of Kanawha County entered by the Honorable Tod J. Kaufman on December 14, 2005, affirming a Final Order of the Kanawha County Family Court.

The parties were divorced in 1987. The Final Order incorporated the terms of a Property Settlement Agreement which, among other things, required Appellant to pay for the college education of his two sons. When it came time to honor the Property Settlement Agreement, Appellant sought to have the Final Order vacated insofar as it required him to educate the children. The Kanawha County Family Court held that a portion of the Final Order should be modified; thus, vacated the segment of the Order requiring him to pay college expenses. However, the Court held that the contract or Property Settlement Agreement of the parties should be enforced as a party may contractually agree to undertake an obligation that the law would not otherwise impose. The Kanawha County Circuit Court agreed. Appellant subsequently filed his Petition for Appeal with this Court. Appellant's Petition for Appeal was granted and a briefing schedule established.

### **STATEMENT OF THE FACTS**

Appellant and Carole E. Damron Shortt (hereinafter "Appellee") entered into a Property Settlement Agreement on May 14, 1987. The parties were divorced by Final Order from the Circuit Court of Kanawha County, West Virginia, dated August 3, 1987.

At the time they divorced, the parties had two children: Stuart Frederick Damron (DOB 5-17-83) and Alexander Thomas Damron (DOB 2-21-86). As stated above, prior

to and as a part of their final divorce order, the parties entered into an Agreement in which Appellant agreed as follows:

(13) 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/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 they graduate by the time they attain the age of twenty-four (24) years; and provided the cost of said education does not exceed the cost of said children attending West Virginia University.

The *Property Settlement Agreement* also provided that:

(17) It is further understood and agreed by and between the parties hereto that this Agreement constitutes a complete and full understanding between the parties and the same shall not be changed or added to without the consent of the other party.

The Final Order incorporated the Agreement and with regard to the children's education and specifically stated:

It is further ORDERED and ADJUDGED that Defendant 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/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 they graduate by the time they attain the age of twenty-four (24) years; and provided the cost of said education does not exceed the cost of said children attending West Virginia University.

Seven years after the parties made their Agreement, and the Final Order was entered, the West Virginia Legislature amended West Virginia Chapter 48 to eliminate the statutory authority to make orders requiring the payment of college tuition and expenses. The amendment, withdrawing the authority to direct that parents pay college expenses, was both prospective and retroactive. Specifically, the amendment provided that

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:

The child, at the time the order was entered, was under the age of sixteen years, in which case the order shall be vacated.

W. Va. Code § 48-11-103(c)(3) (Emphasis added).

At the time the order in question was entered, Stuart was four and Alexander was one; thus, this statute clearly applies to the Final Order at issue.

Seventeen years after the Property Settlement Agreement was made, Alexander had completed his freshman year at Clemson University, and Appellant had failed to pay as agreed. On or about August 30, 2004 Appellee filed a *pro se* Petition for Contempt in the Family Court of Kanawha County seeking to find Appellant in contempt of the Final Order seeking reimbursement of college expenses. After some false starts and general maneuvering by one and all, the Family Court ultimately entered a Rule to Show Cause setting a hearing for April 12, 2005 on the earlier Petition for Judgment and Contempt. This hearing was held as noticed.

On October 24, 2005, the Family Court entered its Order. The Family Court determined that W. Va. Code § 48-11-103(c)(3) makes it clear that any order, or portion thereof, setting forth the obligation for educational and related expenses of a child shall be vacated if at the time the order was entered the child was under the age of sixteen years. Given the children's ages at the time the Final Order was entered, the Family Court had "no choice but to vacate the provision of the final order requiring [Appellant]

to pay college expenses.” (See Final Order of Family Court – “Order Regarding Mr. Damron’s Obligation to Pay College Expenses” at 3.). It is abundantly clear that the abovementioned Code section *only* applies to *orders* and not to the contracts or separation agreements of the parties—because it literally says so. As the Family Court observed “§ 48-11-103(c) repeatedly references the modification or vacation of an “order” and makes no mention whatsoever of a separation agreement or contractual agreement. While the order must, indeed, be vacated . . . *the separation agreement survives as an independent contractual obligation to which Mr. Damron [or Appellant] remains bound.*” *Id.* at 3-4. (Emphasis added).

The Family Court acknowledged that a separation agreement is distinguishable from a court order:

*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 that agreement.* There was no evidence that Mr. Damron’s agreement to pay college expenses was procured through fraud, duress or other unconscionable conduct. W. Va. Code § 48-11-103(c) does not require that a separation providing for payment of college expenses be vacated and, therefore, the separation agreement may be enforced against Mr. Damron.

*Id.* at 4. (Emphasis added).

On November 22, 2005, Appellant filed a Petition for Appeal with the Circuit Court of Kanawha County. On December 14, 2005 the Circuit Court entered an Order Affirming the Family Court Order. The Circuit Court held on appeal that “[t]his Court finds that the Family Court did not abuse its discretion, nor was it clearly erroneous when it upheld the terms of the separation agreement by ordering Mr. Damron to remain responsible for the children’s college expenses.”

On April 14, 2006 Appellant filed his Petition for an appeal from the Circuit Court's Final Order. This Court subsequently granted the Petition for Appeal and established a briefing schedule. On December 22, 2006 Appellant filed his brief with this Court, to which Appellee now responds.

### STANDARD OF REVIEW

The West Virginia Supreme Court of Appeals "held in Syllabus Point 1 of *May v. May*, 214 W. Va. 394, 589 S.E.2d 536 (2003) that, 'in reviewing a final order of a family court judge that is appealed directly to this Court, we review findings of fact by a family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.' This Court's standard of review for an appeal from a circuit court that reviewed a family court's final order, or refused to consider a petition for appeal to review a family court's final order, is the same. *In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law de novo.*" *Carr v. Hancock*, 607 S.E.2d 803, 2004 W. Va. LEXIS 204. (Emphasis added).

Questions of law are always addressed *de novo* on appeal. Three assignments of alleged error in Appellant's brief are actually questions of law. None involve a disputed fact or the application of law to fact. The three questions of law involved in the first three assignments of error actually are:

I. Does WV Code § 48-11-103(c)(2) by its express terms void property settlement agreements or contractual agreements which require one party or both to pay for the college education of children? Answered by the family and circuit court in the negative.

II. If a court order which incorporates a contractual term as an order of the court is vacated, does the contract go away? Answered by the family and circuit court in the negative.

III. Do family courts have jurisdiction to address issues arising out of the property settlements/contracts of the parties? Answered by the family and circuit court in the affirmative.

#### **ARGUMENT, POINTS, AUTHORITY AND DISCUSSION OF LAW**

#### **I – II. THE CIRCUIT COURT FOLLOWED THE DICTATES OF THE WV CODE WHEN IT AFFIRMED THE FAMILY COURT ORDER, WHICH VACATED A PORTION OF THE FINAL ORDER, IN ACCORD WITH THE STATUTE AT ISSUE, BUT DID NOT ALSO VOID THE SEPARATION AGREEMENT/CONTRACT.**

Appellant incorrectly states that the Family Court Order was in direct contravention of the West Virginia Code § 48-11-103(c)(3). As stated above, in full, W. Va. Code § 48-11-103(c)(3) is as follows:

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:

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).

The Code provision is simple, plain and direct; it is repeatedly stated to apply to orders. It makes no mention of separation agreements or other contractual arrangements or obligations. Appellant argues "that Courts are not at liberty to construe any statute so as to deny effect to any part of its language."<sup>1</sup> Indeed, that is a well-known and established law<sup>2</sup> and the Family Court did precisely what the statute mandates.

There are no facts subject to debate requiring determination before the Code can be applied. Even Appellant states that the statute is unambiguous.<sup>3</sup> No credible claim can be, or has been, advanced that the statute is unclear or ambiguous. It might have said more and done more—but a road not taken does not an ambiguity create. Neither the Family nor the Circuit Court interpreted or construed this Code section, they just applied it according to its plain and obvious meaning.

Both courts determined that W. Va. Code § 48-11-103(c)(3) makes it clear that any order setting forth the obligation for educational and related expenses of a child shall be vacated if at the time the order was entered the child was under the age of sixteen years. Alexander was considerably less than sixteen; thus the Family Court had "no choice but to vacate the provision of the final order requiring [Appellant] to pay college expenses." (See Final Order of Family Court – "Order Regarding Mr. Damron's

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<sup>1</sup> See Brief of Appellant at 14.

<sup>2</sup> "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without interpretation." *Meek v. Pugh*, 186 W. Va. 609, 413 S.E.2d 666 (1991) quoting Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968); Syl. Pt. 2, *State ex rel. Underwood v. Silverstein*, 167 W. Va. 121, 278 S.E.2d 886 (1981); Syl. Pt. 1, *Fucillo v. Workers' Compensation Comm'r.*, 180 W. Va. 595, 378 S.E.2d 637 (1988); Syl. Pt. 1, *Legg v. Smith*, 181 W. Va. 796 (1989).

<sup>3</sup> See Brief of Appellant at 2, 6, 13 and 14.

Obligation to Pay College Expenses” at 3.). Further, the Circuit Court affirmed the Family Court’s decision by stating that

The statute that Mr. Damron uses to support his argument, that he should not be responsible for the children’s college education expenses, refers only to vacating an “order,” it does not make reference to vacating a separation or settlement agreement, as was entered in this case. **Pursuant to that section, the Family Court properly vacated the condition in the order which made Mr. Damron responsible for the children’s college education. However, the Family Court properly upheld the condition in the settlement agreement as it noted in its order 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 that agreement. There was no evidence that Mr. Damron’s agreement to pay college expenses was procured through fraud, duress or other unconscionable conduct.’”**

(See Final Order of Circuit Court of Kanawha County at 2). (Emphasis added).

The Courts were aware that from a plain reading of W. Va. Code § 48-11-103(c)(3) it is apprehensible that the Legislature intended that this statute affect only **orders**. The rule makes no mention of separation agreements or contractual obligations. The rule does not abridge by its terms prior contracts because the Legislature was, one can be certain, aware of the fact that Article 3, Section 4 of the West Virginia Constitution provides in relevant part that: “No . . . law impairing the obligation of a contract, shall be passed.” Legislators often grapple with retroactive effect and consequences. It is reasonable, although certainly not essential to the outcome here, to assume that the road not taken as noted above, was actually a choice made and intended, to-wit: not to void private agreements and contracts retroactively.<sup>4</sup>

The Family and Circuit Courts were correct in their determinations that Appellant was bound by his contract. **The West Virginia Supreme Court of Appeals has stated**

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<sup>4</sup> This argument was raised by Appellee in the courts below, but Appellee also argued that there was no need to address constitutional issues unless and until the statute was construed to apply to contracts and agreements in addition to just orders.

that "parties in domestic relations cases may agree to anything in their property settlement agreement." *Burnett v. Burnett*, 208 W. Va. 748, 542 S.E.2d 911, 917-918 (2000). (Emphasis added). This Court has consistently held that

the parties to a marriage frequently have a far better concept of what is a just settlement between them at the dissolution of their marriage than any court can possibly have. For that reason, as the Court said in the *Farley* [*v. Farley*, 149 W. Va. 352, 141 S.E.2d 63 (1965) *overruled on other grounds*] 'Not only are property settlement agreements validly entered into, not against public policy, but they occupy a favorite position in the courts.' ***Therefore when a valid property settlement agreement has been executed by the parties, unless such agreement is induced by fraud, is collusive, or promotes separation or divorce, it will be enforced in an appropriate action at law.***

*Beard v. Worrell*, 158 W. Va. 248, 266-67, 212 S.E.2d 598, 608 (1974) (Emphasis added).

In *Beard*, the husband filed for divorce and the wife answered, but subsequently withdrew her pleadings. The court entered a decree in the husband's favor. The wife asserted "clean hands" as a defense to the action in prohibition. The court concluded that a grant of alimony had to be supported by the pleadings and that the ex-wife's pleadings did not support the award because she withdrew them. However, **the court determined that she might be able to recover under the property settlement agreement because a contract for maintenance could be enforced separately from judicially decreed alimony.**

*Beard* cited to *Farley* and asserted that

In *Farley* a husband and wife entered into a property settlement agreement providing for the husband to pay the wife \$20 per week. This agreement was "ratified, approved and confirmed" by the trial court; however, it was not specifically merged into the decree. The husband contended that this periodic payment was alimony, and under the rule in *Cecil v. Knapp*, [143 W. Va. 896, 105 S.E.2d 569 (1958)] argued that the award of alimony was void as the husband was awarded the divorce. This Court ruled that a valid property settlement agreement created a binding contract.

When *Farley* is read in conjunction with *Miller [v. Miller]*, 114 W.Va. 600, 172 S.E. 893 (1934)], where the court specifically reserved Mrs. Miller's rights under the contract in spite of the fact that judicially decreed alimony was reduced because of economic conditions, ***the conclusion is irresistible that the law treats a contract for maintenance as entirely separate from judicially decreed alimony, and that while a contract may form the foundation for judicially decreed alimony, each may be separately enforced.***

158 W. Va. at 264-65, 212 S.E.2d at 607. (Emphasis added).

The underlying concept in the above referenced cases is the same in the current case—a contract/separation agreement is entirely separable from a judicially decreed order. While the separation agreement may form the foundation for a judicially decreed order, each may be separately enforced. Thus, Appellant's absurd argument that the Family Court erroneously gave independent credit to the two documents is fundamentally incorrect.

Furthermore, this case is nearly identical to *Shoosmith v. Scott*, 217 Va. 290, 227 S.E.2d 729 (1976). In *Shoosmith*, the parties entered a property settlement agreement and nearly thirteen years later the husband claimed that because of subsequent amendments to the Code of Virginia, he should be relieved of all alimony payment obligations. *Shoosmith* invited the Court to hold that the impairment clauses of the Federal and State Constitutions do not limit the state's right, by a subsequent exercise of state power, to abrogate a contract which was perfectly legal and valid when entered into." *Id.* at 731. The Virginia Supreme Court declined this invitation. *The Court held that a valid contract existed between the parties, and thus a vested constitutionally protected property right had been created. Id.*

Such an agreement creates vested property rights in the parties by virtue of the judicial sanction and determination of the court; it is a final

adjudication of the property rights of the parties; *Higgins v. McFarland*, 196 Va. 889, 894-895, 86 S.E.2d 168, 172 (1955); and it cannot be abrogated by subsequent legislative action.

*Id.* at 731.

The parties simply wished to expressly set forth terms to which they both agreed in their property settlement agreement. At the dissolution of their marriage the parties certainly had a far better concept of what was a just settlement between them than any court could possibly have; thus, the Court approved of their agreement. The Family Court determined that a valid contract existed between the parties; thus, a vested constitutionally protected property right had been created.

The Circuit Court properly adhered to the West Virginia Code when it affirmed the vacation of a portion of the Final Order in accord with W. Va. Code § 48-11-103(c)(3). However, neither the Federal nor the West Virginia Constitutions give the State of West Virginia the power to retroactively abrogate a contract which was perfectly legal and valid when made. **"The Supreme Court of Appeals of West Virginia favors fair and equitable contracts between divorcing parties. Mature adults with the help of the court and counsel shall be permitted to negotiate terms and thereby bind themselves."** *Nakashima v. Nakashima*, 171 W. Va. 9, 297 S.E.2d 208 (1982). (Emphasis added).

**III. Family Courts have jurisdiction to address and determine the rights and obligations of parties to property settlement agreements.**

Appellant erroneously contends that the Circuit Court erred when it concluded that the Family Court had jurisdiction to enforce a term of a Separation Agreement. Appellant asserts that "[t]he jurisdiction of Family Courts is limited to only those matters

specifically authorized by the legislature"<sup>5</sup> and that "[n]either *West Virginia Code* § 51-2A-2 nor § 48-1-101 *et seq.*, specifically authorizes Family Courts to hear "contract" disputes. Obviously, Appellant has conveniently over looked the fundamentals of Family Court jurisdictional law as set forth in the West Virginia Code.

The Family Court's jurisdiction is specifically established by law in W. Va. Code § 51-2-A-2(d). 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 [§ § 48-1-101 et seq.] of this code.**

(Emphasis added).

Article 6 of WV Code Chapter 48 is actually entitled "Property Settlement or Separation Agreements." The fact that there is actually a whole Chapter in the WV divorce Code specifically devoted to this topic has not deterred Appellant from arguing that the family courts are courts of limited jurisdiction whose jurisdiction does not extend to the enforcement of property settlement agreements. This is truly a startling assertion—startling in the sense of "everyone knows we are looking at a white house, but one of the observers insists on describing it as red."

Furthermore, W. Va. Code § 48-6-101 defines property settlement or separation agreement as follows:

(a) "Property settlement or separation agreement" means a written **agreement** between a husband and wife whereby they agree to live separate and apart from each other. **A separation agreement may also:**

- (1) Settle the property rights of the parties;
- (2) Provide for child support;
- (3) Provide for the allocation of custodial responsibility and the determination of decision-making responsibility for the children of the parties;

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<sup>5</sup> See Brief of Appellant at 18.

- (4) Provide for the payment or waiver of spousal support by either party; or
- (5) ***Otherwise settle and compromise issues arising from the marital rights and obligations of the parties.***

(Emphasis added).

The parties to domestic relations proceedings are authorized by statute to settle their differences by contract. The West Virginia Supreme Court of Appeals has specifically ruled that "a valid property settlement agreement create[s] a binding contract." *Beard*, supra at 265. It is no secret that the Family Courts are precisely authorized to accept and to enforce precisely these kinds of private agreements.

**IV. The Circuit Court did not abuse its discretion when it required Petitioner to fulfill his contractual obligations.**

Appellant contends that the Circuit Court erred when it upheld the decision of the Family Court that required Appellant to fulfill his contractual obligation to educate his child without first considering whether or not Appellant was financially capable of meeting that obligation.

Ability to pay is not a defense to a complaint or petition seeking a money judgment. Ability to pay may be a factor for a Court to consider when addressing the matter of contempt. In a contempt setting, the burden of proof regarding ability to pay rests squarely on the payor. The Appellant/payor did not file a financial disclosure before or at the hearing. He did not file recent tax returns before or at the hearing. He did not offer recent pay stubs. He had his day in court and did nothing to meet his burden of proof. Having done nothing to prove poverty, he cannot be held to complain at this juncture.

Appellant suggests that he should not be held accountable for the obligations he contractually agreed to nearly twenty years ago because he failed to make financial disclosures. Appellant incorrectly suggests that in accordance with *State ex rel. Trembly v. Whiston*, 159 W. Va. 298, 220 S.E.2d 690 (1975) the Court failed to inquire as to the income of the Appellant.

*Whiston* is distinguishable from the current case. In *Whiston*, the father submitted ample evidence in the trial court of his inability to pay and his obligation arose from his monthly child support obligations, which are always subject to modification. In the current situation, Appellant, by his own free will, did not submit any evidence of any financial information at the family court hearing. Further, Appellant voluntarily agreed to pay for such educational expenses as part of a contractual agreement.

Again, Appellant's obligation to pay the educational expenses of his child is a contractual commitment, not subject to modification by any court. Appellant voluntarily contracted to undertake an obligation that the law would not otherwise impose upon him to settle his case. Now, years later, when the obligation assumed ultimately matures, there is no escape. The Family Court and Circuit Court were correct when they determined that Petitioner must be bound by his agreement.

**V. The Circuit Court did not abuse its discretion when it affirmed the award of Respondent's attorney's fees, expenses and costs.**

Appellant contends that the Circuit Court erred when it upheld the decision of the Family Court awarding attorneys' fees, expenses and costs to Appellee. The Family Court, pursuant to W. Va. Code § 48-1-305(b), properly awarded fees and costs. W. Va. Code § 48-1-305(b) states that "[t]he court may compel either party to pay attorney's fees and court costs reasonably necessary to enable the other party to

prosecute.” Further, “[w]hen it appears to the court that a party has incurred attorney fees and costs unnecessarily . . . the court may order the offending party, or his or her attorney, or both, to pay reasonable attorney fees and costs to the other party.” W. Va. Code 48-1-305(c). (Emphasis added).

It is undisputed that Appellant breached the provision in the contractual separation agreement which mandated that he pay for his children’s post high school education expenses. Due to Appellant’s breach, Appellee had to Petition the Family Court in order to enforce the agreement. The Family Court properly exercised its discretion in mandating that Appellant pay Appellee’s reasonable attorney fees and costs. Likewise, Circuit Court found the Family Court’s award of fees and costs appropriate. As stated by the Appellant, “[i]n divorce 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.”<sup>6</sup> The Family Court did not abuse its discretion; thus, its determination should not be disturbed 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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<sup>6</sup> Appellant’s Brief at 21. See also *Arneault v. Arneault*, 216 W. Va. 215, 219, 605 S.E.2d 590, 594 (2004) quoting Syllabus Point 4 of *Banker v. Banker*, 196 W. Va. 535, 474 S.E.2d 465 (1996).

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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:

Charles R. Webb, Esq.  
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108 ½ Capitol Street, Suite 201  
Charleston, West Virginia 25301

the 3<sup>RD</sup> day of January 2007.

  
Allyson H. Griffith