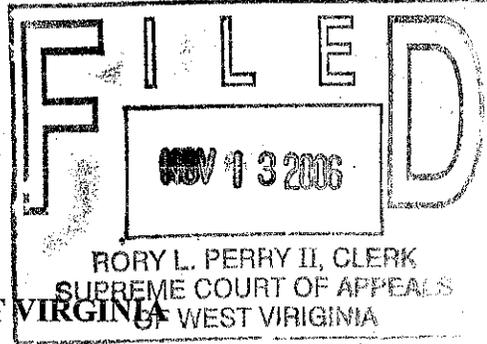


NO. 33094



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**GARY WOLFINGBARGER,**

Appellant,

vs.

**PRICIE FERN WOLFINGBARGER,**

Appellee.

**BRIEF OF APPELLEE PRICIE  
FERN WOLFINGBARGER**

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I.

**KIND OF PROCEEDING AND  
NATURE OF THE RULING BELOW**

This is an appeal by Gary Wolfingbarger (hereinafter "Appellant") from an order of the Circuit Court of Kanawha County dated August 15, 2005, Judge Irene Berger, affirming the findings of Family Court Judge Robert Montgomery dated December 31, 2004. These orders refused to confirm a proposed property settlement agreement sought to be enforced by the Appellant and ordered an equitable distribution of the parties' marital property.

## II.

### STATEMENT OF FACTS AND PROCEDURAL HISTORY

The parties were married on December 24, 1978 in the state of Ohio and last lived together in Kanawha County, West Virginia on or about September 18, 1997. In March of 1979 the Appellant purchased a certain commercial property in St. Albans, Kanawha County, West Virginia known as the Rustic Motel. A portion of the purchase price was contributed by the Appellant from his separate funds. The motel was jointly operated by the Wolfingbargers as their source of income, and balance of the payments on the motel and various repairs and improvements were made with marital funds. The Family Court Judge valued this property at \$309,700.00.

During the marriage, the parties purchased an additional, adjoining parcel of real estate, purchased with marital funds, designated as Bannum Place, which provided additional rental income to the parties. The Family Court Judge valued this property at \$138,700.00.

During the marriage the parties also purchased a condominium in Florida for \$37,500.00, purchased with marital funds.

None of these properties were encumbered at the time of the divorce.

In the Fall of 1997 a divorce action was commenced by the Appellee herein. This action was eventually dismissed, and the within action was commenced by the Appellant in 1999.

In February, 1999 the Appellee was not represented by counsel. The Appellant and his counsel (his nephew), prepared a Property Settlement Agreement dated February 14, 1999, that

is the subject of this appeal.<sup>1</sup> In this proposed agreement, after a 20-year marriage, the Appellee waived alimony and waived all her interest in the parties' marital real estate, in exchange for a payment of \$2,000.00 per month for the rest of Appellee's life. Appellee was nearly 70 at the time this proposed agreement was executed.

### III.

#### ASSIGNMENTS OF ERROR

Appellant asserts that the circuit court erred in the following respects:

1. The lower court's refusal to enforce the terms of the parties written property settlement agreement constituted an abuse of discretion.
2. The lower court's rulings regarding each party's equitable distribution of marital assets were clearly wrong or against the preponderance of the evidence, based on the factors established in West Virginia Code § 48-7-103.
3. The lower court's findings of fact supporting an award of alimony to appellee were clearly erroneous.
4. The lower court's award of alimony to the appellee was an abuse of discretion.

### IV.

#### STANDARD OF REVIEW

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<sup>1</sup> Neither the Family Court Judge nor the circuit court ever ratified, confirmed or approved this proposed agreement.

“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, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.” Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).” Syllabus point 1, *Staton v. Staton*, 218 W. Va. 201, 624 S.E.2d 548 (2005).

“Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

## V.

### ARGUMENT

1. THE FAMILY COURT AND CIRCUIT COURT’S REFUSAL TO ENFORCE THE TERMS OF THE PARTIES’ PROPOSED PROPERTY SETTLEMENT AGREEMENT WAS NOT AN ABUSE OF DISCRETION AND WAS NOT CLEARLY ERRONEOUS.

As noted above, the findings of fact by the family court judge are reviewed under a “clearly erroneous” standard, and the application of law to the facts under an “abuse of discretion” standard. Without belaboring the point, this is clearly a high standard for any appellant. It is submitted that such a standard is an acknowledgment that the family court judge is in a unique position to observe the parties, their demeanor and testimony, to review exhibits

and to generally gain an accurate perception of the essence of each parties' claim. That having been said, a review of the findings of fact by the family court judge is appropriate.

Judge Robert Montgomery found, among other things, in his January 5, 2005 order as follows:<sup>2</sup>

1. That the "Rustic Motel" property, valued at \$309,700.00 was purchased prior to the parties' marriage, that the Appellant made a down payment on the property from separate funds, that the balance of the purchase and various improvements were made with marital funds, and controlled by Appellant after the parties' separation;
2. That an adjoining parcel, valued at \$138,700 was purchased during the marriage, with marital funds, and controlled by Appellant after the parties' separation;
3. That a condominium was purchased by the parties during the marriage, with marital funds, and that has been controlled by the Appellant after the parties' separation;
4. That the Appellee had the use of some \$40,000.00 in certificates of deposit and some \$56,000.00 in cash;
5. That the obligations required by parties' purported Property Settlement Agreement, executed by Appellee without counsel, have not been performed with the exception of one provision; and that the proposed agreement is set aside and held for naught; and

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<sup>2</sup>All of Judge Montgomery's findings are not set out herein, but merely a summary of his relevant findings.

6. That the Appellant is ordered to pay to the Appellee the sum of \$129,800.00 to equalize the marital distribution of the marital properties.

It is noteworthy that the findings of fact by Family Court Judge Montgomery do not appear to be disputed by Appellant, but rather the Appellant seems to object to the application of the relevant law to said facts.<sup>3</sup> The findings of fact by the Family Court Judge are clearly supported by the record and are not subject to any serious dispute. Black's Law Dictionary defines the term "abuse of discretion" as among other things, ". . . any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law pertaining to the matter submitted." Black's Law Dictionary, 1990 Ed., citing *Harvey v. State*, 458 P.2d 336, 338. Was the ruling by the family court judge, and affirmed by the circuit court, unreasonable, unconscionable and arbitrary? Clearly not. Was the ruling taken without proper consideration of the facts and law? Clearly not.

2. THE RULINGS BY THE FAMILY LAW JUDGE AND THE CIRCUIT COURT JUDGE REGARDING THE DISTRIBUTION OF MARITAL ASSETS WERE NOT CLEARLY ERRONEOUS.

In the absence of a legitimate property settlement agreement, one must look to general principles of equitable distribution to determine if the family court and the circuit court were clearly wrong or abused their discretion. They were not clearly wrong and did not abuse their discretion.. As recently noted by this Court in *Arneault v. Arneault*, Appeal No. 32865,

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<sup>3</sup> The "Statement of Facts" set forth by the Appellant contain more allegations of impropriety than facts. Other than the claims of crimes and subterfuge, however, no real

“W. Va. Code, 48-2-1(e)(1) (1986) [W. Va. Code § 48-1-233 (2001) (Repl. Vol. 2004)], defining all property acquired during the marriage as marital property except for certain limited categories of property which are considered separate or nonmarital, expresses a marked preference for characterizing the property of the parties to a divorce action as marital property.’ Syl. pt. 3, *Whiting v. Whiting*, 183 W. Va. 451, 396 S.E.2d 413 (1990).” Syllabus point 2, *Staton v. Staton*, 218 W. Va. 201, 624 S.E.2d 548 (2005).

“Under equitable distribution, the contributions of time and effort to the married life of the couple at home and in the workplace are valued equally regardless of whether the parties’ respective earnings have been equal. Equitable distribution contemplates that parties make their respective contributions to the married life of the parties in that expectation.” Syllabus point 7, *Mayhew v. Mayhew*, 197 W. Va. 290, 475 S.E.2d 382 (1996), *overruled on other grounds by* Syllabus point 3, *Mayhew v. Mayhew*, 205 W. Va. 490, 519 S.E.2d 188 (1999). . “Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” Syllabus point 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968).

W. Va. Code § 48-7-105 (2001) (Repl. Vol. 2004) instructs a court how to equitably distribute a marital estate's ownership interests in a business entity and directs the court to (1) “give [a conditional] preference to the retention of the ownership interests”; (2) consider the party who has the “closer involvement” with, “larger ownership interest” in, or “greater dependency” on such business; (3) further consider “the effects” that a “transfer or retention” of such ownership interests would have on the business, itself; and (4) secure the rights of the

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objections are lodged regarding the court’s findings of fact. Appellant seems merely to object to

parties to receive that to which they are equitably entitled under this provision, either through an in kind transfer of the ownership interests or by the transfer of money or other property of equivalent value. The distribution by the court was clearly consistent with the standards of the code.

Appellant devotes significant argument to his contention that the family court failed to distribute marital assets pursuant to the terms of the proposed property settlement agreement. However, such argument is specious. The family court disposed of the proposed property settlement agreement, declaring it null and void. The family court's ruling evidenced a *de facto* recognition of the clearly unconscionable nature of the agreement. In response, Appellant cites a line of cases discussing contracts, none of which involve property settlement agreements in a divorce case. The Family Court Judge of Kanawha County, like any other judge, has an inherent duty and power to right wrongs. Faced with a proposed property settlement agreement executed by an elderly, unsophisticated, unrepresented litigant, the Family Court Judge exercised the inherent power of the court and refused to approve, ratify and confirm the proposed agreement. It is important to remember that until the court ratified and approves a proposed agreement, the writing is merely a proposed agreement, subject to confirmation, ratification and approval by the Court.

Having disposed of the proposed agreement, the Family Court Judge then exercised his statutory duty and ordered an equitable division of parties' marital property, refusing to allow the Appellant to buy off the Appellee's claim to equitable distribution by merely outliving her.

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the court's conclusions.

Appellant further claims that the Appellee did not protest the terms of the proposed agreement, and has accordingly waived any objections thereto. Appellant then claims that Appellee's refusal to comply with the terms of the agreement, rather than evidencing her objection to the agreement, constitutes "unclean hands." Appellee's refusal to comply with the confiscatory terms of the proposed agreement is, to the contrary, the best evidence of Appellee's objection to the agreement. Appellant's steadfast reliance upon equitable contract principles, as noted elsewhere herein, is inapt. This is not a contract rescission case. It is a divorce case in which the family court judge exercised his inherent power and refused to ratify a proposed property settlement agreement that was unconscionable on its face.

Appellant further claims that the Family Court Judge failed to credit the Appellant with the monthly payments made to Appellee by Appellant during the pendency of the litigation. However, the Family Court Judge directly addressed this issue, and found that, essentially, the Appellant made such payments with funds derived from a marital asset - namely the marital business that was subject to equitable distribution and over which the Appellant has taken control at the time the parties separated. Such finding by the Family Court Judge recognizes that Appellant was paying the Appellee with her own money. The Family Court Judge did not abuse his discretion and was not clearly wrong. In fact, it is submitted that the Family Court Judge was clearly right.

3. THE RULINGS OF THE FAMILY COURT JUDGE AND THE CIRCUIT COURT AWARDING ALIMONY TO THE APPELLEE WERE NOT CLEARLY ERRONEOUS AND DID NOT CONSTITUTE AN ABUSE OF DISCRETION.<sup>4</sup>

Appellant also claims that the family court's award of alimony was an abuse of discretion. Again, the family court as a finder of fact had an opportunity to observe the parties and hear the testimony. The record reflects that the marriage of the parties was nearly 20 years, and that the Appellee was nearly 70 years old at the time the Appellant commenced this action. To claim that an award of \$500.00 per month alimony to Appellee is an abuse of discretion is disingenuous at best.<sup>5</sup> As the family court judge found, the "Respondent's [Appellee's] need for alimony greatly exceeds the Respondent's ability to pay alimony and alimony will awarded to the Respondent [Appellee] . . . in the amount of \$500.00 per month commencing January 1, 2004." (Appellant's Exhibit A, p.7).

A review of the final order herein indicates that the Appellant herein was awarded the income-producing marital assets, which order also found that the appellant had taken control of these assets at the time the parties separated. There was no objection to this by Appellant. Under such circumstances, an award of alimony to the Appellee is appropriate and well-supported by the undisputed facts, given the ability of the Appellant's assets to produce income. Whether or not they produce income is solely within the province of the Appellant, and any failure of the assets to produce income should not be chargeable to the Appellee.

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<sup>4</sup>Appellant has designated as Assignments of Error No. 3 and 4 his claims regarding the award of alimony. For the sake of clarity, Appellee has combined the argument regarding these assignments into a single argument.

## VI.

### CONCLUSION

The Appellant expends much argument and effort on the issue of rescission, claiming that neither the family court nor the Appellee established the grounds necessary to rescind the property settlement agreement. The Appellee suggests that Appellant's reliance upon this theory is inapt - there never was a contract. It is well established in this jurisdiction that a property settlement agreement between parties to a divorce is no contract until ratified, approved and confirmed by the court. In the instant case, there was no such ratification, confirmation or approval, and accordingly no contract to be rescinded.

Given the lack of any proper agreement between the parties, the equitable distribution by the family court was fitting and proper and was not an abuse of discretion or clearly erroneous.

Appellant's argument regarding his payments to Appellee is equally unfounded. Given the nature and circumstances of the distribution of the parties' marital assets, particularly in light of the family court's observation that the Appellant had assumed control of the marital assets upon separation, the Appellant's payments to Appellee were essentially made with her own money.

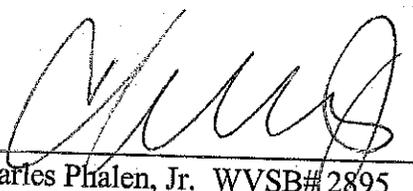
For the foregoing reasons, the rulings of the Family Court of Kanawha County and the Circuit Court of Kanawha County should be affirmed by this Honorable Court.

*Respectfully submitted,*

Pricie Fern Wolfingbarger  
*Appellee*

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<sup>5</sup>It is a clear inference from the record that the Appellant's proposed Property Settlement Agreement is merely Appellant's "bet" against the actuarial tables, hoping to substitute a meager monthly payment (terminating upon Appellee's death) in lieu of an equitable distribution.

  
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### CERTIFICATE OF SERVICE

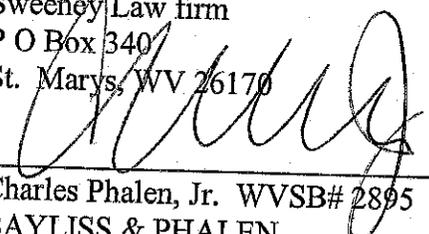
I, Charles Phalen, Jr., counsel for the Appellee, do hereby certify that I served the foregoing "**Appellee's Brief**" upon the Appellant by depositing a true copy thereof in the regular United States mail, postage prepaid, this 2 day of November, 2006, addressed to his counsel of record as follows:

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