

Appeal No. 35475

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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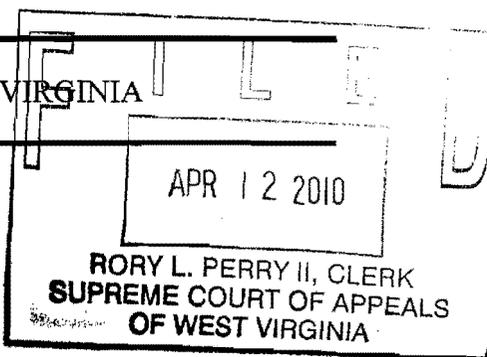
**DONNA WILSON,**

**Appellant,**

v.

**LEON HUNTER WILSON,**

**Appellee.**



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**BRIEF OF APPELLEE**

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## INTRODUCTION

The parties, Donna Wilson (“Mrs. Wilson”) and L. Hunter Wilson (“Mr. Wilson”) were married for 18 years, had no children, and accumulated substantial assets by the time of their May 31, 2005 separation—the agreed date for the valuation of marital assets for the purposes of equitable distribution. Prior to the May 8-9 and September 11, 2008, evidentiary hearings, the parties divided their personal property and stipulated the value of all of their marital assets and debts, except for a component of their jointly owned, closely held corporation, Hunter Company of West Virginia (“HCWV”). HCWV, which was in the business of developing and selling residential real estate, had three (3) assets—cash, personal property, and manager fees.<sup>1</sup> The parties agreed to the value of the cash and the personal property; they disagreed on the value of the manager fees.

Excluding the manager fee component of HCWV and based upon the Joint Trial Order, filed May 12, 2008, the stipulated net marital estate was \$9,536,682.14. Prior to the trial, it was stipulated that Respondent had paid Mrs. Wilson \$4,317,438.00 in cash toward her share of the marital estate and that Mrs. Wilson should receive the education fund of \$20,000 in equitable distribution. At the May and September 2008 hearings, the parties introduced evidence regarding the value of Mr. Wilson’s manager fees for the purposes of equitable distribution.

Mr. Wilson has twenty four (24) years of experience in the field of real estate development. In 1993, Mr. Wilson was specifically chosen by National Land Partners, LLC (“NLP”) to manage real estate development projects in West Virginia, as evidenced by a series of ongoing, non-assignable Management Agreements between Mr. Wilson and NLP. At the onset of this relationship with NLP, Mr. Wilson formed HCWV to facilitate the Management

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<sup>1</sup> The manager fees were contingent fees earned by the company for its management of various real estate development projects. These fees were by far the most valuable assets of the corporation.

Agreement. Mr. Wilson is the sole employee of HCWV. NLP is involved in large tract real estate development and does business in eleven (11) states. Essentially, NLP buys large tracts of land, it subdivides the large tracts into smaller parcels, and sells the individual lots on a retail basis. Mr. Wilson and the members of NLP have had an ongoing business relationship in the real estate development field for approximately twenty (20) years.

In order to understand the personal nature of Mr. Wilson and NLP's business relationship, it is essential to know the general business structure of NLP. In each state that NLP operates, it chooses a manager with exceptional expertise in the large tract land development business. In West Virginia, Mr. Wilson was chosen to manage the properties that are developed by NLP in the State. After a manager is chosen, it is the standard practice of NLP to place local responsibilities on the manager, such as attaining subdivision and infrastructure approval for each project. After this process is complete, and lots are available to sell, the manager is then permitted to choose and supervise a sales force that is employed by Inland Management Co. to assist with local tasks. Accounting, employee payroll, marketing, and other non-local tasks are done at NLP's home office in Massachusetts. After the lots are sold and each project is complete, NLP and the manager typically split the profits, if any, in accordance with the Management Agreement. The percentage of net profits payable to the manager is the sole form of compensation paid to the manager. Like the other managers that NLP contracts with, Mr. Wilson's only compensation is a percentage of net profits earned from each project, if any.

At the time of the parties May 31, 2005 stipulated separation, Mr. Wilson was managing six (6) real estate projects for NLP, four (4) of which were completed and the manager fees determined after separation but before trial. The Family Court of Berkeley County ("Family Court") based its Order valuing the parties' interests in HCWV on an unreliable expert opinion

that was formed from inaccurate profit projections. These errors mainly resulted from the Family Court's wholesale adoption of an extremely flawed expert opinion regarding the present value of the parties' jointly-owned real estate business. The expert's opinions relied on estimates where actual figures were available, ignored unrebutted testimony regarding the value of certain assets, found enterprise goodwill where none existed, ignored entire development projects the company was working on at the time of separation, mischaracterized accounts receivable as goodwill, and failed to use generally-accepted accounting methods to reach his valuation of the business.

In reviewing the Family Court's opinion, the Circuit Court correctly found that the Family Court's Findings of Fact were against the weight of the evidence and clearly wrong. In reversing the Family Court's decision, the Circuit Court based its Order on reliable and specific evidence of earned profits that were contingent upon the net-profit or net-loss of each completed project. The Circuit Court also found that the Family Court erred in refusing to exercise continuing jurisdiction to determine the marital share of the net-profit or net-loss from the two (2) incomplete projects, despite clear legal authority to do so. For these reasons, this Honorable Court must affirm the Circuit Court's well-reasoned and legally correct Order.

#### **I. KIND OF PROCEEDING AND NATURE OF RULING BELOW**

Based on the Family Court's errors, the Circuit Court, sitting as an Appellate Court, correctly reversed and remanded the Family Court's November 21, 2008 Final Divorce Order. The Circuit Court found that the Family Court committed five (5) major errors:

1. The Family Court improperly valued the most important marital asset—the manager fees earned by the parties' jointly-owned business—by relying on a flawed expert opinion rather than actual fees earned.
2. The Family Court committed clear legal error by refusing to exercise continuing jurisdiction over the company's pending contingent fee contracts, opting instead to rely on projections of future value.

3. The Family Court mischaracterized Mr. Wilson's personal goodwill as enterprise goodwill.
4. The Family Court relied on two (2) financial statements that had little or no probative value to corroborate the expert's erroneous opinion; and
5. The Family Court erred in refusing to grant the Motion for Reconsideration.

These errors mainly resulted from the Family Court's wholesale adoption of a defective expert opinion regarding the present value of the parties' jointly-owned real estate business. The net result of the Family Court's erroneous findings was a valuation of the net marital estate at \$18,464,639.00, based largely upon the expert's estimate, rather than the actual figure of \$6,886,304.00, as the evidence showed. The extreme prejudice resulting from the nearly \$12 million swing in value commanded review by the Circuit Court of Berkeley County upon Mr. Wilson's Petition for Appeal.

In reviewing the entire record before the Family Court, the Circuit Court found that the Family Court committed the above referenced assignments of error. *See* March 25, 2009 Cir. Ct. Opinion and Order ("Cir. Ct. Opinion and Order"). The Circuit Court concluded that the net marital estate was valued at \$6,886,304.00, and that the manager fees of the business known as HCWV at the time of separation were a negative \$(2,196, 915.00). The Circuit Court also held that W. Va. Code § 48-7-104(1) requires the Family Court to retain continuing jurisdiction over two (2) incomplete projects, namely The Point at Shepherdstown ("The Point") and WestVaco, where HCWV's manager fees were contingent.

On April 6, 2009, Mrs. Wilson filed a Motion Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure to Alter or Amend the March 25, 2009 Opinion and Order with Memorandum in Support Thereof ("Rule 59(e) Motion"). On June 4, 2009, the Circuit Court denied Mrs. Wilson's Rule 59(e) Motion.

Mr. Wilson respectfully requests that this Honorable Court affirm the Circuit Court's March 25, 2009 Order because it correctly held that the Family Court's Final Divorce Order was clearly erroneous, as specifically outlined below, *infra*.

## II. STATEMENT OF FACTS

The parties stipulated to May 31, 2005 as their date of separation. The following summarizes the trial evidence:

### A. Hunter Company of West Virginia ("HCWV")

The parties were involved in aspects of real estate development prior to the parties' marriage. Both had worked previously for Patten Corp., a land developer. See May 8, 2008, Hearing Transcript (5/8/08 Tr.) pp. 76-81. HCWV was formed in 1993 to conduct real estate development. Each of the parties held fifty percent (50%) of the stock, and Mr. Wilson is its only employee. Mrs. Wilson was involved in training, sales promotion, and some management meetings during the early years of the marriage, but she had stopped working prior to separation as she was devoting her time to the care of the parties' horses. Mr. Wilson was involved in acquisitions, the planning process, oversight of construction, advertising, promotions, and sales. 5/8/08 Tr. pp. 212, 214-217, 219-221. Mr. Wilson received a degree in forest resource management from West Virginia University in 1980, and has over twenty-two (22) years of real estate development experience. Jan. 7, 2008, Hearing Transcript (1/7/08 Tr.) pp. 55-56.

### B. National Land Partners

In 1995, HCWV began a contractual relationship first with Red Creek Ranch, Inc., and then NLP, which were controlled by Harry Patten, who was formerly with the Patten Corp. 5/8/08 Tr. pp. 130, 221. NLP contracted with HCWV to manage its real estate projects, which was accomplished through successive Management Agreements. Mr. Wilson's Exh. 5;

Mrs. Wilson's Exh. 1. Mr. Wilson was specifically chosen by NLP to manage its West Virginia projects based upon his long record of performance with other projects. *See* May 9, 2008 Hearing Transcript (5/9/08 Tr. p. 125). According to NLP, the strength of the Management Agreement was Mr. Wilson. 5/9/08 Tr. p. 138. According to Mrs. Wilson, HCWV's success was primarily due to Mr. Wilson, and he was primarily responsible for the 2004 income of HCWV. 5/8/08 Tr. pp. 251-252. Mrs. Wilson worked approximately fifteen to twenty (15-20) hours per week in the business during the year 2004, but had no involvement in HCWV since the parties' separation. 5/8/08 Tr. pp. 246, 265-266.

NLP is involved in large tract real estate development and does business in eleven (11) states. It generally takes title through various limited liability companies. In West Virginia, WV Hunter LLC is the titled owner of NLP's real estate projects and has financial responsibility for each West Virginia project. In each state that NLP operates, it chooses a manager with exceptional expertise in the large tract land development business. After a manager is chosen, NLP typically places local responsibilities on the manager, such as attaining subdivision and infrastructure approval for each project. After this process is complete, and lots are available to sell, the manager is permitted to choose and supervise a sales force employed by Inland Management Co. to assist with local tasks. Non-local tasks are done at NLP's home office in Massachusetts. After the lots are sold and each project is complete, NLP and the manager typically split the net profits, if any. 5/9/08 Tr. pp. 123-133.

### **C. The Management Agreement**

Under the Management Agreement, HCWV's duties are to identify property that qualifies for a development contract, put it under contract, and accomplish the due diligence or feasibility studies to determine whether NLP should acquire the property. If that occurs, HCWV is to obtain all permits and subdivision approval, and oversee the construction of the

infrastructure. When the roads and utilities are complete, HCWV is to select a sales force to be employed by Inland Management Co., conduct advertising and other promotions, and to sell out the project. 5/9/08 Tr. p. 127; Mrs. Wilson's Exh. 1, § 5. These services are considered personal and unique and are not assignable. Exh. 1, §10.4.

HCWV is entitled to the "net profit" as defined in the Management Agreement, only after 12.5% of the gross sales are paid to NLP, and the acquisition loan, subdivision costs, legal expenses, general administrative expenses, costs of sale, and interest are also paid for each project. The 12.5% of sales payment to NLP is preferential and guaranteed by HCWV. The Management Agreement states that if NLP's preferential payment exceeds the "net profit", HCWV receives no compensation. 5/8/08 Tr. pp. 134-136, 199; 5/9/08 Tr. pp. 20, 142; Mrs. Wilson's Exh. 1, § 6.2.

NLP determines when net profits are distributed, which is normally at the project completion. 5/8/08 Tr. pp. 141-142. The Management Agreement provides that if the Management Agreement is terminated and the manager is removed or if Mr. Wilson dies or becomes incapacitated, NLP will hire a substitute to manage and complete any project. The cost of the substitute manager shall be an expense and shall reduce any net profit owed to HCWV on any project. Mrs. Wilson's Exh. 1, § 3.2.1, 3.2.2. The Management Agreement also provides that NLP is not required to offer future projects to the manager of HCWV, nor is the manager of HCWV entitled to any benefits from NLP's projects after the termination of the subject Management Agreement. Mrs. Wilson's Exh. 1, § 3.1.1.

Under the Management Agreement, HCWV does not own real estate and has no equity or management position in NLP or any of its limited liability companies. 5/9/08 Tr. p. 155.

The staff that supports Mr. Wilson's management of NLP's projects are employees of Inland Management Company, which is a subsidiary of NLP. Section 5.1.6 of the Management Agreement specifically states that Inland Management is the common paymaster for all of the employees of NLP projects<sup>2</sup>, but Mr. Wilson selects the employees and supervises them. See Mrs. Wilson's Exh. 1, 5/8/08 Tr. pp. 188-190, p. 241; 5/9/08 Tr. pp. 139-140. The staff's compensation is an expense of the project and reduces Mr. Wilson's manager fee.

Alan Murray, the CFO of NLP, described the real estate development business as "enormously risky" and "capital intensive." 5/9/08 Tr. pp. 131-132.

#### **D. HCWV's Projects at Separation**

At the time of the parties' separation, HCWV was involved in the management of six (6) real estate projects: Ashton Woods, Crossings, Overlook at Greenbrier, The Springs at Shepherdstown, WestVaco, and The Point. Four (4) of those projects, Overlook, The Springs, Crossings, and Ashton Woods, were completed after separation but before trial, meaning actual manager fees were available for the Court to determine the manager fee. The remaining two (2) projects, WestVaco and The Point, have not completed construction and lot sales. To track the progress of each of its projects, NLP generates a number of internal financial reports. A "Schedule A" Project Evaluation Schedule is created for each project setting out the project

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<sup>2</sup> Section 5.1.6 states that that the Manager must: "arrange for the employment from time to time, on such terms and for such compensation as may be mutually agreed by 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."

budget and showing the expected gross profit. If changes are needed, a “recosting” of the “Schedule A” is prepared. 9/11/08 Tr. pp. 20-21. *See, e.g.*, Mr. Wilson’s Exh. 1-4, 6. For each project, a cumulative monthly project-to-date income statement is generated which tracks the gross profits and incurred selling, operating, and interest expenses. On the project-to-date income statements, HCWV’s potential manager fee is shown as an operating expense; the “net income” shown on the statements is NLP/WV Hunter LLC’s 12.5% guaranteed return on gross sales. *See, e.g.* Mr. Wilson’s Exh. 7-11, 31, 35. 5/9/08 Tr. p. 20. NLP also produces monthly reports on construction spending as a percentage of each project’s budget. 5/9/08 Tr. pp. 160, 192-193. *See, e.g.* Mr. Wilson’s Exh. 12-16, 18, 32-33. According to NLP, construction spending best measures the progress of a project and the work performed by HCWV. Using the percentage of construction spending to measure profits earned by NLP is consistent with Generally Acceptable Accounting Principles (GAAP).<sup>3</sup> 5/9/08 Tr. p. 159; 9/11/08 Tr. p. 55. The accounting system and reports generated by NLP, and before that Red Creek Ranch, have been in place since 1995. 9/11/08 Tr. pp. 77-78.

**E. Kenneth W. Apple’s CPA Testimony**

Kenneth W. Apple, CPA, (“Mr. Apple”) was Mrs. Wilson’s expert on business valuation. Mr. Apple examined sales projections from budgets for three (3) of the projects—Overlook at Greenbrier, The Springs at Shepherdstown, and WestVaco.<sup>4</sup> He determined that the estimated “net profit” as defined under the Management Agreement to HCWV collectively from

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<sup>3</sup> GAAP is generally defined as “principles . . . issued by the Financial Accounting Standards Board for use by accountants in preparing financial statements.” *See, e.g., Black’s Law Dictionary* 548 (7th Ed. 2000). ““While “generally accepted accounting principles” are not a “canonical set of rules” that dictate uniform treatment, “GAAP includes broad statements of accounting principles amounting to aspirational norms as well as more specific guidelines and illustrations.”” *In re Campbell Soup Co. Securities Litigation*, 145 F. Supp. 2d 574, 592 (D.N.J. 2001) (internal citations omitted).

<sup>4</sup> Specifically, Mr. Apple viewed business plans for Overlook at Greenbrier and The Springs at Shepherdstown and a Schedule A Project Evaluation Schedule for Westvaco, Mrs. Wilson’s Exhibits 8, 9, 10.

these three (3) projects was \$11,899,138.00 as of the date of separation. Mr. Apple then deducted a substitute manager's salary of \$360,000.00, including payroll taxes and benefits, from the estimated revenue from each project based upon the estimated length of the project, to determine the cost of management, and further discounted these numbers to arrive at a net present value for manager fees of \$8,927,957.00, of which \$6,319,682.00 were estimated future fees and \$2,608,275.00 were accrued fees. 5/9/08 Tr. pp. 38-44. He did not identify or segregate the marital portion of the net value of manager fees. It was further Mr. Apple's opinion that the net present estimated value of HCWV's manager fees at the time of separation, \$8,927,957.00, was entirely enterprise goodwill because the Management Agreement at Section 3.2.2 provided for an alleged income stream to HCWV in the event Mr. Wilson died or was incapacitated. 5/9/08 Tr. pp. 33, 41-42, 68-70.

Mr. Apple further testified that he did not rely on NLP's project-to-date reports to calculate the "net profits" or manager fees because NLP deducted mortgage interest paid as a monthly expense and did not capitalize mortgage interest expenses over the life of the project, which in his view would reflect on the accuracy of the manager fee shown on those monthly reports. He did not opine on how the treatment of interest expenses by NLP in this manner would affect the interim calculation of potential manager fees as a project went forward. This practice, stated Mr. Apple, was not in accordance with generally accepted accounting principles ("GAAP"), which was required in calculating "net profits" under the Management Agreement. 5/9/08 Tr. pp. 12-14, 27-32; Mrs. Wilson's Exh. 1 at § 6.2. Instead, Mr. Apple relied on budget information.

**F. Cross Examination of Mr. Apple**

On cross examination, Mr. Apple acknowledged the following:

- His projections were based on only three (3) projects—Overlook at Greenbrier, The Springs at Shepherdstown, and WestVaco, and he did not consider three (3) other real estate projects which were pending at the time of separation—Ashton Woods, The Point, and Crossings—despite confirming that he had information on these pending projects. He agreed that his information was incomplete. 5/9/08 Tr. pp. 92-93. The budget information for the Westvaco project he examined was dated and not current. 5/9/08 Tr. pp. 112-113.
- Mr. Apple’s opinions relied on projected revenue from lot sales from project budgets in order to estimate manager fees. The portion of this revenue that resulted from the efforts of Mr. Wilson prior to separation was not determined. NLP, on the other hand, used the percentage of construction spending to determine the progress of work performed by HCWV which is in accordance with GAAP. 9/11/08 Tr. p. 126.
- Mr. Apple conceded that having final accountings or end-of-project information on closed projects would be the best way to determine what “net profits,” if any, were received by HCWV and that information was more reliable than projections. 5/9/08 Tr. pp. 94-95.
- Mr. Apple agreed that his criticism of NLP’s projected income statements, which did not capitalize the interest paid on debt as required by GAAP, would correct itself at the end of a project when all expenses were paid and actual “net profits” could be calculated. 5/9/08 Tr. pp. 99-100. For example, Mrs. Wilson’s Exhibit #19, a projected income statement for

WestVaco dated March 30, 2008, showed a negative manager fee of approximately \$1.2 million. Only when that project was finished would the actual manager fee, if any, be known. 5/9/08 Tr. pp. 101-102. This would be true for all of the incomplete projects. 9/11/08 Tr. p. 123.

**G. Determination of Marital Share of HCWV Manager Fees Based Upon the Percentage of Work Completed at the Time of Separation**

As was previously stated, at the time of the parties' separation, HCWV was involved in the management of six (6) real estate projects: Ashton Woods, Crossings, Overlook, The Springs, WestVaco, and The Point. Four (4) of those projects, Overlook, The Springs, Crossings, and Ashton Woods, were completed after separation and prior to the trial.<sup>5</sup> The remaining two (2) projects, WestVaco and The Point, have not completed construction and lot sales. Based upon the testimony of Alan Murray, CPA, the Chief Financial Officer of NLP, and Joan Holtz, CPA for HCWV, evidence was presented on the amount of manager fees earned as of the date of separation based upon HCWV's work on each completed project as shown by the percentage of construction spending (the marital share of the manager fees) and on the status of the incomplete projects.

As shown in Mr. Wilson's Exhibit 19, a summary of the construction spending for each project, showing a "snapshot" of the percentage of the budget used at both the date of separation and the time of the May, 2008, evidentiary hearings, is as follows:

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<sup>5</sup> For Overlook, The Springs, Crossings, and Ashton Woods, actual figures were available to the Family Court in making the valuation determination.

	Spending Thru May 2005	% Spent May, 2005	Spending Thru Mar. 2008	% Spent Mar. 2008	Total Spending Budget
Ashton Woods					
(excluding timber, including rem elec.)	4,891,763.46	79.3%	6,170,497.28	100.0%	6,170,497.28
Crossings on the Potomac	4,244,332.54	98.8%	4,296,776.90	100.0%	4,296,776.90
Westvaco (excluding timber income and comm.)	623,499.79	8.2%	7,271,564.28	95.3%	7,626,705.69
Springs at Shepherdstown	233,020.07	13.6%	1,716,243.91	100.0%	1,716,243.91
Overlook at Greenbrier (excluding timber income and comm. )	205,262.53	7.7%	2,666,900.00	100.0%	2,666,900.00
The Point	67,528.55	2.3%	2,451,807.21	82.3%	2,977,500.00

For the Overlook subdivision, based upon NLP's AP estimate reflecting construction spending, as of May 22, 2005, 7.7% of the project had been completed by HCWV based upon construction spending. 5/9/08 Tr. pp. 198, 205. Mr. Wilson's Exh. 14, 19, 37. Applying that percentage against the total manager fee of \$2,762,019.00, which was earned but not paid as of June 2, 2005, is \$212,537.00. Overlook is a completed project. 9/11/08 Tr. pp. 89-91. Mr. Wilson's Exh. 22. 5/8/08 Tr. pp. 162-163; 5/9/08 Tr. pp. 145-146.

The Springs subdivision, a completed project, was only 13.6% complete based upon construction spending as of May 22, 2005. 5/9/08 Tr. pp. 199, 204-205. Mr. Wilson's Exh. 15, 19, 37. Applying that percentage of construction spending to the total manager fees earned but not paid as of June 2, 2005, which were \$1,148,389.00, yields \$156,181.00. 9/11/08 Tr. pp. 91-92. Mr. Wilson's Exh. 23. 5/8/08 Tr. p. 167; 5/9/08 Tr. p. 151.

Ashton Woods is a completed project, and was 79.3% complete based upon construction spending as of May 22, 2005, based upon the AP estimate. 5/9/08 Tr. pp. 193-197, 202-203. Mr. Wilson's Exh. 12, 19, 37. On that project, net profits were paid out to HCWV in 2003-04 before the project was completed, but subsequent unanticipated and additional expenses, involving significant problems with the roads, resulted in a downward adjustment of profits. 5/9/08 Tr. p. 143; 9/11/08 Tr. p. 106. The actual manager fee earned by HCWV on Ashton Woods was \$11,615,920.00. Based upon the 79.3% of construction spending as of

June 2, 2005, that total is \$9,211,425.00. Manager fees actually paid prior to June 2, 2005, were \$11,892,096.32, resulting in an excess paid as of that date of \$(2,680,672.00). 9/11/08 Tr. pp. 92-95. Mr. Wilson's Exh. 24. Because of the unanticipated project expenses, the premature overpayment of the manager fee was repaid from manager fee distributions from other projects. As of June 2, 2005, HCWV still owed NLP \$276,176.00 of the overpaid manager fees. 9/11/08 Tr. pp. 107-110. Mr. Wilson's Exh. 42. Mrs. Wilson's expert, Kenneth Apple, and the Family Court failed to recognize this repayment of manager fees to NLP.

At the time of the separation, the Crossings development was 98.8% completed, based upon construction spending detailed on the AP estimate. 5/9/08 Tr. pp. 197-198, 203. Mr. Wilson's Exh. 13, 19, 37. Taking the actual manager fees paid on the Crossings development, \$4,464,186.00 times the 98.8% of construction spending equals \$4,410,616.00 earned at the time of separation. Actual cash advances for June 2, 2005, were \$4,411,308.00, resulting in an excess received of \$(692.00). 9/11/08 Tr. pp. 97-98; Mr. Wilson's Exh. 25. Again, this overpayment was not recognized in the Family Court's calculations.

A recap or summary of the HCWV manager fees earned but not received at the time of separation and received but not earned at the time of separation for the four (4) completed projects showed the following:

Overlook	\$212,537	(manager fees earned but not received)
The Springs	\$156,181	(manager fees earned but not received)
Total:	\$368,718	
Ashton Woods	\$(2,680,672)	(manager fees received but not earned)
Crossings	\$(692)	(manager fees received but not earned)
Total:	\$(2,681,364)	
Grand total:	\$(2,312,646)	Net manager fees received but not earned as of separation

9/11/08 Tr. pp. 99-100, Mr. Wilson's Exh. 26.

As noted above, two (2) of NLP's real estate developments were in progress at the time of the parties' separation and were unfinished at trial — The Point and WestVaco. No lots had been sold at The Point in many months, because it was determined that the roads were not built to proper specifications, a problem which was being corrected by the responsible subcontractor. 9/11/08 Tr. pp. 52-53. Thirty-five (35) of forty-five (45) lots remained to be sold. 5/8/08 Tr. pp. 69-70, 165. Based upon the AP estimates for construction spending, only 2.3% of the project had been performed by the time of separation. 5/9/08 Tr. pp. 200-201, 205; 9/11/08 Tr. pp. 52-54. Mr. Wilson's Exh. 17, 18, 19, 36, 37. The outcome of the project is uncertain, and NLP's financial reports currently show no profit being earned by HCWV. 5/9/08 Tr. pp. 146-147. Mr. Wilson's Exh. 34, 35. Only when construction is complete, and the last lots are sold, will any net-profits or net-loss, if any, to HCWV be known. 9/11/08 Tr. p. 80.

WestVaco is a project which was acquired in September 2004 and involves a large tract of land primarily in Hampshire County and partly in Mineral County. 5/8/08 Tr. p. 45. The parties originally guaranteed the \$14,000,000 acquisition loan obtained by NLP, but when the loan was refinanced, no guarantees of the parties and HCWV were required. 5/8/08 Tr. pp. 175-176. Mrs. Wilson's Exh. 22. Mr. Wilson's Exh. 27. At the end of May 2005 at the time of separation, based upon AP estimates tracking construction spending on the project, 8.2% of the project had been completed. 5/9/08 Tr. pp. 199-200, 203-204; 9/11/08 Tr. pp. 46-48, 53-54. Mr. Wilson's Exh. 16, 19, 32, 33, 37. Though construction spending at WestVaco is currently at 99.1%, no net profits have been earned by HCWV, and in order to guarantee NLP its percentage of gross sales, HCWV would have to pay \$1.3 million. 9/11/08 Tr. pp. 42-43, 54. Mr. Wilson's Exh. 31, 37. Because there are 80 lots left to sell, only when the last lots are sold can "net profits", if any, to HCWV be calculated. 9/11/08 Tr. pp. 21-22, 80.

Subsequent to the separation of the parties, HCWV became a defendant in a lawsuit involving a former development it managed, Summer Hill. Under a previous Management Agreement, the property had been owned by WV MFGH, a Red Creek Ranch company. A lawsuit was filed by property owners and the homeowners association against numerous parties regarding access from another subdivision across Summer Hill's roads and the construction of a community center. 5/9/08 Tr. pp. 134, 221-223. Mr. Wilson's Exh. 39. The litigation has been settled though there are continuing obligations under the Mediation Settlement Agreement. Based upon a written agreement between HCWV and Red Creek Ranch, Inc., the parties are to share equally in the amount of the settlement and the legal costs. The legal expenses totaled \$28,112, and the total cost of the settlement was \$95,000, of which HCWV was obligated to pay one half (1/2) or \$61,556. 9/11/08 Tr. pp. 61-62, 5/9/08 Tr. pp. 207-208. Mr. Wilson's Exh. 38, 40.

Based upon the foregoing evidence presented by Mr. Wilson, at the time of separation, the HCWV manager fees were a negative \$(2,650,378.00), consisting of \$2,312,646.00 net manager fees received but not earned, \$276,176.00 in overpayments on the Ashton Woods project, and \$61,556.00 in HCWV's share of settlement costs and legal fees in the Summer Hill litigation.

This evidence was not rebutted by Mrs. Wilson.

#### **H. The August 2004 and February 2005 Financial Statements**

The Family Court admitted into evidence two (2) financial statements offered by Mrs. Wilson, Exhibits 19 and 20, which the Family Court found were relevant to HCWV's financial condition. The August 3, 2004 financial statement (Mrs. Wilson's Exhibit 19) bears handwriting by Larry Kessel, a loan officer with First United Bank, and its preparation relates to an NLP loan of \$14.6 million for the acquisition of the WestVaco project in September 2004,

which was to be initially guaranteed by the parties. 5/8/08 Tr. p. 99. The financial statement was signed by Mr. Wilson and certified by him as “true and correct.” 5/8/08 Tr. pp. 105-107. The financial statement contained a total valuation of assets of \$20,311,641.00.<sup>6</sup> The Family Court found that given that the parties had stipulated that their marital assets, excluding HCWV stock, were \$11,587,324.00, the Family Court concluded that Mr. Wilson had valued HCWV stock at about \$9 million. The Family Court believed that this number was consistent with the conclusion reached by Kenneth Apple and stated that HCWV’s assets would have increased by the acquisition of the new project WestVaco. Exhibit 19 does not list HCWV or HCWV stock as an asset. It shows an inventory of WV Hunter LLC lots valued at \$4,140,720.00 and receivables from WV Hunter LLC of \$5,292,208.00, which Mr. Wilson believed represented budgeted manager fees by NLP for its real estate projects. 5/8/08 Tr. pp. 107, 185.

Mrs. Wilson’s Exhibit 20 is an unsigned financial statement dated February 2005, which was subpoenaed from HCWV and First United Bank. This financial statement was created pursuant to First United Bank’s request for updated financial information pursuant to the September 2004 loan commitment to NLP. The unsigned financial statement lists the value of HCWV at \$10 million. Mr. Wilson testified that he refused to sign the statement due to several inaccuracies, including the listed value for HCWV and does not know the basis for that number. 1/7/08 Tr. pp. 202-203, 208; 5/8/08 Tr. pp. 111-119. Mr. Wilson testified that he did not prepare it nor did he work on it with Larry Kessel. 5/8/08 Tr. pp. 187-188. He believes it was prepared at First United Bank. 1/7/08 Tr. pp. 201-202. The Family Court found that the assigned value to

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<sup>6</sup> WV Hunter LLC is NLP’s subsidiary which holds title to the real estate. Neither the parties nor HCWV have an interest in the LLC. It is not known why the bank made this entry.

HCWV bolstered the conclusions of Mr. Apple and reflected total assets and net worth in excess of \$29 million, including in excess of \$10 million cash on deposit.

### **III. POINTS AND AUTHORITIES AND LEGAL ANALYSIS**

The Circuit Court's Order must be affirmed because it correctly ruled that: (1) the Family Court erred in finding enterprise goodwill despite the fact that the Management Agreement was for the personal services of Mr. Wilson; (2) the Family Court's Findings of Fact were clearly erroneous since they were based on uncertain profit projections even though evidence of actual profits was admitted into evidence; (3) the Family Court committed clear legal error by failing to exercise continuing jurisdiction over contingent manager fees despite clear statutory authority to do so. Furthermore, Mrs. Wilson waived Assignment of Error Number 3 pursuant to West Virginia Rule of Appellate Procedure 3(a), and this Honorable Court's holding in *Thompson v. Branches-Domestic Violence Shelter of Huntington, W. Va., Inc.*, by failing to raise the issue in its Rule 59(e) Motion to Alter or Amend. 207 W. Va. 479, 483, 534 S.E.2d 33, 37 (2000).

#### **A. Standard of Review**

"In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law de novo." *In re Jason S.*, 219 W. Va. 485, 489, 637 S.E.2d 583, 587 (2006) (citing Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004); *Staton v. Staton*, 218 W. Va. 201, 624 S.E.2d 548 (2005)).

#### **B. Judge Groh correctly determined that Mr. Wilson has personal goodwill.**

The Circuit Court correctly applied *May v. May* in finding that the evidence clearly shows that HCWV does not have enterprise goodwill. 214 W. Va. 394, 589 S.E.2d 536

(2003). Judge Groh determined that the Management Agreement and other evidence shows that Mr. Wilson was hired for his unique expertise and skill in the West Virginia real estate management market. Essentially, all goodwill is personal to Mr. Wilson due to his professional talent and ability. A review of the record makes it apparent that Mrs. Wilson did not meet her burden of proof in showing enterprise goodwill by convincing proof as required by *May*. *Id.* at 399, fn. 10 (citations omitted).

Goodwill is the excess earning power of a business above and beyond its tangible assets. It has been defined by this Court generally as

[T]he advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein, and consequence of general public patronage and encouragement, which it 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.

*May*, 214 W. Va. at 399 (citation omitted).

There are two types of goodwill: “enterprise goodwill” 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. It is wholly attributable to the business and is marital property subject to equitable distribution. *Id.* at Syl. Pt. 2, 4, p. 405. “Enterprise goodwill is an asset of the business and accordingly is property that is divisible in a dissolution to the extent that it inheres in the business, independent of any single individual's personal efforts and will outlast any person's involvement in the business.” *Yoon v. Yoon*, 711 N.E. 2d 1265, 1268-1269 (Ind. 1999). On the other hand, “personal goodwill” is intrinsically tied to the attributes and/or skills of an individual and is not a divisible asset subject to equitable distribution. *May*, at Syl. Pts. 3, 4, p. 405. A trial court must look to the precise

nature of the goodwill in determining whether goodwill should be valued for purposes of equitable distribution. *Id.* at 405. Courts have recognized that “the burden is on the party who seeks to establish goodwill as a marital asset to produce convincing proof delineating between [enterprise] goodwill on the one hand and personal goodwill on the other.” *Id.* at 399, fn. 10 (citing *Williams v. Williams*, 108 S.W.3d 629, 642 (Ark. App. 2003)). *Accord Tortorich v. Tortorich*, 902 S.W.2d 247, 250 (Ark. App. 1995); *Wilson v. Wilson*, 741 S.W.2d 640, 647 (Ark. App. 1987)).

In the case *sub judice*, the Family Court erred in finding that HCWV had enterprise goodwill and by assigning the discounted value of projected accrued and future manager fees for that goodwill. The Circuit Court’s Order should be affirmed because it correctly found that all of the evidence in the record below supports a finding of personal goodwill.

**1. HCWV does not have the characteristics that courts find give rise to enterprise goodwill.**

Mrs. Wilson argues that enterprise goodwill exists because of HCWV’s (1) alleged workforce of twenty to twenty-five (20-25) employees; (2) alleged “seven (7) business locations and product names”; and (3) advertising campaigns for the projects at issue. These contentions are flawed and directly contrary to the evidence.

**a. HCWV has only one (1) employee.**

The Circuit Court correctly recognized that the evidence shows that HCWV’s sole employee is Mr. Wilson. Mrs. Wilson fails to explain in her Brief that HCWV’s business is based solely upon a Management Agreement and has one (1) customer, NLP. The “qualified and highly compensated workforce” found to exist by the Family Court are all employees of Inland Management Co., a subsidiary of NLP. Additional evidence that HCWV does not employ this

“workforce” can be found in Kenneth Apple’s testimony. Mr. Apple’s method of calculating HCWV’s enterprise goodwill required him to deduct employee salaries from projected future earnings. The only employee’s salary that Mr. Apple deducted in his valuation was Mr. Wilson’s. *See* 5/9/08 Tr. pp. 40-41. This fact further evidences that HCWV only had one employee. *See, e.g., People ex rel. Dept. of Transportation v. Muller*, 36 Cal. 3d 263, 268 (1984) (recognizing that valuation methods for calculating enterprise goodwill require the deduction of employee salaries.).

While it is true that Mr. Wilson arranges for and directs employees working under his supervision, they are not HCWV’s employees. Instead, they are employees of Inland Management Co. Alan Murray, the Chief Financial Officer of Inland Management, explained this point in further detail:

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.

5/9/08 Tr. pp. 139-140. An “employer” is defined as “[a] person who controls and directs a worker under and express or implied contract of hire and who pays the worker’s salary or wages.” *See, e.g., Black’s Law Dictionary* 430 (7th Ed. 2000) (emphasis added). While it is true that Mr. Wilson controls and directs the employees in question, HCWV does not pay their salary or wages. The payment of Inland Management’s employees is an expense of the particular project that they are working on, and Section 5.1.6 of the Management Agreement specifically provides that Inland Management is the common paymaster of the employees. *See Mrs. Wilson’s Exh. 1, 5/9/08 Tr. pp. 139-140.*

Even if HCWV had employees, it would not convert Mr. Wilson’s personal goodwill to enterprise goodwill. A business does not have enterprise goodwill merely because it has employees. In fact, courts regularly find personal goodwill for individuals operating businesses as doctors, accountants, and lawyers. All of these types of businesses generally have employees. Thus, even if HCWV did have employees, this fact still would not justify a finding of enterprise goodwill.

Furthermore, NLP’s ongoing contractual relationship with HCWV is based entirely on Mr. Wilson. HCWV is merely the contract vehicle; it is the experience and services of Mr. Wilson that NLP sought to manage its real estate projects. If Hunter Wilson were to leave HCWV, it would not only have zero (0) employees, it would collapse completely. Section 10.4 of the Management Agreement in fact prohibits the assignment of the obligations of the Management Agreement because “the services and performance to be rendered hereunder are unique and personal.”

**b. HCWV does not own the six (6) of the seven (7) business locations as Mrs. Wilson claims.**

Likewise, Mrs. Wilson's argument that HCWV has seven (7) business locations, each having their own business name, is directly contrary to the evidence. While HCWV does own its office at B&O Overpass Road, HCWV does not own the remaining six (6) locations, nor does it hold itself out as owning these locations. HCWV merely manages the development of the locations. WV Hunter LLC is the titled owner of NLP's real estate projects and has financial responsibility for each West Virginia project. *See* 5/9/09 Tr. pp. 123-125. The only association that HCWV has with these locations is its management of each property. This fact does not comport with the legal recognition of enterprise goodwill based upon the public's association of a company with its business location. *See, e.g. Baker v. Baker*, 2004 Pa Super. 413, 861 A. 2d 298, 303 (Pa. Super. 2004) ("a portion of Husband's equity interest took the form of enterprise goodwill which included the location of the practice and the customer list.").

Mrs. Wilson also did not offer any evidence showing that the properties at issue were owned by HCWV. To the contrary, WV Hunter LLC is the titled owner of NLP's real estate projects. *See* 5/9/08 Tr. pp. 123-125. Finally, she did not introduce any evidence showing that HCWV's actual business location somehow contributes to enterprise goodwill. Therefore, Mrs. Wilson has not met her burden of convincing proof as required by *May*, and the Circuit Court correctly reversed the Family Court's findings relating to this issue.

**c. HCWV does not pay the advertising expenses for the projects.**

Mrs. Wilson also argues that the advertising campaigns for the subject projects show enterprise goodwill. Again, this argument is contrary to the evidence. It is undisputed that advertising and promotional expenses are costs of the project, and not paid by HCWV. 5/9/08 Tr. p. 127; 9/11/08 Tr. p. 31; Mrs. Wilson's Exh. 1, § 5. Even if these costs were an expense of

HCWV's operation, Mrs. Wilson does not cite any law in support of her argument that advertising converts the goodwill of a business to enterprise goodwill. In fact, many individuals operating businesses as doctors, accountants, and lawyers that are found to have only personal goodwill almost always incur advertising expenses. Therefore, the Court must reject this unfounded argument.

**d. Mrs. Wilson has not met her burden of proving that HCWV has characteristics tending to show enterprise goodwill.**

The presence of a skilled labor force, business locations, and advertising expenses are only a few elements to take into consideration when determining if enterprise or personal goodwill exists. Alone, these elements do not establish a positive showing of enterprise goodwill. *See, e.g., 38 Am. Jur. 2d Good Will § 5* ("Good will is a concept that embraces many intangible elements"). In *May v. May*, this Court cited many other jurisdictions in discussing the characteristics of businesses that tend to show enterprise goodwill. 214 W. Va. 394, 399-400, 589 S.E.2d 536, 541-542 (2003). For example, this Court cited the Court of Appeals of Indiana's opinion in *Frazier v. Frazier*. *Frazier* recognizes that there are many factors to consider when assessing good will: "[e]nterprise goodwill is based on the intangible, but generally marketable, existence in a business of established relations with employees, customers and suppliers, and may include a business location, its name recognition and its business reputation." *Id.* at 399-400, (citing 737 N.E.2d 1220, 1225 (Ind. App. 2000)). *See also In re Marriage of Alexander*, 368 Ill. App. 3d 192, 199, 857 N.E.2d 766, 772 (Ill. App. 5 Dist. 2006) (where an expert's valuation of personal goodwill based on the following elements was held to be admissible: (1) lacks transferability, (2) specialized knowledge, (3) personalized name, (4) inbound referrals, (5) personal reputation, (6) personal staff, (7) age, health, and work habits, and (8) knowledge of end user. The following enterprise attributes were also noted: (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.).

Mrs. Wilson did not meet her burden of convincing proof as required by *May*, 214 W. Va. at 399, fn 10. She did not introduce any evidence that shows that HCWV possesses a labor force, multiple business locations, or incurs advertising costs. Even if HCWV did possess these characteristics, they alone do not establish a showing of enterprise goodwill.

**2. The Circuit Court correctly found that the facts of this case support a finding of personal goodwill.**

All of the facts of this case support the Circuit Court's finding of personal goodwill. According to NLP's Chief Financial Officer, Alan Murray, CPA, Mr. Wilson was chosen for the service-based contract because of his "long record of performance." 5/9/08 Tr. p. 125. The duties required of a manager, according to NLP, are in the nature of "personal services" and involve a wide ranging skill set: the identification of suitable property for development, the direction and oversight of a feasibility study for the property, the engineering, surveying, planning, and permitting for subdivision approval, the construction of the roads, utilities, and infrastructure, the employment of a sales force, and the marketing and sale of the finished lots. 5/9/08 Tr. p. 127. Mr. Wilson is "good at what he does" and is the "real strength of the manager agreement," according to Mr. Murray. 5/9/08 Tr. pp. 132-133, 138. Mr. Murray testified that Mr. Wilson is essential to the success of West Virginia projects:

Q. And how important is National Land Partners' reliance on Hunter Wilson in the performance of those obligations?

A. Without Hunter Wilson, we really don't have a project locally.

5/9/08 Tr. p. 132-133. He further acknowledged that it would be difficult to replace Mr. Wilson because he was "not sure there's another person in the state of West Virginia that has the skill

sets that are required to manage our business.” 5/9/08 Tr. p. 214.<sup>7</sup> Mrs. Wilson agreed with that assessment, testifying that the 2004 success of HCWV, in which the company earned \$11.8 million in manager fees, was due to her husband’s efforts. 5/8/08 Tr. pp. 251-252. Any goodwill HCWV has is personal goodwill and belongs to Mr. Wilson. He takes that goodwill wherever he goes and it is not dependent on HCWV. *See Butler v. Butler*, 541 Pa. 364, 380-381, 663 A.2d 148, 156 (Pa. 1995) (reversing the Superior Court’s finding of enterprise goodwill because the evidence showed personal goodwill when an accountant had clients who were loyal to the individual and not the firm).

These facts show that the success or failure of HCWV’s management of NLP’s real estate projects is intrinsically tied to Mr. Wilson’s skills and is uniquely personal to him. HCWV has no customers or suppliers or ongoing relationships with anyone but NLP and thus is not an “enterprise.” The company’s business is purely the services that Mr. Wilson provides for which manager fees are earned. There is only personal goodwill.

Additionally, case law supports the Circuit Court’s determination that HCWV possessed personal goodwill. *In re Marriage of Weakley* involved a husband who owned a logging business with two other individuals. 177 Or. App. 363, 33 P.3d 1045 (2001). Though the logging business relied primarily on fixed bid contracts, the finding of enterprise goodwill in the divorce proceeding turned on the facts that the husband was not the sole owner and that there was no evidence the business was dependent on his services. The Oregon Court distinguished this fact pattern from *Lanksford v. Lanksford*, which also involved a logging business. 79 Or. App. 742, 720 P.2d 407 (1986). There, the husband was the sole owner, and the success or failure of the business was dependent upon his special expertise and ability to negotiate

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<sup>7</sup> Mr. Murray further offered: “Mr. Patten [NLP’s CEO] doesn’t even trust me to step into Mr. Wilson’s shoes, and I’ve been with him 18 years.” 5/9/08 Tr. pp. 220-21.

contracts. The Court found that there was no goodwill for value to be assigned. *Lanksford* is readily adaptable to the case at bar. While Mr. Wilson is not the sole owner of his business, it is his expertise and skill in managing large real estate developments that directly affects HCWV's success. That is the essence of personal goodwill. Therefore, the Circuit Court correctly found that only personal goodwill is present.

In *In re Marriage of Foley*, 516 N.E.2d 455 (Ill. App. 1987), the appellate court sustained the lower court's finding that the goodwill of the husband's automobile parts business rested entirely with him and was personal because of his relationship with his customers. Similarly, in *Bertholet v. Bertholet*, 725 N.E.2d 487 (Ind. App. 2000), a husband's bail bonds business was found to have personal goodwill, and the Indiana court remanded the case for determination of the value of the business excluding personal goodwill.

These cases confirm the principle that where a business depends upon the continued presence of a particular individual and is attributed to the individual's personal skill, training or reputation, personal goodwill exists and is not subject to equitable distribution. *See May, supra*, syl. pt. 4.

**3. The Management Agreement supports the Circuit Court's finding of personal goodwill.**

Mrs. Wilson argues that the Management Agreement shows enterprise goodwill, since *May v. May* notes that existing arrangements may be a factor to consider when determining if enterprise goodwill exists. Syl. Pt. 2, 214 W. Va. 394, 589 S.E.2d 536. However, this argument is contrary to the evidence. First, Mrs. Wilson fails to mention that *May* also explains that personal goodwill "depends on the continued presence of a particular individual." *Id.* at Syl. Pt. 3. Here, Section 10.4 of the Management Agreement specifically and unequivocally prohibits the assignment of Mr. Wilson's obligations under the Management Agreement because

“the services and performance to be rendered hereunder are unique and personal.” This non-assignment clause in the Management Agreement directly relates to the explanation of personal goodwill as set forth in *May*.

Next, Mrs. Wilson incorrectly argues that Section 3.2.2 of the Management Agreement shows enterprise goodwill because of what she and the Family Court believe provide an “income stream” to HCWV in the event of Mr. Wilson’s death or incapacity.<sup>8</sup> Mrs. Wilson can point to no evidence showing that the parties drafted this provision to simply provide an income stream in order for HCWV to continue operating after death or incapacity of Mr. Wilson. In fact, Mr. Murray testified that Section 3.2.2 of the Management Agreement supports a finding of personal goodwill:

Q. Now, in both of the management agreements that are active, Mr. Wilson was named specifically Section 3.2.2, meaning that when he dies or is incapacitated, National Land Partners would then proceed to hire a substitute manager. Why is his personal name in this agreement when the management agreement, you know, is actually with his company?

.....

A. We view the company that we are entering into this management agreement as simply that, a company. The company itself does nothing unless Hunter Wilson does it, so the...the real strength of the manager agreement is, in this case, Hunter Wilson who signs as the principal.

5/9/08 Tr. pp. 138-39. The Circuit Court correctly found that this provision provides nothing more than a method of payment to HCWV for Mr. Wilson’s work in progress upon his death or incapacity. Cir. Ct. Opinion and Order, p. 14, ¶3. This factor alone does not create enterprise

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<sup>8</sup> Section 3.2.2 states: “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.”

goodwill, and Mrs. Wilson can point to no other fact that supports the existence of enterprise goodwill, nor can Mrs. Wilson rely on any case law that supports her theory.

Furthermore, Section 3.1.1 directly negates Mrs. Wilson's claim that Section 3.2.2 is simply a vehicle for providing an "income stream" to HCWV in the event of Mr. Wilson's death or incapacity. Section 3.1.1 states:

The Company is not required to offer future projects to Manager. If Company proceeds with another project with any person or entity and does not offer participation in it to Manager pursuant to this Section 3.1.1, then Company and Manager shall continue to fulfill their obligations, if any, under this Agreement solely as to the Projects then managed by Manager. Manager shall not be entitled to any benefits under this Agreement from any project initiated by Company after the date of Company's termination of this Agreement, and Company shall not be entitled to participate in any project initiated by Manager after date of Company's termination.

(emphasis added). This shows that NLP can freely sever its relationship with HCWV if Mr. Wilson dies or becomes incapacitated. This arrangement is logical, since the relationship between NLP and HCWV exists because of Mr. Wilson's specialized skills, not because NLP wants to do business with HCWV as an entity. Section 3.1.1 confirms that the parties to the Management Agreement anticipated that the relationship between NLP and HCWV should be terminated if an event like Mr. Wilson's death or incapacity should occur. This language defeats Mrs. Wilson's argument that the Management Agreement supports a finding of enterprise goodwill.

There is no persuasive authority that holds that the existence of an "income stream" contract protecting the value of work performed *ipso facto* creates enterprise goodwill. The existence of such a contract would necessarily require further inquiry on whether the circumstances create enterprise or personal goodwill. The bottom line is whether that perceived goodwill is marketable. Like the dentist in *May v. May*, any goodwill attributed to HCWV's

contract with NLP is dependent upon Mr. Wilson's continued presence. *See* 214 W. Va. 394, 408-409, 589 S.E.2d 536, 550-551. Merely because the value of his work is protected by a contract provision does not change the nature of that goodwill. Since the facts of this case show personal goodwill, the Circuit Court did not exceed its authority by finding that enterprise goodwill cannot be attributed to HCWV.

**4. Kenneth Apple's valuation of alleged enterprise goodwill is flawed and unreliable.**

Next, Mrs. Wilson argues that Kenneth Apple's testimony supports the Family Court's finding of enterprise goodwill. However, Mr. Apple based his valuation of HCWV solely on speculative profit projections, despite the fact that specific evidence of earned profits was available. The Circuit Court correctly determined that it was clearly erroneous for the Family Court to accept Mr. Apple's valuation over Mr. Wilson's evidence of accurate management fee earnings. Moreover, the law provided by this Honorable Court specifically permits a court to consider lay testimony that rebuts an expert's opinion.

Mr. Apple's testimony showed a seriously flawed business valuation. The defects in the valuation are three (3):

**a. Mr. Apple did not use an acceptable method of calculating goodwill value.**

In *May v. May*, the Supreme Court of Appeals recognized that there are a number of acceptable methods in valuing goodwill and that no one formula is preferred. 214 W. Va. at 405-06 (citing cases). The five (5) major formulas involve (a) straight capitalization, (b) capitalization of excess earning methods, (c) IRS variation of capitalized excess earnings, (d) market value analysis, and (e) application of buy-sell agreement terms. *Id.* at 406-07 (citing *In re Marriage of Hall*, 103 Wash. 2d 236, 242-246, 692 P.2d 175, 178-80 (Wash. 1984)). If a calculation of goodwill is not based on one of these acceptable methods, it "must be based on

competent evidence and on a sound valuation method or methods.” *May*, 214 W. Va. at 408 (emphasis added) (citations omitted).

Mr. Apple did not identify, nor did he rely upon, any of the acceptable, traditional formulas for valuing goodwill. Nor did Mr. Apple use a “sound valuation method” based on “competent evidence.” Instead, Mr. Apple explained that he merely calculated the present value of a future cash flow based upon budget estimates. Mr. Apple used the language of Section 3.2.2 of the Management Agreement in order to create his model. But deviating from the standard valuation methods is suspect and, to the extent that Section 3.2.2. can be likened to a buy-sell agreement, courts are advised to exercise caution in relying upon contractually based formulas. *May v. May*, 214 W. Va. at 406. See also *Syl. Pt. 2, Bettinger v. Bettinger*, 183 W. Va. 528, 396 S.E.2d 709 (1990), *Syl. Pt. 1* (Buy-sell agreement in closely held corporation setting stock value for equitable distributions purposes should not be considered as binding, but rather should be weighed along with other factors in making a determination as to the value of such stock).

Mr. Apple’s valuation method using speculative profit projections, despite the availability of certain evidence, is contrary to legal principles forbidding the use of contingent earnings in calculating the value of goodwill. For example, courts in other jurisdictions have held that contingent fees cannot be used as a basis for calculating goodwill. In *Beasley v. Beasley*, the Superior Court of Pennsylvania held that contingent fees from a sole proprietorship law practice could not be considered to establish present value or goodwill of a business for the purposes of establishing an award of spousal support. 359 Pa. Super. 20, 518 A.2d 545 (Pa. Super. 1986). In finding that the enterprise goodwill of a law practice was not marital property for the purposes of equitable distribution, the court noted that “[i]t is tenuous and risky to attempt to evaluate the likely return on contingent fees and as such, no value can be placed on them for

purposes of equitable distribution. . . . just as we could not establish good will based on contingent fee earnings, as at best these are potential earnings, so must we limit consideration of contingent fees for purposes of present value.” *Id.* at 554-556. *See also Vohn Hohn v. Vohn Hohn*, 260 S.W. 3d 631, 641-642 (Tex. App. 2008) (reversing a final divorce decree adopting an expert’s faulty valuation method which included future contingency fees in the value of the husband’s interest in a law firm); *In re Marriage of Tietz*, 238 Ill. App. 3d 965, 973, 605 N.E.2d 670 (1992) (“Clearly, future earned fees, like contingent fees, are not marital assets because their value is too speculative and because they are fees earned in the future.”); *Musser v. Musser*, 909 P.2d 37, 41 (Okl. 1995) (favorably citing *Beasley* in holding that contingency fees cannot be used to calculate the present value of a business).

HCWV’s contingent manager fees are no different than an attorney’s contingent fee contract such as the one considered in *Beasley*. The value of the manager fees remains uncertain until the project is completed. In fact, Mr. Apple likened Mr. Wilson’s contingent manager fees to accounts receivable, as though the fees were fixed and due to be received by HCWV. However, consideration of only the total amount of accounts receivable is not mentioned in cases around the country discussing the numerous appropriate methods for calculating goodwill. Instead, the amount of a business’s accounts receivable, as a tangible asset, is usually just one factor to take into consideration in determining the value of goodwill, an intangible asset. *See, e.g., In re Marriage of Foster*, 42 Cal. App. 3d 577 (1974) (“On cross-examination Heller was asked what he meant by ‘goodwill.’ He replied: ‘Goodwill is value that somebody has built up. . . . it is part of the business; it is separate from the accounts receivable, and is in addition thereto.’”) (emphasis added). *See, e.g.,* the definition of goodwill in *Black’s Law Dictionary* (“A business’s reputation, patronage, and other intangible assets that are

considered when appraising the business, esp. for purchase; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets.”) 557, (7th Ed. 2000) (emphasis added).

Mrs. Wilson has never provided evidence that Mr. Apple’s method is an acceptable method of valuating goodwill. To the contrary, Mr. Apple’s method uses inaccurate and incomplete profit projections that are not acceptable by the standard of *May*. As such, the Family Court erred by relying on Mr. Apple’s valuation method of goodwill since it is contrary to legal principals.

**b. Mr. Apple used incomplete and outdated information.**

Mr. Apple had been provided with final numbers for completed projects, but chose instead to rely on budget estimates of revenue from which he calculated accrued and future manager fees. Mr. Apple’s projections were based on estimated lot sales, not the value of actual work performed by HCWV which indicated the project’s actual progress and a tool used by NLP in its accounting system. Mr. Apple’s projections, for unknown reasons, also did not consider all six (6) projects pending at the time of separation, but looked at only three projects (3)—the Overlook, the Springs, and WestVaco. He readily acknowledged that actual end-of-project information was better for calculating manager fees than projections and that some of the information he had used was dated.

The contrast between the depth and breadth of the accounting data presented by Mr. Wilson and the paucity and questionable quality of information utilized by Mrs. Wilson’s expert for his estimates was dramatic, yet the Family Court gave weight to an expert’s opinions of value over actual proof. In doing so, the Family Court violated the Supreme Court’s repeated instruction to its lower courts to maintain a preference for actual proof of value over estimates:

Proof of facts will usually outweigh opinions or estimates contrary thereto. *Comstock v. Lumber Co.*, 69 W. Va. 100, 71 S.E. 255. The testimony of expert witnesses is not exclusive, and does not necessarily destroy the force or credibility of other testimony. The jury has a right to weigh the testimony of all the witnesses, experts and otherwise; and the same rule applies as to the weight and credibility of such testimony. *Payne v. Railway Co.*, 47 Wash. 342, 91 P. 1084.

*Webb v. Chesapeake & O. Ry. Co.*, 105 W. Va. 555, 144 S.E. 100, 103 (1928). In *Underwood v. Raleigh Transportation Equipment & Construction Co.*, the Court held that “the only absolute test we can have of the value of merchantable article is what it has been sold for at a fair sale. All other means of ascertaining the value of a merchantable commodity are speculative, and must, to a greater or less extent, be uncertain. A sale is a demonstration of the fact, while estimates, even by the best judges, are simply matters of opinion, which, at best, are only approaches to the fact.” 102 W. Va. 305, 135 S.E. 4, 4 (1926) (citation omitted).

Mrs. Wilson incorrectly claims that Mr. Apple’s valuation of HCWV was incomplete because Mr. Wilson refused to provide certain project documents. Not only is this accusation incorrect, but it also mischaracterizes the evidence. The Family Court Judge did not find that Mr. Wilson engaged in misconduct. In fact, he overruled Mrs. Wilson’s objection and allowed the admission of these documents into evidence. 5/9/08 Tr., p. 188-89. Specifically, Mrs. Wilson objected to the admission of updated project statements that were provided to Mrs. Wilson’s counsel after the report was generated at the end of the month when the information became available. 5/9/08 Tr., pp. 164. Mr. Apple was already provided with exactly the same documents for each project. The only difference between the documents that Mr. Apple had in his possession and the documents that Mrs. Wilson objected to is the total percentage of construction completed on each project, since each project continually progressed.

Most importantly, Mr. Apple did not even use the near-identical project statements that he was provided with in forming his opinion. As discussed *supra*, he opted to utilize profit projections for three (3) out of six (6) projects, even though he was provided with actual project statements for six (6) projects. His failure to opine about half of the projects at issue in this case has nothing to do Mrs. Wilson's objection. Therefore, Mrs. Wilson's argument is irrelevant and misleading.

The Circuit Court's adoption of un rebutted evidence showing the actual end-of-profit calculations of manager fees in favor of an expert's estimate of value using limited, dated budget information is correct and must be affirmed.

**c. Mr. Apple's assumption of a substitute manager's salary of \$360,000.00 is not supported by the evidence.**

In making his projections, Mr. Apple reduced the alleged income stream to HCWV for each of the three (3) projects by \$360,000.00 per year which consisted of a \$300,000.00 salary plus benefits, similar to what was paid annually to Mr. Wilson by HCWV. (The Management Agreement at Section 3.2.2 provides for the hiring of a substitute manager in the event of Mr. Wilson's death or incapacity. 5/9/08 Tr. pp. 33, 41-42.) However, Alan Murray, CPA, the CFO for NLP, testified that a competent replacement manager would receive a percentage of the net profits and could not be hired on a salary basis, and especially not for a salary of \$300,000.00. 5/9/08 Tr. pp. 208-209, 214-215. Joan Holtz, CPA, testified that the \$300,000.00 salary was created to meet IRS regulations requiring "reasonable compensation" for subchapter S corporation executives and to create a means to pay federal withholdings and payroll taxes. Mr. Wilson's salary bears no relationship to his efforts as a manager of the various projects, and it is paid from manager fees earned by HCWV. 5/8/08 Tr. p. 155; 9/11/08 Tr. pp.

100-104. Thus, the assumption of a substitute manager salary by Mr. Apple has no factual predicate.

The evidence shows that the Circuit Court was correct in rejecting Mr. Apple's finding of enterprise goodwill. His testimony shows that his valuation was based on incomplete and unreliable evidence, despite the fact that he could have used actual, definite fees earned in his valuation of HCWV. As such, the Family Court's findings regarding Mr. Apple were clearly erroneous.

**C. The Circuit Court properly found that the Family Court's Order, which was based on estimated profit projections, was clearly erroneous in light of evidence of finite profits subject to equitable distribution.**

The Circuit Court did not exceed its authority in concluding that the Family Court's finding of enterprise goodwill was not based on credible evidence. Instead, the Circuit Court properly found that the Family Court's Order was not based on specific evidence of manager fees, even though this evidence was available. In accordance with the law of this State, the Circuit Court correctly considered the lay testimony offered in rebuttal in rejecting the flawed opinions of Mr. Apple's finding, and subsequently valuing, enterprise goodwill.

**1. The Circuit Court was correct in finding that the Family Court's findings of fact were against the weight of the evidence and clearly wrong.**

The Circuit Court applied the correct standard of review in finding that the Family Court Judge's rulings were against the weight of the evidence or were clearly wrong. If Mrs. Wilson's interpretation is adopted, circuit courts sitting as intermediate appellate courts in this State would never be able to reverse and remand a family court's decisions.

Mrs. Wilson cites to numerous cases which hold that the "findings of fact made by a (family court) in a divorce proceeding based on conflicting evidence will not be disturbed unless they are clearly wrong or against the preponderance of the evidence." *See, e.g., Sellitti v.*

*Sellitti*, 192 W. Va. 546, 551, 453 S.E.2d 380, 385 (1994). See Appellant's Brief, pp. 16-17. This is consistent with the first prong of the statutory reviewing standard that findings of fact by a family judge are reviewed under a clearly erroneous standard. W. Va. Code § 51-2A-14(b) (2003). Additionally, where a family court applies the law to the facts, the abuse of discretion standard applies. *Id.*

The Circuit Court properly applied the standard of review in its careful and exhaustive analysis of the Family Court's decision. In each instance addressed by the Circuit Court in its Opinion and Order, the Family Court Judge's rulings were found to be against the weight of the evidence or were clearly wrong. In a large part, the evidence at trial on which the Circuit Court's ruling was based was not conflicting. Rather, the Court properly recognized that the Family Court had ruled contrary to the weight or preponderance of the evidence on the key issues, and that the Family Court's ruling was not plausible. See *Board of Education v. Wirt*, 192 W. Va. 568, 579, 453 S.E.2d 402, 413 (1994).

For instance, the Circuit Court was clearly correct when it rejected the Family Court's adoption of a flawed expert value opinion of future and accrued manager fees based upon incomplete and unsupported estimates and budgets, in favor of unrebutted end-of-project calculations of manager fees on which the marital share was determined based upon the percentage of construction spending at the time of separation. See Cir. Ct. Opinion and Order, pp. 4-8. The Circuit Court's judgment was also sound when it overruled the Family Court's finding of enterprise goodwill based upon one (1) fact<sup>9</sup> when the record supported the conclusion that Mr. Wilson's business services were personal, and the success of his business was intrinsically tied to his skills. See Cir. Ct. Opinion and Order, pp. 15-17. Finally, when the

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<sup>9</sup> The Family Court's determination that enterprise goodwill exists was based solely on Section 3.2.2 of the Management Agreement which authorized the payment of manager compensation, less the cost of a substitute manager, if Mr. Wilson died or became incapacitated.

Family Court ignored the facts that two (2) different projects were unfinished at the conclusion of the trial and the manager fees to Mr. Wilson's (and their marital shares) were uncertain and contingent, the Circuit Court properly ruled that jurisdiction over the marital shares of these projects should be reserved in accordance with W. Va. Code § 48-7-104(1)(B). *See* Cir. Ct. Opinion and Order, pp. 9-12.

Furthermore, the Circuit Court was correct in determining that the Family Court's reliance on the August 2004 and February 2005 financial statements was against the weight of the evidence and clearly wrong. *See* Mrs. Wilson's Exhibit 19 and 20. These statements should not have been considered by the Family Court because they were created solely for the purpose of the Wilsons' personal guarantee of loans taken out by NLP. The August 2004 financial statement does not list HCWV or HCWV stock as an asset. It shows an inventory of WV Hunter LLC lots valued at \$4,140,720.00 and receivables from WV Hunter LLC of \$5,292,208.00, which Mr. Wilson believed represented budgeted manager fees by NLP for its real estate projects. 5/8/08 Tr. pp. 107, 185. The February 2005 financial statement was created pursuant to First United Bank's request for updated financial information pursuant to the September 2004 loan commitment to NLP. Mr. Wilson testified that he refused to sign the statement due to several inaccuracies, including the listed value for HCWV, and does not know the basis for the number listed on the statement. 1/7/08 Tr. pp. 202-203, 208; 5/8/08 Tr. pp. 111-119. Mr. Wilson testified that he did not prepare it nor did he work on it with Larry Kessel. 5/8/08 Tr. pp. 187-188. He believes it was prepared at First United Bank. 1/7/08 Tr. pp. 201-202. Obviously, the record shows that these statements contained inaccurate information that should have not been relied on by the Family Court in determining the equitable distribution of property.

2. **The Circuit Court properly rejected expert testimony based on uncertain and inaccurate evidence in favor of lay testimony based on accurate evidence.**

Furthermore, Mrs. Wilson suggests that the Circuit Court erred by finding that HCWV did not possess enterprise goodwill because Mr. Wilson offered lay testimony to rebut Mr. Apple's finding and valuation of enterprise goodwill. In support of this suggestion, Mrs. Wilson cites the following from *Helper v. Helper* (hereinafter *Helper II*): "A measure of discretion is accorded to a family law master in making value determinations after hearing expert testimony." 224 W. Va. 413, 686 S.E.2d 64, 74 (2009). *Helper II* does not require expert testimony to be rebutted by an expert witness. In fact, this Honorable Court has expressly held that a lay witness can rebut the testimony of an expert witness. "The testimony of expert witnesses on an issue is not exclusive, and does not necessarily destroy the force or credibility of other testimony." Syl. pt. 2, *Webb v. Chesapeake and Ohio Ry.*, 105 W. Va. 555, 144 S.E. 100 (1928), cert. denied, 278 U.S. 646, 49 S.Ct. 82, 73 L.Ed. 559 (1928). *Accord Powers v. Bayliner Marine Corp.*, 83 F.3d 789, 798 (6th Cir. 1996) (jury's rejection of expert witness's unrebutted testimony would not require new trial because the jury "could have rejected [it] even if contradicted.").

Mrs. Wilson asks that this Honorable Court find that the Circuit Court's findings were incorrect because Mr. Wilson presented lay testimony to rebut Mr. Apple. It would be dangerous precedent for the Court to adopt this reasoning. For example, family law judges in this State would be required to adopt an expert's finding and valuation of enterprise goodwill even if based on uncertain and inaccurate evidence, merely because the expert testified. This exact scenario is present in the case *sub judice*. Therefore, this Court should find that the Circuit

Court did not exceed its authority in concluding that the Family Court's finding of enterprise goodwill was based on an inaccurate expert testimony.

**D. Mrs. Wilson has not preserved Assignment of Error Number 3 because she did not raise it in her Rule 59(e) Motion to Alter or Amend.**

For the first time in this case, Mrs. Wilson argues that the Circuit Court erred in relying upon the same evidence that the Family Court relied on, over Mrs. Wilson's objection, in finding that the Family Court's Order was clearly erroneous. Specifically, Mrs. Wilson complains that certain testimonial and documentary evidence supporting Mr. Wilson's construction spending theory to accurately measure manager fees earned before the date of the parties' separation was improperly admitted into evidence. This alleged error was not raised in Mrs. Wilson's Rule 59(e) Motion to Alter or Amend the Court's March 25, 2009 Opinion and Order. Therefore, this Assignment of Error cannot be considered by this Honorable Court.

West Virginia Rule of Appellate Procedure 3(a) states in pertinent part:

"(a) Time for petition.-No petition shall be presented for an appeal from, or a writ of supersedeas to, any judgment, decree or order, which shall have been rendered more than four months before such petition is filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered[.]"

In *Thompson v. Branches-Domestic Violence Shelter of Huntington, W. Va., Inc.*, this Court held that:

"the only errors which benefit from the extended appeal period are those which are raised in the Rule 59(e) motion to alter or amend judgment. The issues not assigned as grounds supporting an alteration or amendment of judgment retain the original filing period. Accordingly, we may only consider the errors raised by the Thompsons in their Rule 59(e) motion as their petition for appeal was filed more than four months after summary judgment was granted."

207 W. Va. 479, 483, 534 S.E.2d 33, 37 (2000). See also Syl. Pt. 6, *Dixon v. American Industrial Leasing Co.*, 157 W. Va. 735, 736, 205 S.E.2d 4, 5 (1974); *Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro* 158 W. Va. 708, 709, 214 S.E.2d 823, 824 (1975).

The final order that Mrs. Wilson is appealing is the Circuit Court's Order Denying Motion to Alter or Amend, which was entered on June 4, 2009. According to *Thompson*, a party may appeal errors not raised in a Rule 59(e) motion only when the appeal is filed within four (4) months of the original filing period, as set forth in West Virginia Rule of Appellate Procedure 3(a). In this case, the original filing period ran from the date of entry of the Circuit Court's March 25, 2009 Order reversing and remanding the Family Court's decision. The time to assign error from the March 25, 2009 Order ended in July 2009. Therefore, the only assignments of error that may be raised before this Court today must have been addressed in the Rule 59(e) Motion, since the June 4, 2009 Order properly extended the appeal period.

However, Mrs. Wilson never assigned Error Number 3 in her Rule 59(e) Motion. Therefore, this Court cannot consider Assignment of Error Number 3, as it was never raised in Mrs. Wilson's Rule 59(e) Motion. In a footnote in her Appellate Brief, Mrs. Wilson argues that she preserved Assignment of Error Number 3 by claiming that she raised it on pages 2 and 3 of her Rule 59(e) Motion. See Appellant's Brief, p. 4, fn 4. However, Mrs. Wilson's reference to the evidence complained of is tangential, and not a proper assignment of error in accordance with *Thompson*. Specifically, Mrs. Wilson claims that the following sentence set forth in the "Summary of Facts" section of her Rule 59(e) Motion constitutes a proper assignment of error: "Further, at trial, Mrs. Wilson objected to all evidence of the "construction spending theory" which this Court relied upon, in part, in reversing the Family Court." See Appellant's Rule 59(e) Motion, p. 2-3. In the remainder her Rule 59(e) Motion, the evidence complained of is never

mentioned again. Clearly, stating an objection raised at the trial below in the statement of facts of a Rule 59(e) Motion does not equate to a properly raised assignment of error, since it was never “assigned as grounds supporting an alteration or amendment of judgment” pursuant to *Thompson*. In her Rule 59(e) Motion, Mrs. Wilson did not advance any specific argument as to why the evidence complained of is inadmissible. Obviously, this made it impossible for Mr. Wilson to respond to a non-existent assignment of error in his Response to Mrs. Wilson’s Rule 59(e) Motion.

Furthermore, the evidence supporting the construction spending theory was correctly admitted because it had a proper foundation and did not require the testimony of an expert witness. Alan Murray and Joan Holtz are qualified to testify about this evidence. Alan Murray is a CPA and Chief Financial Officer of NLP. Joan Holtz is the CPA for HCWV. These qualifications show intimate knowledge of the projects that Mr. Wilson managed. Mrs. Wilson was able to thoroughly cross-examine Mr. Murray and Ms. Holtz about their opinions regarding construction costs of the subject projects. Furthermore, the Family Court Judge allowed Mrs. Wilson to depose Mr. Murray after his May 9, 2008 testimony about construction management fees and charge back issues raised in his direct examination. Therefore, the evidence presented on the amount of manager fees earned on each completed project as shown by the percentage of construction spending was properly admitted.

Additionally, Mrs. Wilson’s assertion that this evidence was inadmissible because it does not follow generally accepted accounting principles (“GAAP”) is not supported by the evidence. Mr. Apple testified that NLP’s projected income statements for its projects did not follow GAAP because interest expenses for NLP’s debt were not capitalized over the life of the project and were instead expensed as paid. Because Section 6.2 of the Management Agreement

required the manager's compensation, the "net profit," to be calculated in accordance with GAAP, the manager fees shown on the interim projected income statements for the projects were inaccurate, stated Mr. Apple. Mrs. Wilson's Exh. 1. This assertion was adopted by the Family Court, which found generally that Mr. Apple's methodology applied GAAP while the accounting produced by Mr. Wilson's evidence did not.

The Family Court's finding was grossly overstated and erroneous, as Mr. Apple's assertion was a red herring. NLP's election to reflect interest paid monthly on the mortgage debt on each project as an expense rather than to capitalize it over the life of the project mattered little when a project ended. Then, whether the interest was capitalized or not, all expenses were paid and a "net profit" or manager fees owed to HCWV were determined. This fact was acknowledged by Mr. Apple, 5/9/08 Tr. pp. 99-100, and confirmed by Mr. Murray, 5/9/08 Tr. pp. 150-151.

Furthermore, as discussed *supra*, Section 6.2 of the Management Agreement states that GAAP shall be used only for the payment of Mr. Wilson. The Management Agreement does not mandate the use of GAAP for any other calculations. Therefore, this argument is inapposite to the admissibility of evidence supporting the construction spending theory. The Management Agreement does not require that all calculations be made in accordance with GAAP. Therefore, Mrs. Wilson's reliance on the mention of GAAP in one section of the Management Agreement to argue that Mr. Wilson's calculation of marital and non-marital managers fees was faulty is unfounded. 5/9/08 Tr. p. 159; 9/11/08 Tr. p. 55.

Finally, it should be noted that Mrs. Wilson does not contend that the Circuit Court exceeded its authority by considering evidence that was not in the record. Mrs. Wilson only claims that certain evidence admitted and considered by the Family Court was admitted

over her objection. However, the Circuit Court appropriately reviewed the entire record in determining that the Family Court's findings were clearly erroneous. Therefore, this assignment of error should respectfully be rejected.

**E. The Circuit Court properly remanded this case because W. Va. Code § 48-7-104(1) mandates continuing jurisdiction since all marital manager fees cannot yet be determined.**

Mrs. Wilson argues that it was error for the Circuit Court to remand the case to the Family Court to determine the actual profits for the two (2) incomplete projects, WestVaco and The Point at Shepherdstown. In support of this contention, Mrs. Wilson claims that continuing jurisdiction is only appropriate when enterprise goodwill is present. She further argues that since Mr. Wilson states that only personal goodwill is present, continuing jurisdiction is not appropriate because personal goodwill is not subject to equitable distribution. However, this argument misses the point. Mr. Wilson never claimed that all of the profits for the remaining two (2) incomplete projects were not subject to equitable distribution. Instead, Mr. Wilson submits that continuing jurisdiction is necessary for the Family Court to make an accurate determination of the amount of marital and non-marital manager fees from these two (2) ongoing projects.

The Circuit Court correctly determined that the "construction spending" theory advanced by Mr. Wilson allows for the determination of actual profits earned before and after the date of separation.<sup>10</sup> Since Mrs. Wilson is entitled to profits earned for work performed prior to the separation pursuant to West Virginia law, the Circuit Court correctly remanded this case to

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<sup>10</sup> See Cir. Ct. Opinion and Order, p. 22, ¶5: "the Family Court shall effect a supplemental equitable distribution in accordance with W. Va. Code § 48-7-104(1), *i.e.*, the marital share of any manager fees earned or loss taken is based upon the percentage of construction spending for each project at the time of separation, being 8.2% for WestVaco and 2.3% for The Point."

the Family Court to accurately distribute the marital estate when all projects are complete and the marital manager fees may be determined.

It was clear legal error for the Family Court to refuse to retain continuing jurisdiction over The Point and WestVaco projects in order to determine the value of HCWV's contingent manager fees from these projects when completed. The Family Court failed to do so despite the fact that two (2) of the six (6) projects pending at the time of separation were not complete at the time of trial. In *Chafin v. Chafin*, a case involving equitable distribution of an attorney's interest in contingent fee contracts, the Supreme Court of Appeals held that a court is required to retain continuing jurisdiction to determine the value of those assets:

Contingent and other future earned fees...pending at the time of a divorce should be treated as marital property for purposes of equitable distribution. However, only that portion of the fee that represents compensation for work done during the marriage is actually "marital property" as defined by our statute. Because the ultimate value of a contingent fee case remains uncertain until the case is resolved, a court must retain continuing jurisdiction over the matter in order to determine how to effectuate an equitable distribution of this property.

202 W. Va. 616, 632, 505 S.E.2d 679, 695 (1998) (emphasis added). *See also* W. Va Code § 48-7-104(1) (2001),<sup>11</sup> Syl. Pt. 5, *Metzner v. Metzner*, 191 W. Va. 378, 446 S.E.2d 165 (1994).

HCWV's contingent manager fees are no different than an attorney's contingent fee contract. The value of the manager fees remains uncertain until the project is completed. Just as it would be error for a court to rely on an estimate of the value of a lawsuit to determine

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<sup>11</sup> The relevant statutory language regarding valuation of contingent fee contracts in effect when *Chafin* was decided is identical to the language of West Virginia Code § 48-7-104(1). *Compare* W. Va. Code § 48-2-32(d)(1) (1999) *with* W. Va. Code § 48-7-104 (2003). The Family Court construed § 48-7-104(1) to confer *discretion* on the court to exercise continuing jurisdiction if it desired. (Final Order at p.11 ¶7) ("The Court declines to exercise such jurisdiction, as the court has accepted the methodology of CPA Apple as appropriate and reasonable.") The language of *Chafin*, however, is mandatory. However, even if *Chafin* does not mean what it says and leaves continuing jurisdiction to the discretion of the Family Court, the Family Court abused that discretion by relying on Kenneth Apple's flawed analysis rather than await the actual figures.

equitable distribution of a contingent legal fee, it would be error for a court to rely on an estimate of the projected sales of one of NLP's development projects rather than to retain continuing jurisdiction until the project was completed and the net-profit or net-loss of manager fees could be actually determined and marital shares calculated. *Chafin v. Chafin* does not give the Family Court the option of using an estimate or retaining jurisdiction to determine the actual value of a contingent fee contract. It requires the Family Court to retain continuing jurisdiction. *Chafin*, 202 W. Va. at 632 (“a court must retain continuing jurisdiction over the matter in order to determine how to effectuate an equitable distribution of this property”) (emphasis added). The Family Court's refusal to retain continuing jurisdiction was therefore clear legal error that was correctly reversed by the Circuit Court.

The Point project was 2.3 % completed at the time of separation, and thirty-five (35) of its forty-five (45) lots remained to be sold at the time of the September 11, 2008 hearing. Work on the WestVaco project was 8.2% completed at the time of separation, and at the time of the last hearing, eighty (80) lots remained to be sold. On both projects, because of the downturn in the economy, it was uncertain whether HCWV would earn any “net profits” as determined under the Management Agreement, and because HCWV's interest in the outcome of those projects was clearly contingent and could not be accurately estimated<sup>12</sup>, the Family Court erred by failing to retain continuing jurisdiction. Therefore, the Circuit Court correctly remanded the case to the Family Court so that an accurate determination of the marital shares of the parties can be distributed.

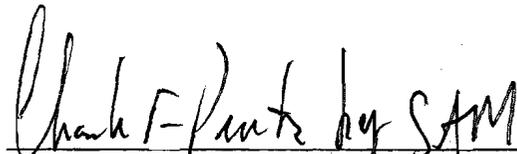
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<sup>12</sup> Kenneth Apple did not even consider The Point development in his estimates and his projections for the success of WestVaco, even if based on NLP numbers, were dated and did not reflect current reality.

#### IV. CONCLUSION

Mr. Wilson respectfully requests that this Honorable Court affirm the Circuit Court's March 25, 2009 Order reversing the findings of the Family Court and remanding this case to exercise continuing jurisdiction. The Circuit Court correctly determined that the Family Court's Order was clearly erroneous with the guidance of *May v. May*, because the weight of the evidence established that HCWV has only personal goodwill. Moreover, Mrs. Wilson failed to show enterprise goodwill by convincing proof. The evidence shows that Mr. Apple's determination of enterprise goodwill was not based on "competent evidence" or "sound valuation methods." Instead, Mr. Apple's valuation of HCWV was based on speculative profit projections of a real estate development management company, even though actual figures were available for calculations. Finally, the Family Court ignored this Court's interpretation of W. Va. Code § 48-7-104(1) in refusing to retain continuing jurisdiction to determine the actual profits from two (2) incomplete projects of HCWV that are subject to marital distribution. For these reasons, the Circuit Court's Order should be affirmed.

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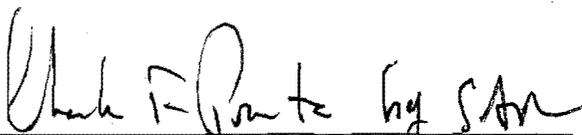
## CERTIFICATE OF SERVICE

I, Charles F. Printz, Jr., hereby certify that a true and exact copy of the foregoing **RESPONSE TO PETITION FOR APPEAL** has been served by United States mail, postage prepaid, upon the following individual:

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Charles F. Printz, Jr.