

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DONNA F. WILSON,

Appellant,

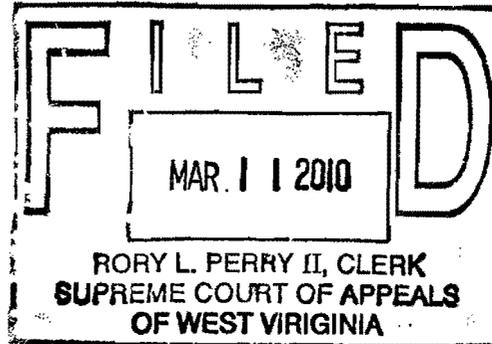
v.

Appeal No. 35475

LEON HUNTER WILSON,

Appellee.

BRIEF OF APPELLANT



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BRIEF OF APPELLANT

COMES NOW, Appellant, Donna F. Wilson, now known following divorce as Donna F. Miller (hereinafter for clarity “Donna Wilson” or “Wife”), by counsel, and files this Brief in Support of her Appeal, stating as follows:

I. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

Donna Wilson seeks reversal of the Berkeley County Circuit Court (the “Circuit Court”), which reversed the Berkeley County Family Court’s (the “Family Court”) finding of enterprise goodwill, and the appropriate value of the same, following a four (4) day trial. The Circuit Court asserted that the Family Court was clearly erroneous in its conclusions regarding enterprise goodwill and improperly asserted that Donna Wilson had a burden of proving the existence of enterprise goodwill by “*convincing proof*,” although no authority creates such a burden of proof in an equitable distribution proceeding. *See* Circuit Court Opinion at page 14.

On November 21, 2008, the Family Court entered a well-reasoned Final Order concluding that the Hunter Company possessed “*enterprise goodwill*.” In addition to this Finding of Fact, the Family Court determined that the net present value of said enterprise goodwill was \$9,381,420. The Family Court’s conclusion that enterprise goodwill existed related to several salient facts in the record including:

- A Management Agreement (the “Management Agreement”) between the Hunter Company and National Land Partners that provided revenue and profits to the Hunter Company even following the death of Hunter Wilson;
- The Hunter Company managed six (6) separate real estate projects in six (6) different locations in West Virginia;
- The Hunter Company employed more than twenty (20) highly skilled and trained employees;
- Several of the Hunter Company’s employees, other than Hunter Wilson, earned more than \$300,000 per year; and
- The expert testimony of Kenneth Apple (“Mr. Apple”), a certified public accountant who opined that enterprise goodwill clearly existed and was valued at \$9,381,420.

Hunter Wilson appealed the Family Court’s Divorce Order and Order of Equitable Distribution to the Circuit Court of Berkeley County (the “Circuit Court”) pursuant to West Virginia Code Section 51-2A-14. The Circuit Court entered an Order asserting that the factual findings of the Family Court were clearly erroneous with respect to the existence of enterprise goodwill and the valuation thereof. In fact, the Circuit Court reversed the Family Court’s award to Donna Wilson in the sum of \$4,914,582.50, and awarded Hunter Wilson the sum of \$894,286 — a reversal of more than \$5.8 million. This timely appeal follows the June 4, 2009 Circuit Court Order denying Donna Wilson’s Motion for Reconsideration pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure.

II. STATEMENT OF FACTS

On November 21, 2008, the Family Court entered a Final Order and concluded that the evidence presented at the four (4) day trial supported a Finding of Fact (Finding No. 13) that the Management Agreement between Hunter Company and National Land Partners created “*independent value of the company . . . separate and apart from the abilities and skills of Hunter Wilson.*” The Family Court also found that the Hunter Company would “*still have value beyond*

its existing accounts and physical assets” even following the death of Hunter Wilson; that “*enterprise goodwill*” was supported by the expert testimony of certified public accountant Kenneth Apple; and that “*the Hunter Company has a qualified and highly compensated work force of approximately twenty (20) employees.*” See Finding of Fact No. 16.

Based upon the unrebutted expert testimony of certified public accountant, Kenneth Apple, the Family Court determined that the net present value of the Hunter Company as of the date of separation was \$9,381,420 (see Finding Nos. 20 and 25). The Family Court also concluded that Mr. Apple’s opinion on valuation was corroborated by two financial statements (Wife’s Exhibit Nos. 19 and 20), which indicated that Hunter Wilson himself valued the Hunter Company at approximately \$10 million, at least when seeking loans from banks.

The Family Court rejected the testimony of Hunter Wilson’s witnesses, Joan Holtz and Alan Murray, each of whom utilized a “*different methodology, [in] which they acknowledged did not apply GAAP*”¹ and concluded that the expert testimony of Kenneth Apple was “*more reliable and more consistent with the evidence presented, in addition to being consistent with GAAP, especially taking into account Respondent’s [Hunter Wilson’s] records . . .*” See Finding of Fact No. 24.

Hunter Wilson appealed the Family Court’s Final Order to the Circuit Court pursuant to West Virginia Code Section 51-2A-14. The Circuit Court entered its Opinion and Order of March 25, 2009 (the “Circuit Court Opinion”) by entering *verbatim* a proposed order submitted by counsel for Hunter Wilson on that same date. The Circuit Court reversed the Findings of Fact regarding the existence of enterprise goodwill and the valuation of said goodwill, asserting each

¹ The Management Agreement between the Hunter Company and National Land Partners required that generally accepted accounting principles (“GAAP”) be utilized to calculate “*net profits*” to be paid to the Hunter Company. Donna Wilson objected to the admission of evidence on the different methodology because no proper foundation had been made; the testimony was not consistent with GAAP; and that expert testimony would be required. See September 11, 2008 Trial Transcript at page 44, lines 24-25; and page 45, lines 1-5.

to be “*clearly erroneous*” factual conclusions by the Family Court.² Amazingly, while the Family Court awarded Donna Wilson the sum of \$4,914,582.50, the Circuit Court awarded Hunter Wilson the sum of \$894,286.

Demonstrating the Circuit Court’s misapplication of the law and its conclusion that the Hunter Company did not possess enterprise goodwill and the award of \$894,286 to Hunter Wilson, the Circuit Court surprisingly elected to remand the case to the Family Court pending the completion of two (2) of the six (6) projects pending and managed by the Hunter Company.³

On April 6, 2009, Donna Wilson filed a Motion for Reconsideration pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. The Circuit Court denied the Motion by Order entered on June 4, 2009.⁴

III. ASSIGNMENTS OF ERROR

1. Whether the Circuit Court misapplied *May v. May*, 214 W.Va. 394, 589 S.E.2d 536 (2003) on the issue of enterprise goodwill?
2. Whether the Circuit Court improperly reversed the Family Court’s well-supported and reasoned Findings of Fact concerning the existence and value of enterprise goodwill for the Hunter Company?

² As addressed later, the Circuit Court concluded that it was undisputed that the Hunter Company had only a single employee — Hunter Wilson. This conclusion by the Circuit Court is remarkable given that Wife’s Exhibit No. 1 (the Management Agreement) required the Hunter Company to have employees, and Hunter Wilson testified that the company had twenty (20) employees, while Donna Wilson testified that the number was twenty (20) to twenty-five (25). The Circuit Court did not explain how it drew the conclusion that “*it was undisputed*” that Hunter Wilson was the only employee in the face of this un rebutted evidence.

³ In the absence of enterprise goodwill, there would clearly be no reason to “*wait and see*” how successful the projects would actually be over time. Without enterprise goodwill, the Hunter Company was worth only the value of its equipment, office furnishings, cash and accounts receivable.

⁴ In his Opposition to the Petition for Appeal, Hunter Wilson asserted that Donna Wilson had not preserved on appeal her objection to the Circuit Court’s reliance upon improperly admitted evidence as noted in Assignment of Error No. 3. Notwithstanding this assertion, Donna Wilson did raise this issue on pages 2 and 3 of her April 6, 2009 Rule 59(e) Motion. Accordingly, this objection to the evidence upon which the Circuit Court relied in reversing the Family Court was, in fact, preserved.

3. Whether the Circuit Court improperly admitted evidence in relation to the “*construction spending*” theory, resulting in an award to Husband, when no foundation was made for the evidence supporting the theory and the theory was not supported by expert testimony?

4. Whether the Circuit Court improperly remanded to the Family Court to determine the outcome of two (2) of the six (6) projects?

IV. SUMMARY OF THE ARGUMENT

This case is one of first impression in West Virginia on the issue of enterprise goodwill, unrelated to a professional practice. In *May v. May*, 214 W.Va. 394, 589 S.E.2d 536 (2003), this Honorable Court determined that enterprise goodwill is part of a marital estate and that personal goodwill is not. This Court revisited the enterprise goodwill issue in *Helper v. Helper*, 221 W.Va. 625, 656 S.E.2d 70 (2007) (“*Helper I*”); and *Helper v. Helper*, 224 W.Va. 413, 686 S.E.2d 64 (2009) (“*Helper II*”). *May* and *Helper I* and *II* each dealt with professional practices — a dental practice in *May* and a chiropractic practice in the *Helper* cases.

This Court has not yet provided guidance to the family courts, circuit courts and litigants in West Virginia in relation to the enterprise goodwill determination and evaluation of goodwill of businesses which are not professional practices. The Hunter Company is a management company contractually obligated to develop, manage, sell and account for six (6) separate real estate development projects. The Hunter Company develops, manages and sells these (6) separate projects, using the skills of twenty (20) to twenty-five (25) highly compensated employees — in addition to Hunter Wilson.

The Family Court concluded that the Hunter Company possessed enterprise goodwill as of the May 2005 separation of the parties after (4) full days of evidence, and specifically identified three (3) factors that supported enterprise goodwill:

- (i) Wife's Exhibit No. 1, the Management Agreement between the Hunter Company and National Land Partners, which provided for continuation of profits, even after the death of Husband;
- (ii) testimony at trial regarding the highly skilled and highly compensated workforce of the Hunter Company of between twenty (20) and twenty-five (25) employees; and
- (iii) the unrebutted expert testimony of Mr. Apple that continuation of profits to the Hunter Company after the death of an individual was the clearest example of enterprise goodwill.

The Circuit Court, on appeal, either abandoned or read far too narrowly, the reasoning of *May*. Moreover, the Circuit Court violated the mandate of *Stephen v. Sherry*, 195 W.Va. 384, 465 S.E.2d 841 (1995); *George v. Godby*, 174 W.Va. 313, 325 S.E.2d 102 (1984); *Smith v. Godby*, 154 W.Va. 190, 174 S.E.2d 165 (1970); *Bettinger v. Bettinger*, 183 W.Va. 528, 396 S.E.2d 709 (1990), by invading the province of the Family Court as the trier of fact on contested factual issues. In *Stephen*, this Court mandated that Findings of Fact and inferences therefrom by a family court "**may not be overturned even if a circuit court may be inclined to make different findings or draw contrary inferences.**" *Stephen* at 852, 395 citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 577, 105 S.Ct. 1504, 1513, 84 L.Ed.2d 518, 530 (1985); *Beck v. QuikTrip Corp.*, 708 F.2d 532, 535 (10th Cir. 1983).

The Circuit Court's error includes the unfathomable conclusion that Hunter Wilson was the only employee of the Hunter Company, and that the issue was "*not in dispute*" in the record. Nothing could be further from the truth. The Management Agreement (Wife's Exhibit No. 1) required that the Hunter Company have employees, with Inland Management Corporation serving as "*administrative paymaster*." See Management Agreement, Section 5.1.6 (Wife's Exhibit 1). Hunter Wilson testified at trial that the Hunter Company had approximately twenty (20) employees, several of whom were compensated more than \$300,000 per year. See May 8, 2008 Trial Transcript at page 122, lines 23-25; page 125, lines 9-19. Hunter Wilson testified about ten (10) sales people, two (2) acquisitions people, four (4) administrative people, his administrative assistant, a technology person, a construction superintendent and himself. See May 8, 2008 Trial Transcript at page 123, lines 6-25; page 124, lines 1-18. Donna Wilson testified that the Hunter Company had between twenty (20) and twenty-five (25) employees. See May 8, 2008 Trial Transcript at page 275, lines 5-16. Even Alan Murray, the CFO of National Land Partners, testified that Inland Management served as "*common paymaster*" for the employees of the Hunter Company, employees other than Hunter Wilson. See May 9, 2008 Trial Transcript at page 139, lines 15-25; page 140, lines 1-13. Pursuant to the *May* reasoning, a skilled workforce can support a finding of enterprise goodwill. See *May* at 541.

One can only wonder how or why the Circuit Court viewed this record as supporting its conclusion that it was "*not in dispute*" that Hunter Wilson was the only Hunter Company employee, given the content of the Management Agreement and the testimony of three (3) witnesses.

The Circuit Court improperly rejected and ignored the unrebutted expert testimony of certified public account, Ken Apple and ignored the mandate of *Bettinger v. Bettinger*, 183

W.Va. 528, 396 S.E.2d 709 (1990) by “*improperly rejecting competent expert testimony which had not been rebutted.*” *Id.* at 386, 174. See also *Helper II* at Syl. Pt. 4, *George v. Godby*, 174 W.Va. 313, 325 S.E.2d 102 (1984), quoting Syllabus Point No. 4, *Smith v. Godby*, 154 W.Va. 190, 174 S.E.2d 165 (1970); Syllabus Point 1, *Bettinger v. Bettinger*, 183 W.Va. 528, 396 S.E.2d 709 (1990).⁵

Other than invading the province of the trier of fact and weighing the evidence a second time, the Circuit Court did not explain why it disregarded the evidence presented by Donna Wilson and her expert to the Family Court or why it supplanted its judgment. Moreover, the Circuit Court’s reliance upon *Webb v. Chesapeake*, 105 W.Va. 555, 144 S.E. 100 (1928) was entirely misplaced. The Circuit Court asserted that, pursuant to *Webb*, it was **not bound** to accept Mr. Apple’s expert testimony because of the mandate of *Webb* and that “*Mr. Apple’s opinions were outweighed by the actual end-of-project calculations of manager fees.*” See Circuit Court Opinion at page 7 (emphasis added). Regrettably, the Circuit Court ignored the fact that *Webb* mandates that the “*trier of fact*” may elect to give greater weight to non-opinion evidence because “*it is for the triers of fact to decide which witnesses they will believe or rely upon.*” *Webb* at 103 (emphasis added). The Circuit Court was not the trier of fact. The Family Court explained exactly why it concluded, in its scope of discretion, that Mr. Apple’s opinions were more consistent with the evidence than were the theories presented by Hunter Wilson regarding the calculation of management fees.

Finally, the “*construction spending theory*” advanced by Hunter Wilson at trial was improperly admitted into evidence over objection, as such theories necessarily would have required a proper foundation and expert testimony.

⁵ The Circuit Court’s rejection of Mr. Apple’s expert opinion is also inconsistent with *Helper II*.

V. ARGUMENT

A. **Whether the Circuit Court Misapplied *May v. May*, 214 W.Va. 394, 589 S.E.2d 536 (2003) on the Issue of Enterprise Goodwill? (Assignment of Error No. 1)**

In *May*, this Court identified a variety of factors that would be evidence providing a factual basis for the existence of enterprise goodwill. This Court noted that “*product names, business locations and skilled labor forces are common examples of enterprise goodwill*” (*Id.* at 399) and that enterprise goodwill can be based upon “*established relations with employees, customers and suppliers and may include a business location, its name recognition and its business reputation.*” *Id.* at 541-42, 399-400. Donna Wilson respectfully asserts that the Family Court correctly applied this standard, while the Circuit Court either completely ignored or misunderstood the well-reasoned mandate of *May*.

1. **The Hunter Company Had Seven (7) Business Locations and Product Names Related Thereto, Which Prove the Existence of Enterprise Goodwill**

The Hunter Company’s business, as required by the Management Agreement, was to acquire, subdivide, build roads and sell real estate for National Land Partners. The properties were the “*product*” that the Hunter Company was selling for National Land Partners.

“*Location, location, location*” is a mantra for the real estate industry⁶ and is a generally accepted maxim that the location of real estate is the most important marketing and marketability factor. In *May*, it was noted that the enterprise value of business can be a result of “*product names*” and “*business locations.*” *Id.* The Hunter Company benefitted from both. As noted by William Safire in the *New York Times* article identified in Footnote 4 above, “*location, location, location*” are the three most important “*rules*” for successful real estate ventures.

⁶ Real estate tycoon, Lord Harold Samuel is credited with coining the expression: “There are three things that matter in property: location, location, location.” See William Safire, “*Location, Location, Location*”, *The New York Times*, June 26, 2009.

The evidence was undisputed that, at the time of separation, the Hunter Company had no less than seven (7) business locations, which each evidence enterprise goodwill.

a. **The Hunter Company's 17,000 Square Foot Corporate Office**

The Hunter Company moved its executive offices from 1800 West King Street in Martinsburg to 470 B&O Overpass Road in Martinsburg in 2004. *See* January 7, 2008 Trial Transcript at page 60, lines 16-18; page 110, lines 20-25; page 11, line 1; and May 8, 2008 Trial Transcript at page 84, line 25 and page 85, lines 1-8.

The 17,000 square foot office at B&O Overpass Road was acquired as part of the Crossings on the Potomac project which will be discussed later. *See* May 8, 2008 Trial Transcript at Page 85, Lines 1-8. Hunter Wilson testified that approximately twenty (20) of the Hunter Company's twenty-five (25) employees worked at the corporate office. *See* May 8, 2008 Trial Transcript at page 85, lines 14-17. Donna Wilson testified that it was a significant undertaking to move the Hunter Company's large staff from the West King Street location to the office at B&O Overpass. *See* May 8, 2008 Trial Transcript at page 262, lines 14-19. Donna Wilson also testified that twenty-three (23) to twenty-five (25) employees comprised the large staff working in that 17,000 square foot office. *See* May 8, 2008 Trial Transcript at page 274, lines 3 through page 276, line 23.

b. **Ashton Woods in Hardy and Hampshire Counties**

Ashton Woods was completed prior to the separation of the parties but was discussed frequently in the testimony presented at trial. *See* May 8, 2008 Trial Transcript at page 145, line 25; page 146, lines 1-2; page 149, lines 8-16; page 156, line 25; and page 157, Lines 1-4. Further the Ashton Woods project was specifically identified in Mr. Wilson's Exhibits, 6, 7 and

12. According to Hunter Wilson's Exhibit 7, the Hunter Company spent \$1,790,355.35 advertising the product known as "*Ashton Woods*."

c. **Bluffs on the Potomac in Hampshire and Mineral Counties**

Donna Wilson offered into evidence two (2) full page ads published by the Hunter Company in the *Washington Post*. See Wife's Exhibit Nos. 29 and 30. These full page ads did not market Hunter Wilson — rather they marketed the "*location*" of Bluff's on the Potomac, the "*product*" name and price. These full page ads were representative of the type of ads published by the Hunter Company prior to separation, and were designed by the Hunter Company's highly skilled staff to sell "*location, location, location*" and price. In fact, Donna Wilson's Exhibit 15, a "*project to date*" statement dated March 30, 2008 indicates that \$3,160,263.97 was spent in advertising Bluffs on the Potomac.

Bluffs on the Potomac was also the subject matter of other evidence submitted to the Family Court including Hunter Wilson's Exhibits 4, 11 and 16. The Bluffs on the Potomac project is also known as the Westvaco Tract. Thus, when Exhibits 4, 11 and 16 refer to Westvaco it is the same project as Bluffs on the Potomac.

Donna Wilson's Exhibits 10, 12, 15 and 16 also relate to Bluffs on the Potomac and/or the Westvaco project. Wife's Exhibit 10 shows the gross sales value of the project as \$55 million. This project is also mentioned repeatedly in the transcripts of the four day trial. See May 8, 2008 Trial Transcript at page 45, lines 13-21; page 46, lines 9-21; page 52, lines 5-25; and pages 53-58.

d. **Crossings on the Potomac in Berkeley County**

Crossings on the Potomac in Berkeley County was identified in Hunter Wilson's Exhibit 13 and was also identified in the May 8, 2008 Trial Transcript at page 85, lines 4-10; page 146, lines 1-7; page 97, lines 24-25; page 98, lines 1-6 and page 22, lines 7-11.

The Crossings is the project that also had a residence which became the Hunter Company's 17,000 square foot office.

e. **Overlook at Greenbrier**

Overlook at Greenbrier is identified in Hunter Wilson's Exhibits 1, 8 and 14 and in Donna Wilson's Exhibit 8. Hunter Wilson's Exhibit 1 identified the Overlook property as being 4,149 acres in Greenbrier County, West Virginia. Schedule A attached to Exhibit 1 identified the objective of selling eighty-five single family lots from the Overlook tract at a total sales price of \$10.4 Million Dollars. See May 8, 2008 Trial Transcript at page 41, lines 7-25; page 42, lines 1-25; page 70, lines 19-25; page 71, lines 1-25; page 72, lines 1-2; page 139, lines 16-25; and page 140, lines 1-7. The advertising expended for this project through March 30, 2008 was \$716,977 according to Hunter Wilson's Exhibit 8.

f. **The Point in Jefferson County**

The Point was a project comprised of forty-five (45) five acre lots in Jefferson County, West Virginia. See May 8, 2008 Trial Transcript page 72, lines 12-22 and page 163, lines 10-24. The Point was also identified in Hunter Wilson's Exhibits 2, 9, 17 and 18. According to Hunter Wilson's Exhibit 9, the Hunter Company spent \$470,199.93 advertising the product known as "The Point."

g. Springs in Jefferson County

The Springs was identified in Donna Wilson's Exhibits 9 and in Hunter Wilson's Exhibit 3, 10 and 15. The Springs was also identified and discussed during the January 7, 2008 Trial Transcript at page 91, lines 17-24; page 92, lines 8-13; page 122, lines 7-19; and page 130, lines 2-7 and in the May 8, 2008 Trial Transcript at page 43, lines 20-22; page 70, lines 6-18; and page 143, lines 1-5. According to Hunter Wilson's Exhibit 10, the Hunter Company spent \$194,560.46 advertising the product known as the "Springs."

2. The Hunter Company's Advertising Programs and Campaigns are Evidence of an Enterprise

From the evidence presented at trial, it was clear that the Hunter Company's extraordinary success is a result, in part, of well-developed advertising campaigns. The evidence presented at trial indicated that the primary approach to advertising was to market the various products to prospective purchasers in the Washington Metropolitan area. It seems the business plan was to get people close to or inside Washington, D.C.'s beltway to buy real property in West Virginia. These programs were described during Hunter Wilson's testimony about the marketing programs that he and his wife established in the early years of the Hunter Company.

Q. And isn't it true that you and she developed sales programs to market your products?

A. She helped me write ads, yes, sir.

Q. Pardon me?

A. She helped me write ads, yes, sir.

Q. And you devised a certain approach to selling your real estate, is that true?

A. Yes, sir.

Q. And in fact you marketed primarily in the Washington Metropolitan area?

A. Yes, sir.

Q. For large acreage lots located in West Virginia?

A. Yes, sir.

Q. And you would market on the radio?

A. Some.

Q. And you would also market in newspaper ads?

A. That was the primary.

See May 8, 2008 Trial Transcript at page 80, lines 1-18.

Q. Okay, but the two of you implemented these programs for your own businesses?

A. Yes, sir.

See May 8, 2008 Trial Transcript at page 81, lines 8-10.

The Hunter Company spent an extraordinary amount of money on advertising. Although evidence was not presented at trial regarding the advertising expenditures for all six (6) projects at issue in this marital estate, the sum expended for Ashton Woods, The Bluffs, The Springs and The Point totaled more than \$4.5 million. This kind of advertising budget is clearly indicative of an enterprise selling a product.

Donna Wilson's Exhibits 29 and 30 are an example of the splashy, full color, full page ads that the Hunter Company purchased for its products and projects in the *Washington Post*. Although admittedly Exhibits 29 and 30 were published in the *Washington Post* days before the last day of trial, the evidence of Donna Wilson was clear that these were examples of the types of ads placed with the *Post* to market the Hunter Company projects. While specific evidence was offered about newspaper ads, Hunter Wilson also noted on page 80, lines 15-16 of the May 8, 2008 Trial Transcript, that the Hunter Company also marketed products on the radio.

The evidence also indicates that the Hunter Company enterprise marketed its products through the internet, just as most successful businesses do in these modern times.

Q. What do those four other administrative people actually do?

A. *Three of them are secretaries, one of those three also helps deal with the computers and the internet and then we have a lady downstairs that helps deal with the computers and the internet and helps with some of the marketing tasks.*

Q. *Now you market your properties through the internet, don't you?*

A. *Not that much.*

Q. *You have a website that offers it for sale and describes the projects?*

A. *Sometimes we open it up and sometimes we keep it shut down.*

Q. *The web site you mean?*

A. *Yes, sir.*

See May 8, 2008 Trial Transcript at page 124, lines 12-25; page 125, lines 1-3.

3. **The Hunter Company Possessed Enterprise Goodwill by Virtue of a Workforce of Twenty (20) to Twenty-Five (25) Highly Skilled Employees**

A skilled labor force is a common attribute for businesses possessing enterprise goodwill.

See May at 541, 399. The Circuit Court asserted that it was undisputed that the Hunter Company only had a single employee, Hunter Wilson. The Circuit Court explained this conclusion as follows:

In addition, the Family Court was clearly wrong when it found that HCWV [the Hunter Company] "has a qualified and highly compensated work force" The evidence was not in dispute that this "work force" is composed entirely of employees of Inland Management Co., an NLP [National Land Partners] subsidiary. HCWV has only one employee, Mr. Wilson and if he left HCWV, it would collapse entirely."

See Circuit Court Opinion at page 15. (Emphasis added.)

The Circuit Court's conclusion that the "evidence was not in dispute" is shocking given the record before the Family Court.

a. **The Management Agreement Requires the Hunter Company to Have Skilled Employees**

First and foremost, Wife's Exhibit 1 was the Management Agreement dated December 3, 2004 between the Hunter Company and National Land Partners. The Management Agreement identifies eleven (11) separate obligations of the Hunter Company in relation to the management of real estate projects owned by National Land Partners. A specific condition of the Management Agreement is for the **Hunter Company to have employees** to "manage, operate, develop and market each Scheduled Property and to arrange for "employees" to perform these tasks."⁷ Paragraph 5.1.6 succinctly states this obligation of the Hunter Company, which is identified as "Manager":

*5.1.6 **To arrange for the employment** from time to time, on such terms and for such compensation as may be mutually agreed by the Company and Manager, of persons to manage, operate, develop and market each Scheduled Property. Such persons shall be employees of Manager. Company shall have no employees in connection with the Project. Manager shall be entitled to utilize the services and employee benefit packages of Inland Management Corporation which will act as a common paymaster for Manager. Manager shall hold Company and Inland Management Corporation harmless from and against any and all claims, actions, damages, liability and expenses (including attorneys fees and expenses) (called "Liabilities"), in connection with or arising from or out of Manager's employment of such Project's employees, except liability for Inland Management Corporation's failure to properly issue paychecks to or administer employee benefit packages for Manager's employees, and the Company will hold Manager harmless from any Liabilities of the Manager in connection with or arising from or out of Company's employment of its separate employees if such liability would be personal to the Manager. To the extent provided by all applicable labor and privacy laws, Inland Management Corporation shall have access to all employee files, and shall also be entitled to create and maintain separate files on such project's employees as Manager deems necessary.*

See Management Agreement at page 5. (Emphasis added.)

⁷ Husband asserts that there were six (6) "Scheduled Properties" to be considered at the time of separation.

The Circuit Court made no reference to this provision of the Management Agreement and did not explain a basis for ignoring a central requirement of the most important contract of the Hunter Company in this valuation case.

b. **Hunter Wilson Admitted that the Hunter Company Had Twenty (20) Employees**

The Circuit Court's conclusion that the issue was "*not in dispute*" cannot be reconciled with Hunter Wilson's trial testimony that the Hunter Company had at least twenty (20) employees:

Q. How many employees does Hunter Company of West Virginia have currently?

A. About twenty.

See May 8, 2008 Trial Transcript at page 122, lines 23-25. (Emphasis added.)

Q. How many administrative staff members that do duties similar to Kathy Cummings does Hunter Company have?

A. Kathy's unique in what she does so.

Q. Pardon me?

A. Kathy's the only one that does her duties.

Q. Do you have people that supervise construction activities?

A. I have one person, yes, sir.

Q. Do you have people that handle the sales?

A. Sales managers answer to me.

Q. How many sales managers do you have?

A. Two.

Q. How many sales people do you have?

A. I think there is five on each team.

Q. How many teams are there?

A. Two.

Q. So you have ten sales people?

A. Yes, sir.

Q. So by my count we're up to sixteen that you have, Kathy Cummings, you've got a construction manager, you've got two sales managers and ten sales people?

A. Well I think the ten includes the two managers.

Q. Okay so we have twelve?

A. Uh-huh (affirmative response)

Q. You said you had about twenty, who are the other eight employees?

A. Two acquisitions people and there's four other administrative people.

Q. What do those four other administrative people actually do?

A. Three of them are secretaries, one of those three also helps deal with the computers and the internet and then we have a lady downstairs that helps deal with the computers and the internet and helps with some of the marketing tasks.

See May 8, 2008 Trial Transcript at page 123, lines 6-25 and page 124, lines 1-18.
(Emphasis added.)

c. Donna Wilson Testified about the Hunter Company Employees

The unsupported conclusion of the Circuit Court, that there was “no dispute” that Hunter Wilson was the sole employee, likewise cannot be reconciled with the testimony of Donna Wilson who testified that the Hunter Company began hiring employees in 1993:

Q: Okay. You stated that you helped – hired staff starting I believe in 1993. Now did those staff at that point work for Hunter Company of West Virginia or is it the same type of arrangement you have now? Or that Mr. Wilson has not?

A: The same –

Q: Who were they paid by?

A: Our employees have always worked for Hunter Company of West Virginia.

See May 8, 2008 Trial Transcript at page 239, lines 22-25; page 240, lines 1-10.

Q: When did that change?

A: Their payroll came from, excuse me, their paycheck came from our payroll management company, which was in the management and then, and/or National Land Partners.

Q: I'm not asking about shares, I'm asking about employees, people that worked there, that got a paycheck, had withholding from it, had Social Security wages paid from them, et cetera.

A: Every employee that works and has worked for us will say that they will work for Hunter Company of West Virginia, its owned by Hunter and Donna Wilson. They tell their customers that they are buying land from Hunter Company of West Virginia, owned by Hunter and Donna Wilson. Today ---

Q: Who do the paychecks come from?

A: Our payroll company, Inland Management.

Q: Okay, so not from Hunter Company of West Virginia, correct?

A: But we---

Q: Is that correct?

A: Yes but what we are telling our employees what Hunter was telling our employees was that Inland Management was our company that kept track of 401K, insurance, payroll. They placed our ads for us.

See May 8, 2008 Trial Transcript at page 240, lines 22-25; page 241, lines 1-16.

Not only did Mrs. Wilson emphatically state that the highly skilled staff worked for the Hunter Company, with Inland Management as paymaster, but Mrs. Wilson was able to specifically identify the role of each employee when she testified about twenty-three to twenty-five employees, including an in-house attorney.

Q: How many managers, other than Mr. Wilson, were employed by the company?

A: Two sales managers, an office manager, myself, as far as whatever duties I did, we had a gentleman that took care of maintenance and acquisitions, so five.

Q: And I thought that you said that when you moved into the 17,000 square foot new office, you had a large staff that was moving into that office?

A: Yes.

- Q: How many employees were working at the new location when you moved into the Quail Creek or Caste Hill property in the fall of 2004?*
- A: We had approximately ten salespeople, and approximately eight secretaries, including the secretaries that handled the closings, Hunter, myself, a marketing girl, one, two, maybe three, two or three acquisitions men.*
- Q: Okay so you had at least three acquisition people?*
- A: And an attorney.*
- Q: Okay three acquisition people, is that correct?*
- A: Two or three, yes.*
- Q: Several people that actually worked on the construction side.*
- A: Yes.*
- Q: How many people worked on the construction side, other than your husband?*
- A: The, one particular gentleman, Tom Norton, and then two to three acquisitions gentlemen as well.*
- Q: Okay, so that's five or six on that side.*
- A: Mm-hmm.*
- Q: Plus did you say ten salespeople?*
- A: Yes.*
- Q: Plus two sales managers?*
- A: Yes.*
- Q: That's eighteen.*
- A: You could, yeah, yeah. Ten, we had approximately ten, including managers, ten, eleven.*
- Q: Plus a marketing person.*
- A: Yes.*
- Q: That's seventeen or eighteen.*
- A: Yes.*
- Q: Plus his personal assistant, Miss Cummings?*
- A: Yes.*

Q: So that's nineteen?

A: Yes.

Q: And also someone else, anybody else, and you had various secretaries?

A: We had enough staff to answer the phone twelve hours a day and always have, almost always have two of them there.

Q: So how many were on the staff, how many secretaries were on the staff?

A: At least five.

Q: At least five. So we are up to 22 or 23 employees?

Q: And you also had people who handled the closing process?

A: Yes.

Q: How many people handled closing.

A: Two.

Q: Two. So in 2004 you had approximately 23 to 25 employees other than Mr. Wilson who were working on the business of the Hunter Company?

A: Yes.

Q: Okay, how, how many people were there in 2005?

A: The same, about the same it should have been.

Q: And how many people were there in 2003?

A: In 2003? Less. Less.

See May 8, 2008 Trial Transcript at page 273, lines 22-25; page 274; page 275; page 276, lines 1-21.

Accordingly, there was a significant record of twenty-five employees of the Hunter Company, many of whom were highly skilled. This all supported the Family Court's Finding of Fact No. 16.

**d. Alan Murray Testified About the
Paymaster Status of Inland Management**

Alan Murray is the CFO of the National Land Partners, the other party to the Management Agreement (Wife's Exhibit 1). As noted above, the Management Agreement, Paragraph 5.1.6 in particular, required all of the employees engaged to "*manage, copy, operate, develop and market...*" each property to be "*employees of Manager.*" The Management Agreement specifically provided that Inland Management would be the "*common paymaster*" for Hunter Company employees; but the employees would all be employees of the Hunter Company.

On the third day of trial, Alan Murray testified about this arrangement:

Q: Before I move into that area a little bit more, I forgot one other thing to ask you, and that's about Inland Management. What is Inland Management?

A: Simplest way for me to describe Inland Management is that it is a common paymaster. Because we do business in a lot of separate limited liability companies, it would be...it would be very difficult and nearly impossible to keep switching employees from one entity to another.

So instead of doing so, we have everyone be an employee of Inland Management, and then the individual operating companies in the different states utilize the Inland employees to get their work done. Anyone who works on a project here in west Virginia, even though they're under Mr. Wilson's supervision, their paycheck is going to come from Inland Management. That way, we can give them a 401(k) that will be there indefinitely, health insurance, the typical employee benefits.

Q: So, the 20 employees that work at Hunter Company in West Virginia are actually paid by Inland Management in order to get the employee benefits that are common to all employees across the country that work under these circumstances. Right?

A: Correct.

See May 9, 2008 Trial Transcript at page 139, lines 15-25; page 140, lines 1-14.

(Emphasis added).

Mr. Murray's testimony also supports the Family Court's Finding of Fact on this issue.

e. **Hunter Company Employees were Highly Skilled and Highly Compensated**

Not only did Hunter Wilson admit that the Hunter Company had approximately twenty (20) employees, but his own description of their duties and obligations makes it clear that many were highly skilled. His testimony regarding their compensation is also important, because this Court may certainly infer reasonably that only a highly skilled employee would be paid more than \$300,000 per year.

- Q. What does your most highly compensated sales manager make?*
A. Without going back and pulling the records, sir, I don't know off the top of my head.
- Q. Less than three hundred thousand dollars?*
A. Some of them make less, some of them make more.
- Q. Anybody make...somebody makes more than Three Hundred Thousand Dollars?*
A. If they would have hit all their bonuses, doing exceptionally well in sales, they can.

See May 8, 2008 Trial Transcript at page 125, lines 9-19.

Donna Wilson confirmed that the work force was both highly skilled and highly compensated, indicating that most of them were paid more than \$100,000 per year:

- Q: And how many of those – when I say highly compensated I mean to say people who are compensated, oh, say, more than 50,000 dollars per year? How many of those employees were known by you to be highly compensated?*
A: Over half.
- Q: Okay. Of the sales staff, how many of those would be highly compensated?*
A: Every one of them.
- Q: Of the staff, how many of them made more than 100,000 per year?*
A: All of them.
- Q: Did any of them make more than 200,000 dollars a year?*
A: Probably all of them.

Q: Okay, so they were highly, it was a highly skilled staff?

A: Yes.

Q: And do you believe that highly skilled sales staff have anything to do with the successes in 2004?

A: Yes.

Q: And how 'bout with, did that highly skilled sales staff have anything to do with the success in 2005?

A: Yes.

See May 8, 2008 Trial Transcript at page 276, lines 22-25; page 277, lines 1-14.

Finally, Donna Wilson provided un rebutted testimony that the Hunter Company was an enterprise so complicated and multi-tiered that, amongst its highly skilled and highly compensated staff, was a licensed attorney. See May 8, 2008 Trial Transcript at page 274, lines 15-17.⁸

4. **The Management Agreement is the Type of “Existing Arrangement” that Gives Rise to Enterprise Goodwill**

In *May*, this Court held that:

[E]nterprise goodwill 'is an asset of a business and may be attributed to a business by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business. Additionally, we hold that 'personal goodwill' is a personal asset that depends on the continued presence of a particular individual and may be attributed to the individual owner's skill, training or reputation.

Id. at 406, 548. (Emphasis added.)

The Management Agreement between the Hunter Company and National Land Partners is precisely the type of “existing arrangement” contemplated by this Honorable Court in *May*.

⁸ Mrs. Wilson hopes that this Court will take judicial notice that being an attorney requires some level of training. Whether a particular attorney is skilled is frequently the subject of fierce debate. See May 8, 2008 Trial Transcript at page 274, lines 15-17.

As is set forth repeatedly in the record, Paragraph 3.2.2 of the Management Agreement provides specifically as follows:

3.2.2. In the event of the death or incapacitation of L. Hunter Wilson, Company will hire a substitute person or entity to manage the Project. In the event a substitute is hired, Manager shall be entitled to its compensation as determined in Section 6 using generally accepted accounting principles consistently applied, however, the cost of such substitute manager shall be an expense of the Project.

(Emphasis added.)

Section 3.2.2 of the Management Agreement supports the Family Court's conclusion that enterprise goodwill existed. Personal goodwill is found when the asset at issue depends upon the "continued presence of a particular individual." The Management Agreement provided specifically for the continuation of profits and revenue to the Hunter Company, even after the death or disability of Hunter Wilson. The continued presence of Hunter Wilson was not required, although a replacement manager would be required to manage the Hunter Company's highly skilled workforce, as contemplated by the Management Agreement.

The Circuit Court characterized Section 3.2.2 of the Management Agreement as simply being a "method of payment to [the Hunter Company] . . . for Mr. Wilson's work in progress upon his death or incapacity." Further, the Circuit Court opined that:

"Ms. Wilson can point to no other fact in this case at bar that supports the existence of enterprise goodwill, nor does Ms. Wilson cite to any case law that supports this theory, that the existence of an 'income stream' contract protecting the value of work performed ipso facto creates enterprise goodwill." See Circuit Court Opinion at page 14.

The Circuit Court Opinion simply ignores this Court's mandate in *May*. The Circuit Court completely disregarded the guidance from *May* regarding location, product name, highly skilled and compensated workforce and the impact of the "existing arrangement" clearly

evidenced by the Management Agreement. In the briefing to the Circuit Court, all of these issues were raised with specificity.

The Circuit Court treated the continuing profits from Section 3.2.2 as an account receivable for work already performed by Hunter Wilson, which treatment is entirely inconsistent with Paragraph 5.1.6 of the Management Agreement, requiring the Hunter Company to have employees to “*manage, operate, develop and market each scheduled property.*” The Circuit Court did not explain how and why it ignored or discounted the testimony of Hunter Wilson about the important work to be done by each of (i) the Hunter Company’s administrative employees; (ii) the Hunter Company’s construction superintendent; (iii) the Hunter Company’s ten (10) sales people; (iv) the Hunter Company’s two (2) sales managers; and (v) the Hunter Company’s four (4) other administrative people through the conclusion of each project. Simply stated, the Circuit Court did not apply the *May* analysis. Further, there was no evidence before the Court that the “*profits*” that were the subject of Mr. Apple’s opinions were “*accounts receivable*” for Hunter Wilson’s work. Importantly, if the profits were merely “*accounts receivable*” such “*accounts receivable*” would clearly have been part of the marital estate, just like cash and physical assets, and be subject to equitable distribution. Either way, the Circuit Court’s conclusions are erroneous.

5. The Expert Testimony of Mr. Apple Supports Both the Existence and Appropriate Value of Enterprise Goodwill

On May 9, 2008, Kenneth Apple a practicing certified public accountant was qualified and testified as an accounting and valuation expert. Prior to his testimony, Hunter Wilson, through counsel, stipulated that Mr. Apple was qualified to offer expert opinions in the areas of certified public accounting and business valuation pursuant to the West Virginia Rules of

Evidence. *See* May 9, 2008 Trial Transcript at page 5, lines 24-25; and page 6, lines 1-11. Mr. Apple testified that he had been qualified as a valuation expert on approximately twenty (20) prior occasions. *See* May 9, 2008 Trial Transcript at page 6, lines 14-17.

a. **Unrebutted Expert Testimony Supported the Existence of the Existence of Enterprise Goodwill**

In *Helper I*, this Court remanded to a family court where the only issue was the valuation of a closely held business, a chiropractic practice. In *Helper I*, this Court provided clear guidance that a trial court must articulate its reasons for finding the existence or absence of enterprise goodwill. *See Helper I* at 628, 629.

Consistent with the mandate of *Helper I*, Mr. Apple opined to a reasonable degree of accounting and valuation certainty that the Hunter Company possessed “*enterprise goodwill*,” based principally on the terms and conditions of the Management Agreement. *See* May 9, 2008 Trial Transcript at page 68, line 25 through page 70, line 8.

Mr. Apple also opined that the **clearest example of enterprise goodwill**, as opposed to personal goodwill, **is where income or profit would continue** to be earned by a company even **after the death of an owner**, such as Hunter Wilson. (*See* May 9, 2008 Trial Transcript at page 66, lines 20-25; page 68, lines 18-25; and page 69, lines 1-24.)

On cross-examination, Mr. Apple was asked whether there were other employees important to the Hunter Company’s success or failure. Mr. Apple responded as follows:

A: *I believe that I heard testimony yesterday that there were twenty other highly compensated employees as well as the Management Agreement with very experienced National Land Partners. So yes.*

See May 9, 2008 Trial Transcript at page 104, lines 22-25.

Although the Family Court and the Circuit Court in this case did not have the benefit of *Helper II* (decided on November 2, 2009), the holding in *Helper II* is instructive in divining the Circuit Court's errors. In *Helper II*, this Honorable Court confirmed the vitality of Syllabus Point 1 of *Bettinger v. Bettinger*, 183 W.Va. 528, 396 S.E.2d. 709 (1990).

A measure of discretion is accorded to a family law master in making value determinations after hearing expert testimony. However, the family law master is not free to reject competent expert testimony which has not been rebutted. This statement is analogous to the rule that "[w]hen the finding of a trial court in a case tried by it in lieu of a jury is against the preponderance of the evidence, is not supported by the evidence, or is plainly wrong, such finding will be reversed and set aside by the Court upon appellate review." Syllabus Point 1, in part, *George v. Godby*, 174 W.Va. 313, 325 S.E.2d 102 (1984), quoting Syllabus Point 4, *Smith v. Godby*, 154 W.Va. 190, 174 S.E.2d 165 (1970).

Helper II at 74 (Emphasis added).

While the Family Court in this matter followed *Bettinger* and *Helper*, the Circuit Court did not; nor did the Circuit Court even cite *Helper I* in its twenty-two page Opinion and Order.

b. Unrebutted Expert Testimony, To a Reasonable Degree of Accounting Certainty Established the Value of Enterprise Goodwill

Mr. Apple testified to a reasonable degree of accounting certainty that the net present value of the Hunter Company on the date of separation, including said "goodwill", was the sum of \$9,384,420.00. See May 9, 2008 Transcript at page 46, lines 4-13; and page 68, lines 18-24. Mr. Apple explained that he calculated the net present value by reducing the future income for the Hunter Company of \$11,899,138.00 to net present value, using an appropriate discount rate.

(See May 9, 2008 Transcript at page 39, lines 2-20; page 43, lines 1-21).⁹ The amount of future income for the Hunter Company was derived from the accounting records of the Hunter Company and National Land Partners, as explained by Mr. Apple during his testimony on May 9, 2008.

Q. Just so I'm clear, Mr. Apple, on the interest along the top row where it says revenue for each project, now Mr. Printz used the word "your projections," and you were talking about where the projections are from. I'm just making sure I understand it. To the extent by way of example, the revenue numbers for the three projects up there, totaling \$75,327,631. To reach your opinions, where did you get those revenue numbers?

A. I got those off of the projected financial statements that were provided to me.

Q. So, and whose projected financial statements?

A. Again, they were prepared by either National Land Partners, Inland Management, Hunter Company of West Virginia, Hunter Wilson or any combination thereof.

Q. So all the projections shown on this report that resulted in your opinions regarding sales, and costs of development, and cost of sales, and projected profit are from Hunter Company of West Virginia or Inland Management?

A. Yes.

Q. So you did not estimate projections yourself? You relied 100% on the information they provided?

A. That's correct.

Q. And the most recent information they provided?

A. Yes.

See May 8, 2008 Transcript at page 112, lines 9-25; page 113, lines 1-11.

Q. And where did you get that projected net profit?

A. Again, that was from the projected financial statements prepared by them.

⁹ The future income also included \$2,608,275 of "manager fees receivable" and not paid, as of the date of separation. See May 9, 2008 Trial Transcript at page 44, lines 10-25. Using GAAP, Mr. Apple concluded that \$2,608,275 was due on the date of separation, while Hunter Wilson's "construction spending" theory, without expert opinion, asserted that Donna Wilson was overpaid prior to separation. This is another contested factual issue resolved in favor of Donna Wilson by the Family Court.

- Q. Okay. And so today you've offered an opinion, you've offered your opinion. You said that the gross projected net revenue or net profit was \$11,899,138; is that correct?
- A. That's correct.
- Q. And can you tell the Court how it is that, that projected net profit number changed from the \$11,434,432 that you did in August of '06.
- A. Yes. **They periodically recast their projections, and I use the latest one that they've given me.**
- Q. Okay. So to make sure I understand this correctly, the projected net profit of \$11,434,432 was based on documents submitted to you from Hunter Company of West Virginia by Inland Management?
- A. Yes.
- Q. And when you increased that amount to \$11,899,138, once again it was based on modified information as of October of '07 from Hunter Company of West Virginia and Inland Management?
- A. Yes. I did not increase that number. **They did.**
- Q. Okay. And then when you achieved your net present value calculation, you used their projection as the future revenue and simply reduced it to present value after deducting the management fees we discussed before?
- A. That's correct.

See May 8, 2008 Trial Transcript at page 114, lines 21-25; page 115, lines 1-25; page 116, lines 1-2 (Emphasis added).

When Mr. Apple referred to "them," "they" and "their," he was referring to the Hunter Company and Inland Management.

Only a small portion of the accounting documents upon which Mr. Apple relied were offered into evidence by Wife. Most were introduced into evidence or produced by Husband and/or National Land Partners. By way of example, Exhibit 8 was a report dated October 15, 2007 for the Overlook Project; Exhibit 9 was a spreadsheet showing the financial status of the Springs Project following completion; Exhibit 10 was a recosting project evaluation statement for the Westvaco Project dated October 2, 2007; and Exhibit 16 was a project to date statement for the Westvaco Project dated March 30, 2008. These documents generated by the Hunter

Company and National Land Partners demonstrate conclusively what their own business accounting records disclosed about expected net profits after the date of separation.

In the Circuit Court's opinion, Mr. Apple was criticized for not taking into consideration alleged overpayments of manager fees for three of the six projects that were completed after the date of separation. The Circuit Court's conclusion was erroneous for two reasons. The first relates to misconduct by the Mr. Wilson at trial. It is undisputed in the record that the Hunter Wilson was ordered to produce all documents relevant to the valuation issue, including monthly operating reports. In fact, on May 9, 2008, the Court first excluded information offered. *See* May 9, 2008 Trial Transcript at page 160, lines 7-19.¹⁰ Notwithstanding an Order to produce the same, no such documents were produced. As such, Mr. Apple's opinions were based on the several thousand pages of accounting documents produced and provided to him consistent with the Court's Order. Certainly the Family Court was justified in accepting Mr. Apple's opinion based on documents produced and it was free to disregard any additional evidence that Hunter Wilson failed to provide pursuant to the Court's Order.

The second reason that the Circuit Court's criticism of Mr. Apple's testimony is misplaced is the issue of GAAP. The Circuit Court apparently was not concerned that the Management Agreement required the application of GAAP for the calculation of net profits or manager fees. The Family Court specifically addressed this issue in Finding of Fact No. 24:

24. Hunter Wilson did offer testimony of Joan Holtz and Alan to counter this by utilizing a different methodology, which they acknowledged did not apply GAAP. The Court is satisfied that the methodology of Mr. Apple, rather than that of Respondent's witnesses, is the more reliable and more consistent with the evidence presented, in addition to being consistent with GAAP, especially taking into account Respondent's records, as hereinafter referenced. Though Mr.

¹⁰ The Family Court first decided to exclude the information which had not been produced pursuant to a previous Order. *See* May 9, 2008 Trial Transcript at page 160, lines 15-17. The Family Court reconsidered and allowed the information and permitted additional discovery. *See* May 9, 2008 Trial Transcript at page 188, line 7 through page 190, line 24.

Apple's analysis relied on certain projects, it, importantly, was based on the information provided by Respondent and applied GAAP.

This explains why the so called "*construction spending theory*" would show overpayments of manager fees, while analysis of the same data pursuant to GAAP as testified by Mr. Apple, shows over \$11 Million Dollars in earned or projected manager fees.

Article 6.2 of the Management Agreement with National Land Partners required that net profits be calculated according to GAAP. Mr. Apple testified that he had received several thousand pages of accounting documents in court ordered discovery, provided from the Hunter Company and National Land Partners, which demonstrated both actual events from the May, 2005 separation and up to late 2007; and future profit projections by National Land Partners and the Hunter Company regarding the completion of each project. *See* May 9, 2008 Trial Transcript at page 9, lines 3-8. The accounting documents maintained by National Land Partners and the Hunter Company did not utilize GAAP. *See* Circuit Court Finding of Fact No. 24. By way of example, secured debt on each project was not paid off pro rata, both rather by the payment of forty-five percent of gross sales proceeds to debt retirement. Accordingly, the documents provided to Mr. Apple did not show "*net profits*" in accordance with GAAP. Mr. Apple's opinions were consistent with GAAP as required by the Management Agreement.¹¹

Mr. Apple's conclusions were corroborated, in part, by the testimony of Hunter Wilson. Although Hunter Wilson repeatedly declined to offer any evidence about any specific value of the Hunter Company (*see* May 8, 2008 Transcript at page 119, lines 12-14), he conceded that the value of the Hunter Company related to the net profits payable pursuant to the Management Agreement.

¹¹ The application of GAAP is important in relation to the so called construction spending theory improperly utilized by the Circuit Court. The construction spending theory, which was not supported by any expert testimony, created a false impression of "*losses*" and overpayment of management fees. Applying GAAP, management fees were clearly due according to Mr. Apple.

- Q: What do you think Hunter Company of West Virginia is worth?*
- A: It's worth whatever we make off the net proceeds of our projects are sir.*
- Q: It's worth the net profits?*
- A: It's worth whatever we make off of our projects, yes, sir.*
- Q: So you think the value of the Hunter Company is the value of its net profits?*
- A: It's the only asset the company has.*
- Q: The only assets the company has is the Exhibit #1, is that correct?*
- A: Yes, sir.*
- Q: And it's your testimony that the value of the Hunter Company is related to net profit?*
- A: Yes, sir.*
- Q: And also any cash it might have on hand, too, would you agree?*
- A: Yes, sir.*
- Q: And its furnishings?*
- A: It doesn't hold much in furnishings, but yes sir.*
- Q: And any sums due to it from the LLC?*
- A: Yes, sir.*

See May 8, 2008 Transcript at page 112, lines 18-25; page 113, lines 1-6; and page 136, lines 10-21.

Because the West Virginia Supreme Court requires trial courts to do so, Mr. Apple offered an opinion as to the total value of the marital estate. Specifically, Mr. Apple opined that the value of the marital estate was \$20,813,189.00 on the date of separation based upon his opinion that the net present value of the Hunter Company was \$9,381,420 and that the parties had stipulated that the remaining property of the marital estate was valued at \$11,431,796. See May 9, 2008 Trial Transcript at page 60, line 15 through page 61, line 22.

The Family Court found that Hunter Wilson's financial statements to First United Bank, Exhibits 19 and 20, placing the value of the marital estate at \$19,653,456 on August 4, 2004 and \$29,058,944 on February 7, 2005, corroborated Mr. Apple's opinion that the marital estate,

including the Hunter Company, was \$20,813,189. *See* Final Order's Findings of Fact Nos. 28 and 32.

**c. Unrebutted Expert Testimony
that the Hunter Company's
Personal Goodwill Was Valued at Zero**

Consistent with the mandate of *Helper I*, Mr. Apple was also questioned with respect to his opinion about the value, if any, of the Hunter Company's "*personal goodwill*." Clearly and unequivocally, Mr. Apple testified that he found the Hunter Company to have no personal goodwill and thus, no value for any such goodwill. *See* May 9, 2008 Trial Transcript at page 70, lines 9-14.

**B. The Hunter Company Possessed Enterprise Goodwill
Consistent with the Mandate of *Helper II* and Courts and
Commentators Around the Country
(Assignment of Error No. 2)**

After the Petition and Response in this case were filed, this Honorable Court decided *Helper II* on November 2, 2009, *Helper v. Helper*, 224 W.Va. 413, 686 S.E.2d 64 (2009). *Helper II* confirmed the mandate of *May* that family courts, when determining the value of a business owned by the parties to a divorce, must determine whether or not the marital estate contains enterprise goodwill value, and to explain the basis for any such finding and valuation.

Since the decision in *May*, the distinction between enterprise goodwill and personal goodwill has been a topic of interest for courts across the country, many of whom cite *May* for its wisdom and guidance. However, since this Court has not yet decided the issue of the existence of enterprise goodwill for a business that is not a professional practice, guidance can be obtained from our sister states.

1. California Statutory Authority and Case Law

California has an unusual statutory scheme for condemnations, which allows the owners of condemned real property to recover the loss of goodwill when a business is harmed by such a condemnation. Section 1263.510(b) of the California Code of Civil Procedure defines goodwill as “*benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstance resulting in probable retention of old or acquisition of new patronage.*”

The issue of enterprise goodwill has also arisen frequently in California divorce proceedings. *In the Marriage of DeVries*, 2009 WL 4264309 (Cal.App. 4 Dist.) (Nov. 30, 2009), the Court considered the enterprise goodwill value of a construction company which was awarded to the husband as his sole and separate property. The wife’s interest in the construction company was limited to her share of any value of the business. The *Devries* Court noted that goodwill is defined, in part, by the California Business and Professional Code, Section 14100 as being “*the goodwill of a business is the expectation of continued public patronage.*” In explaining the statute, the Court provided the following guidance with respect to goodwill:

It is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which is receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partialities or prejudices. [Citation.] . . . it is the probability that the old customers will resort to the old place. It is the probability that the business will continue in the future as in the past, adding to the profits of the concern and contributing to the means of meeting its engagements as they come in. [Citation.] (In re Marriage of Foster, 1974 42 Cal.App.3d 577, 581-582 (Foster), internal quotation marks omitted.)

Based on the facts before it, the California Court of Appeals affirmed the trial court’s conclusion that the construction company possessed enterprise goodwill and that it was part of

the marital estate to be divided by the parties. Donna Wilson respectfully asserts that the full page ads in the *Washington Post* would bring potential buyers to the Bluffs on the Potomac to meet with the Hunter Company sales staff, with or without Hunter Wilson.

2. The Appellate Court of Illinois

In the *Marriage of Alexander*, 368 Ill.App. 192, 857 N.E.2d 766 (2006), the Appellate Court of Illinois held that goodwill represents the ability to acquire future income; and that:

Value of a business or practice that exceeds the combined value of the physical assets. In re Marriage of Schneider, 214 Ill.2d 152, 166, 291 Ill.Dec. 601, 824 N.E.2d 177 (2005) (quoting In re Marriage of Talty, 166 Ill.2d 232, 238, 209 Ill.Dec. 790, 652 N.E.2d 330 (1995) (quoting In re Marriage of White, 151 Ill.App.3d 778, 780, 104 Ill.Dec. 424, 502 N.E.2d 1084 (1986) (quoting 2 Valuation & Distribution of Marital Property Section 23.04(1) (Matthew Bender ed.1984))). Goodwill may be categorized as enterprise or personal. Enterprise goodwill is that which exists independently of one's personal efforts and will outlast one's involvement with the business. In re Marriage of Talty, 166 Ill.2d at 240, 209 Ill.2d at 240, 209 Ill.Dec. 790, 652 N.E.2d 330.

Id. at 370, 769.

In *Alexander*, the appellate court affirmed the trial court, and the admission into evidence of an expert witness' "multiattribute utility theory" for the purpose of supporting a finding of enterprise goodwill. The *Alexander* Trial Court determined that a portion of a physician's medical practice constituted personal goodwill, which was not part of the marital estate, while a remaining portion constituted enterprise goodwill, which was part of the marital estate for the purposes of equitable distribution. In *Alexander*, the expert witness specifically identified eight (8) separate attributes that would be indicative of enterprise goodwill:

(1) Number of offices; (2) business location; (3) multiple service providers; (4) enterprise staff; (5) systems; (6) years in business; (7) outbound referrals; and (8) marketing.

Id.

Although these factors were unique to a medical practice, the Hunter Company has six (6) of the factors indicating enterprise goodwill as articulated in *Alexander*. Further, if the focus is the ability to acquire future income, the Hunter Company is an enterprise.

3. The Hawaii Intermediate Court of Appeals

In *Tanaka v. Tanaka*, 2009 WL 5084064 (Hawaii App. Dec. 28, 2009), Hawaii's Intermediate Court of Appeals affirmed a family court's finding of enterprise goodwill based upon the husband's business, known as "*Kitchen & Bath Remodeling*," having "*operated under a trade name separate from any personality, maintained a well-trained workforce, spent \$10,000 in advertising, and attracted customers based upon the good reputation it had earned over the years for its renovation work.*" In addition, the expert witness who found the existence of enterprise goodwill opined that the business could "*continue to profitably operate without husband, by hiring a competent manager.*"

Tanaka is very similar to the Hunter Company given the project names, well-trained work force and the Hunter Company's \$4.5 million advertising budget.

4. The Maine Supreme Judicial Court

In *Ahern v. Ahern*, 938 A.2d 35, 2008 ME 1 (2008), the Maine Supreme Court specifically found that the goodwill value of the husband's sole practitioner dental practice was personal goodwill, rather than enterprise goodwill. The *Ahern* Court specifically acknowledged the enterprise goodwill analysis utilized by this Court in *May* and concluded that it would follow the 25 states in the United States that "*treat enterprise goodwill as property subject to valuation and distribution in a divorce proceeding, and treat personal goodwill as not being property subject to division.*" The Maine Court specifically noted that in prior decisions, it:

[I]mplicitly recognized the distinction between enterprise and personal goodwill. We have previously found that an insurance agency, as distinct from a

professional practice, has goodwill value that is divisible upon divorce. Lord v. Lord, 454 A.2d 830, 833 (Me. 1983). In so finding, we reasoned the good will of an insurance agency such as the one involved in this case is not necessarily dependent on the continued employment of the agent who developed the agency. This type of agency and its good will may be transferred to a third party and operated by that third party without the assistance of the person who developed the business.

Clearly, the Maine Court would have considered Section 3.2.2 of the Management Agreement to be strong indicia of enterprise goodwill.

5. The Kentucky Supreme Court

In *Gaskill v. Robbins*, 282 S.W.3d 306 (2009), the Kentucky Supreme Court addressed the issue of enterprise goodwill in a divorce where the wife had a solo oral surgery practice. In *Gaskill*, the Kentucky court acknowledged specifically that the valuation of goodwill in a business is frequently a source of contention and that “goodwill is a factor to be considered in arriving at the value of a business” *Id.* at 312.

In the divorce context, the Kentucky court specifically followed *May* for the proposition that enterprise goodwill is part of the marital estate and personal goodwill is not. Notwithstanding that distinction, the *Gaskill* Court confirmed that goodwill “*in a professional practice may be attributable to the business enterprise itself by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business.*”

As in *Helper I*, the Kentucky Supreme Court remanded to the trial court to determine the enterprise goodwill value, if any, of Dr. Gaskill’s oral surgery practice.

C. Whether the Circuit Court Improperly Reversed the Family Court's Well-Supported Findings of Fact Regarding Enterprise Goodwill for the Hunter Company and the Net Present Value Thereof? (Assignment of Error No. 2)

The Circuit Court, sitting as an intermediate appellate court, improperly exceeded its authority and did not apply the mandate of *Stephen v. Sherry*, 195 W.Va. 384, 465 S.E.2d 841 (1995); *George v. Godby*, 174 W.Va. 313, 325 S.E.2d 102 (1984); *Smith v. Godby*, 154 W.Va. 190, 174 S.E.2d 165 (1970); *Bettinger v. Bettinger*, 183 W.Va. 528, 396 S.E.2d 709 (1990) to the findings of fact made by the Family Court. In *Stephen*, this Court mandated that findings of fact and inferences there from by a family court “*may not be overturned even if a circuit court may be inclined to make different findings or draw contrary inferences.*” *Stephen* at 852, 395 citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 577, 105 S.Ct. 1504, 1513, 84 L.Ed.2d 518, 530 (1985); *Beck v. QuikTrip Corp.*, 708 F.2d 532, 535 (10th Cir. 1983).

In *Stephen*, this Court also noted that:

There are many critical aspects of an evidentiary hearing which cannot be reduced to writing and can't be placed in a record, e.g., the demeanor of witnesses. These factors may affect the mind of a trier of fact in forming an opinion as to the weight of the evidence and the character and credibility of the witnesses. Thus, the importance of these facts should not be ignored by a reviewing court. Given a family law master's intimate familiarity with the proceedings, the family law master is in the best position to weigh and assess credibility in making the ultimate ruling on disputed issues.

Stephen at 852-53, 395-96.

In *Board of Education v. Wirt*, 192 W.Va. 568, 579, 453 S.E.2d 402, 413 (1994), this Court provided guidance as to how an appellate court should view a lower court's findings of fact:

Indeed, if the lower tribunal's conclusion is plausible when viewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact. (Citation omitted.) This

deference given to the lower tribunal in Wirt also is appropriate in the present case because the family law master is in a position to see and hear the witnesses and is able to view the case from a perspective that an appellate court can never match. Weil v. Seltzer, 873 F.2d 1453, 1457 (D.C.Cir. 1989). (Citation omitted).

1. The Circuit Court Improperly Invaded the Province of the Trier of Fact

The Family Court's Findings of Fact were more than "*plausible*;" rather, each Finding specifically identified documents admitted into evidence and/or testimony — all of which were admitted into evidence without so much as an objection by Hunter Wilson.

The Family Court found the "*arrangement*" set forth in the Management Agreement to be significant given the mandate of *May*. The Family Court found the highly skilled and highly compensated workforce to be significant and the expert testimony of Mr. Apple to be compelling. The Family Court also found that Hunter Wilson's financial statements¹² given to federally insured lending institutions showing the value of the Hunter Company to be \$9 million to be significant, and to have corroborated Mr. Apple's opinions.

2. Expert Testimony is Required for the Valuation of Enterprise Goodwill

In *May*, this Court identified a number of appropriate ways to value enterprise goodwill. This Court identified specifically straight capitalization, capitalization of excess earnings, the IRS variation of capitalization of excess earnings, market value analysis and application of buy-sell terms. Applying *Conway v. Conway*, 508 S.E.2d 812, 818 (N.C.App. 1988), this Court, in *May*, indicated that so long as the net value of the business and its goodwill, if any, is based on

¹² Wife's Exhibit 19 was an August 4, 2004 financial statement signed by Hunter Wilson and showing the value of the Hunter Company as \$10,159,411. Wife's Exhibit 20 was an unsigned financial statement dated February 7, 2005 showing the value of the Hunter Company to be \$14,981,018.72. Each of these financial statements were obtained by subpoena from loan files of First United Bank in relation to multi-million dollar loan transactions by Hunter Wilson. The importance of these exhibits was that Hunter Wilson borrowed money from the bank while certifying that the Hunter Company had an enterprise value of more than \$10 million.

“*competent evidence*” and on a “*sound valuation method*” or methods, the valuation will be not disturbed.

The Circuit Court rejected Mr. Apple’s valuation method, although his method was based expressly on the requirements of the Management Agreement, applying GAAP. This was an “*agreement*” much like the “*buy-sell*” terms identified specifically in *May*. The Family Court’s Finding of Fact was not erroneous on the valuation offered into evidence by Mr. Apple because Mr. Apple’s method was, indeed, a “*sound valuation method*” based on the terms of the Management Agreement and GAAP.

In order to understand the record below, it is important to understand the factual basis for Mr. Apple’s opinions that the value of enterprise goodwill was approximately \$9.4 million. The Hunter Company and National Land Partners each and every month recalculated the cost of each project and what the anticipated profits would be at the end of each project — meaning, for each project, each month, a spreadsheet was created to show every cost of development, every cost of sale, the projected sales price for each lot and the projected net profit for the entire project; and most significantly — the expected profit. Not only were Mr. Apple’s opinions admitted into evidence without objection, but the foundation for his opinions were profit projections made by none other than the Hunter Company and its partner pursuant to the Management Agreement, National Land Partners.

The Family Court found Mr. Apple’s opinions to be consistent with (i) the projections of profit made by the Hunter Company and National Land Partners; and (ii) Hunter Wilson’s statement of value regarding the Hunter Company as made to banks in financing applications. *See* Wife’s Exhibit Nos. 19 and 20. The Family Court’s factual findings in this regard were far

more than “*plausible*,” but were supported by substantial, credible evidence — most of which were admissions by Hunter Wilson himself.

In *Dept. of Transportation v. Leslie*, 55 Cal.App.4th 918, 64 Cal.Rptr.2d 252 (1997), the California Court of Appeals for the Second District articulated a simple rule for the valuation of goodwill

Goodwill may be measured by the capitalized value of the net income or profits of a business or some similar method of calculating present value of anticipated profits. People ex rel Dept. of Transportation v. Mueller, 36 Cal.3rd 263, 271, 203 Cal.Rptr. 772 (1984). Valuation methods differ with the nature of the business and purpose for which the valuation is conducted. There is no single method to evaluate goodwill.

Id. at 255, 923.

The Circuit Court in its Opinion Order indicated that the calculation of the present value of future income was not one of the precise valuation methodologies identified in *May*. The Circuit Court clearly misses the point of *May*, which stands for the proposition that there “*are a variety of acceptable methods of valuing goodwill*” and “*no single method is to be preferred as a matter of law.*” *May* at 547-48. Notwithstanding the specific examples noted by this Court in *May*, Donna Wilson respectfully asserts that accountants and valuation experts such as Mr. Apple frequently are called to calculate the present value of a future profit stream. Whether it is in relation to an office building, shopping center or real estate development firm, reducing future profits to present value is an appropriate valuation methodology.

D. The Circuit Court Relied on Improperly Admitted Evidence as Part of Its Reversal of the Family Court (Assignment of Error No. 3)

The evidence which the Circuit Court improperly weighed a second time in favor of Hunter Wilson’s chargeback and “*constructing spending theory*” should not have been admitted into evidence over Donna Wilson’s objections.

On the second and third days of trial (May 8 and 9, 2008), Hunter Wilson offered into evidence information and opinions in support of his proposed construction spending theory. Counsel for Donna Wilson objected to this testimony on the basis of the absence of foundation; inconsistency with GAAP; and the need for expert testimony. The Court admitted the disputed testimony and exhibits over objection. *See* May 8, 2008 Trial Transcript at page 168, line 20 through page 171, line 23. This same objection was also raised on May 9, 2008 by counsel for Donna Wilson that the opinions being offered, and the exhibits related thereto, were objectionable because they required a properly qualified expert. *See* May 9, 2008 Trial Transcript at pages 42-48. In each instance, the Court entertained the objections to the opinion evidence and admitted the evidence over objection of Donna Wilson.

Hunter Wilson offered documents into evidence in support of his assertion that additional expenses had been incurred at Ashton Woods, Crossings at the Potomac, Overlook at Greenbrier and the Springs at Shepherdstown, which information had not been produced in discovery as ordered by the Family Court. *See* May 22, 2008 Order of the Family Court. This failure of discovery is significant for two (2) reasons. First, on the initial day of trial, the Family Court Judge admonished the parties that information not provided in discovery would not be admitted into evidence at the final hearing. When Hunter Wilson's Exhibits 12 through 19 were offered into evidence in support of this "*chargeback*" theory, Donna Wilson objected. The argument regarding the objection is reflected in nearly thirty (30) pages of the transcript. *See* May 8, 2008 Trial Transcript at pages 160-190. After initially excluding the evidence, the Family Court elected to allow the evidence over objection, and to permit Donna Wilson to engage in limited discovery on the contested issue prior to the last day of trial.

Hunter Wilson's Exhibits 32, 33, 36, 38, 39 and 40 were also admitted over objection. Specifically, the objection was that the documents necessarily contained opinions or estimates regarding construction costs. Donna Wilson objected because she could not cross-examine the individual or individuals who prepared these estimates, to understand their true basis, if any. *See* September 11, 2008 Trial Transcript at pages 44-47.

The construction spending theory was acknowledged by Hunter Wilson, his counsel and Alan Murray to be inconsistent with GAAP. *See* Finding of Fact No. 24. Donna Wilson respectfully asserted then, and asserts now, that any other theory, inconsistent with GAAP, was inappropriate for the calculation of manager fees, as the Management Agreement mandated that such fees be calculated pursuant to GAAP.

Obviously, the Family Court found the objectionable evidence and opinions to be of very little evidentiary weight as set forth in Finding of Fact No. 24 where the Family Court properly found the testimony of Mr. Apple, and the "*other evidence in the case*" to be more compelling than the evidence of Mr. Murray and Ms. Holtz, which was inconsistent with GAAP. Nevertheless, Donna Wilson respectfully asserts that evidence of the construction spending theory was improperly admitted into evidence after proper and timely objection.

Accordingly, the Circuit Court's reversal of the Family Court, finding that the improperly admitted evidence outweighed Mr. Apple's expert opinions, is error.

**E. The Circuit Court Improperly
Remanded to the Family Court
(Assignment of Error No. 4)**

The parties agreed that the date of separation, which was May 31, 2005, would be the date for valuation of the marital estate. The Circuit Court Opinion remands the case to the

Family Court to determine what the actual profits would be for two (2) of the six (6) projects (Bluffs on the Potomac and The Point at Shepherdstown).

This remand by the Circuit Court clarifies the extent to which the Circuit Court did not understand *May* or even the implications of its own findings on reversal. If the Hunter Company did not possess enterprise goodwill its value was related only to its physical assets such as furniture and computers, and its cash on hand, as of the date of separation. There was never a dispute regarding the value of the physical assets and the cash on hand as of the date of separation.

Retaining jurisdiction would only be appropriate if the Hunter Company possessed “*enterprise goodwill*” based upon the net profits to be paid in the future pursuant to the Management Agreement. Accordingly, remand to the Family Court is error and should be reversed.

V. CONCLUSION

The Family Court was correct in all respects when it found enterprise goodwill existed in the Hunter Company given the mandate of *May*, *Helper I* and *Helper II*. The Family Court’s November 21, 2008 Findings of Fact and Conclusions of Law are a shining example of how a trial court should consider and make such decisions. The Family Court provided precisely what this Honorable Court mandates in *May*, *Helper I* and *Helper II*. The Family Court should have been lauded for its good work, not reversed.

The Circuit Court, on the other hand, asserted, without basis, that Donna Wilson was required to provide “*convincing proof*” of enterprise goodwill, while ignoring the actual evidence tendered to the Family Court. The Circuit Court’s conclusion that it was “*undisputed*” that the

Hunter Company had only a single employee calls into question whether or not the Circuit Court even considered the record below.

Accordingly, Donna Wilson respectfully requests that she be restored to the benefits of the November 21, 2008 Final Order of the trial court in this instance, the Berkeley County Family Court.

VI. RELIEF SOUGHT AND REQUEST FOR ORAL ARGUMENT

Donna Wilson respectfully requests that this Honorable Court reverse the Circuit Court's Order of March 25, 2009 and reinstate the Family Court's Order of November 21, 2008.

Donna F. Wilson respectfully requests to be heard orally by this Honorable Court on the issues raised in this Brief.

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CERTIFICATE OF SERVICE

I hereby certify that service of a true copy of the foregoing has been made as follows:

Type of Service: Federal Express

Date of Service: March 11, 2010

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Item Served: Brief of Appellant



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