

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

DENVER D. JUSTICE

Appellant,

vs:

Logan County Case No.08-D-505
Supreme Court Case No. 35481

SUSAN D. JUSTICE

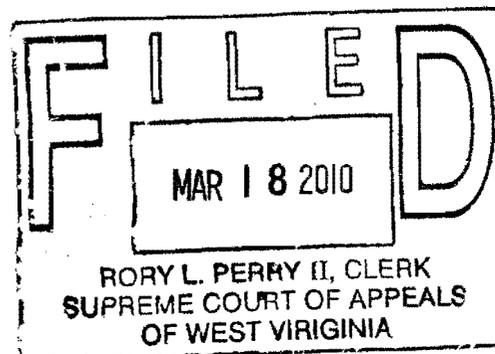
Appellee.

BRIEF OF APPELLANT

FROM THE CIRCUIT COURT OF
LOGAN COUNTY, WEST VIRGINIA

TO THE HONORABLE JUSTICES
OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Appellee.

**KIND OF PROCEEDING AND
NATURE OR RULING IN LOWER TRIBUNAL**

This is a divorce action which was filed on the 13th day of September, 2008, in Logan County, West Virginia. The parties appeared and conducted a final hearing before Judge Kelly Codispoti on the 1st day of April, 2009. The issues included primarily equitable distribution of marital assets and debts and spousal support requested by Appellee.

After the conclusion of the final hearing, the Family Court Judge Ordered the Appellant herein to pay to the Appellee the sum of One Thousand Dollars (\$1,000.00) per month spousal support as a permanent award of alimony.

The Court further Ordered in regards to the equitable distribution of assets the following:

“With respect with the equitable distribution issues before the Court, the Court specifically finds that the vehicles and other assets allocated to Ms. Justice, as well as the

credit card and related indebtedness related to Mr. Justice, and that she has an advantage of a greater value than Mr. Justice considering the equitable distribution and accordingly makes up this difference by reducing the alimony award to \$500.00 a month continuing from the Temporary Order to and including November 23, 2009...”

The Appellant appealed this Order to the Circuit Court of Logan County, West Virginia, and on July 13, 2009, the Honorable Roger L. Perry issued a Final Order refusing to consider the Petition for Appeal herein.

Based upon that Order, the Final Order in this matter was entered on July 13, 2009, and this appeal now follows.

STATEMENT OF THE FACTS OF THE CASE

The parties were married on July 13, 1983, and last lived and cohabitated together on or about September 26, 2008. All children born as a result of the union are over the age of eighteen (18), but the Appellant herein has continued to support the son of the parties who had developed a substance abuse problem.

Both of the parties had worked during their adult life, the Appellee working for Wal Mart and the Appellant having worked at different jobs. The last employment of the Appellant was working in a coal preparation plant. He was working there at the time of the separation of the parties and at the time the Divorce action was filed.

The Appellant was laid off from his work on January 31, 2009, when his mines shut down laying off all of its more than three hundred (300) employees. Although the Appellant was working in the coal mining industry, his work skills were limited to working in the coal preparation plant. He did not have a permit nor license to be employed as an underground coal miner, an electrician, nor as a surface coal miner. Nor

had he any coal mining experience other than at the preparation plant. Between the time that he was laid off and the time of the final hearing, only one former employee of the preparation plant had been successful in finding a new job at a preparation plant.

At the time of the Final Hearing in this matter, the Appellee was earning approximately Fifteen Hundred Dollars (\$1,500.00) per month even though she was not working full time. The Appellant's sole income consisted of approximately Fifteen Hundred Dollars per month in unemployment benefits. The Court in announcing its Final Order concerning alimony stated words to the effect that the Court believed the Appellant would soon go back to work. There is absolutely no evidence in the record to support this speculative conclusion.

The parties at their hearing had stipulated to much of the values of the assets of the parties. In addition, the parties had agreed upon a division of much of their assets as to which party would receive which item. However, the parties had not agreed upon the actual value of each item nor upon the complete equitable distribution to be determined by the Court. Since the Appellee was receiving more in value in the items that she was to keep, the parties intended that the Court would balance the same from other assets of the parties, including possibly granting to the Appellant a monetary settlement to arrive at an equal distribution with the same to be paid from the proceeds of the sale of the former marital residence which was being held in escrow pending the Court's ruling.

The ruling by the Family Court Judge was very vague as to how the equitable distribution was to be accomplished. While it awarded to the Appellant a credit of Five Hundred Dollars (500.00) per month on the alimony until November 23, 2009, it did not address the actual value of all of the assets and debts of the parties, including several that

were contested between the parties. One of the major assets not discussed was the bank account held by the Appellee which contained Eight Thousand One Hundred Fifty One Dollars and Thirty Six Cents (\$8,151.36) as of July 2, 2008, shortly before the separation of the parties. In addition, the Court did not itemize nor discuss the martial debts and other marital assets.

STANDARD OF REVIEW

The standard of review by the Supreme Court of a Circuit Court Order of findings of fact is the clearly erroneous standard and the standard of review of the application to the law of facts is an abuse of discretion standard pursuant to *West Virginia Code 51-2A-14*.

ASSIGNMENT OF ERROR

1. That the Court erred in allowing One Thousand Dollars (\$1,000.00) per month in alimony.
2. That the Court erred in the equitable distribution of the marital assets.

POINTS AND AUTHORITIES

STATUTES

1. Chapter 48, Article 7, Section 103 of the *Code of West Virginia*.
2. Chapter 48, Article 7, Section 106 of the *Code of West Virginia*.
3. Chapter 48, Article 8, Section 101(b) of the *Code of West Virginia*.
4. Chapter 48, Article 8, Section 103 of the *Code of West Virginia*.
5. Chapter 48, Article 8, Section 104 of the *Code of West Virginia*.
6. Chapter 51, Article 2A, Section 11 of the *Code of West Virginia*.
7. Chapter 51, Article 2A, Section 14 of the *Code of West Virginia*.

CASE LAW:

1. *Lucas v. Lucas* 215 W.Va. 1, 592 S.E. 2d 646 (2003).
2. *Pelliccioni v. Pelliccioni*, 214W.Va.28, 34, 585, S.E.2d 28, 34 (2003).
3. *Stone v. Stone*, 200W.Va.15, 19, 488S.E.2d 15, 19 (1997).
4. *Whiting v. Whiting* 183 W.Va. 451, 396 S.E. 2d 413 (1990).

RULES:

1. Rule 28 of the West Virginia Rules of Practice and Procedure for Family Court.
2. Rule 52a of the West Virginia Rules of Civil Procedure.

ARGUMENT

THE COURT ERRED IN AWARDING

ONE THOUSAND DOLLARS (\$1,000.00) PER MONTH AS ALIMONY

In this case, the Appellant is a laid off employee of a preparation plant. At the time of the filing of the Divorce action he was forty five (45) years of age. He has a high school education. He has never worked as an underground coalminer nor as a surface miner. He does not possess any certifications to work in the coal mines, neither underground nor as a surface miner.

His only income is approximately Fifteen Hundred Dollars (\$1,500.00) per month in unemployment benefits, which is limited in time as to how long he can receive the same. He had minimal savings other than a 410K that the Appellee has been awarded one half of as part of the marital distribution. The marital home has been sold leaving him less then Twenty Six Thousand Dollars (\$26,000.00) with which to purchase a new home. However, he owes several thousand dollars in credit card expenses. After paying the

credit card debt he will not have enough money to purchase another home. He has a 1996 motor vehicle worth about Two Thousand Dollars (\$2,000.00). His health insurance has ran out as he can not afford the COBRA payments.

The job that he worked at for the past few years is gone. The mine has closed down and every employee was laid off including all of the employees at the preparation plant.

No fault was found on either of the parties for their Divorce. The Family Court simply speculated that the Appellant would soon be back to work. This was pure conjecture on the part of the Court as there was no evidence to support the same.

On the other hand, the Appellee had a bank account with over Eight Thousand Dollars (\$8,000.00) shortly before the separation of the parties. She has Twenty Six Thousand Dollars from the sale of the marital residence. She lives with her mother and father and although she introduced into evidence a list of her expenses, it was greatly inflated, including eight hundred dollars for rent and expenses for medical coverage that were inaccurate. Her testimony before the Court was filled with a lack of candor and even one time stated in response to a question that this time she was telling the truth which begs the question as to whether she was telling the truth during earlier testimony. She has a 2006 motor vehicle and little debt. She has a job that she has had for over ten (10) years and by her own testimony acknowledges that she could work more hours if she chose to do so.

Based upon this, the awarding of One Thousand Dollars (\$1,000.00) per month is clearly erroneous.

West Virginia Code 48-8-101(b) dictates that there are four classes of spousal

support: (1) permanent spousal support; (2) temporary spousal support, otherwise known as spousal support *pendente lite*; (3) rehabilitative spousal support; and, (4) spousal support in gross.

West Virginia Code 48-8-103 sets forth that spousal support is to be ordinarily made from a party's income, but when the income is not sufficient to adequately provide for those payments, the Court may, upon specific findings set forth in the Order, order the party required to make those payments to make them from the corpus of his or her separate estate.

The spousal support awarded was clearly erroneous. Regardless of any other factors the nature of the Appellant's income clearly dictated that no spousal support be paid by either party to the other in this matter. In addition, he has no separate estate sufficient to pay alimony.

Any issue of fault or misconduct by way of the provision of *West Virginia Code 48-8-104* is absent from this case. While the Appellee attempted to show fault on the part of the Appellant, the Family Court made no such findings.

Finally, the Circuit Court appears to have "equalized" the parties net income which is strictly prohibited by law. *Pelliccioni v. Pelliccioni*, 214 W.Va. 28, 34, 585, S.E.2d 28, 34 (2003); *Stone v. Stone*, 200 W.Va. 15, 19, 488 S.E.2d 15, 19 (1997).

Therefore, in viewing the determination by the Family Court, it is apparent that it acted arbitrarily in determining the amount of alimony and abused its discretion.

Therefore, the order should be reversed and the Appellant should be relieved of any further responsibility to pay alimony.

**THE COURT ERRED IN THE EQUITABLE DISTRIBUTION OF THE
MARITAL ASSETS**

The Court did not make any determination as to the value of the marital assets. While many of the marital assets had their value stipulated to, a substantial portion did not. In order to equitably divide the same, it would have been necessary for the Court to value the total amount of the assets and the debts. This was not done in this case.

The Court simply ignored the provisions of Rule 52(a) of the West Virginia Rules of Civil Procedure. Furthermore, the Family Court failed to complete the three-step equitable distribution analysis under Chapter 48, Article 7, Section 103. Furthermore, “in reviewing challenges to findings made by a family court judge that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a de novo review.” Lucas v. Lucas, 215 W.Va. 1, 592 S.E.2d 646 (2003). Further, the Court simply ignored the requirements of Chapter 48, Article 7, Section 106 as the Family Court failed to set out in detail its findings of fact and conclusions of law and the reasons for dividing the property in the manner adopted which are required under Chapter 48, Article 7, Section 103.

“Equitable distribution ... is a three-step process. The first step is to classify the parties property as marital or non-marital. The second step is to value the marital assets. The third step is to divide the marital estate between the parties in accordance with the principles contained in [former] W.Va. Code, 48-2-32 [now W.Va. Code Section 48-7-103].” Syllabus Point 1, Whiting v. Whiting, 183 W.Va. 451, 396 S.E. 2d 413 (1990).

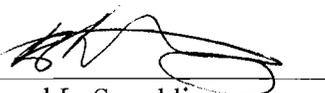
“Unless the parties have made a joint stipulation or property settlement agreement, under Rule 52(a) of the West Virginia Rules of Civil Procedure the Circuit Court [and family court] is required to make findings of fact and conclusions of law in its final order which reflect each step of the equitable distribution procedure. Syllabus Point 2, in part, Whiting v. Whiting, 183 W.Va. 451, 396 S.E.2d 413 (1990).

In the case at hand, it should be noted that the Family Court Judge did not use the three-step process in determining equitable distribution. Furthermore, the Family Court did not make any finding of fact as to why it was dividing the property the way it chose to do. The decision of the Family Court Judge is flawed for two (2) reasons as not only did the Court not make specific findings regarding equitable distribution but it failed to follow the three-step process under Chapter 48, Article 7, Section 103.

RELIEF REQUESTED

Based upon the above, the Appellant, hereby submits to this Court that sufficient grounds have been established to reverse the Circuit Court’s decision and order; that this Court should reverse the order and remand the same for an equitable distribution as required by the law; order that no alimony be paid; and such other and further relief as to the Court might see proper.

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By Counsel



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CERTIFICATE OF SERVICE

I, Bernard L. Spaulding, counsel for the Appellant, do hereby certify that I served a copy of the foregoing Brief of Appellant upon Peter Hendricks, Counsel for the Appellee by mailing a copy to him, postage prepaid, this the 17th day of March, 2010, to the address listed below:

Peter Hendricks
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Madison, West Virginia 25130



Bernard L. Spaulding