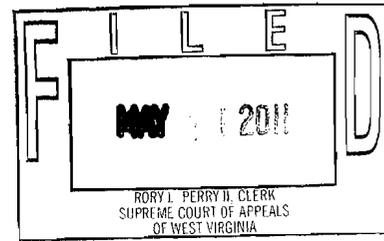


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO.: 101605



IN RE: THE MARRIAGE OF

CHARLES W. LEE,

Appellee/Petitioner Below,

and

PATRICIA E. LEE,

Appellant/Respondent Below.

From the Circuit Court of
Upshur County, West Virginia
CIVIL ACTION NO. 09-D-137

BRIEF OF APPELLEE CHARLES W. LEE

Prepared By:

Peter J. Conley
(WV Bar ID 798)
Siegrist & White, PLLC
P.O. Drawer 2550
Clarksburg, WV 26302-2550
304-624-6391

Teresa J. Lyons
(WV Bar ID 8047)
Hedges Lyons & Shepherd, PLLC
141 Walnut Street
Morgantown, WV 26505
304-296-0123

Counsel for Charles W. Lee

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I. RESPONSE TO ASSIGNMENT OF ERRORS

1. The Circuit Court and Family Court correctly concluded that the Appellant's interpretation of the term "another relationship" was not the plain, legal and grammatical meaning of the term.

2. The Circuit Court correctly applied the law governing the interpretation of contracts -- that extrinsic evidence intent must be first considered. Only if the trial court cannot determine the parties' intent should an ambiguity be resolved against the party drafting the contract. In addition, the facts in this case do not indicate that the Appellee solely drafted the contract.

3. The Appellant failed to meet the required burden of proof necessary to apply the doctrine of equitable estoppel and foreclose the Appellee from asserting his defense with regard to the ambiguous term "another relationship."

4. Although the Appellant claims that her rights to equal protection and due process of law were violated, she did not present any analysis with regard to this alleged error. In addition, her claim is not supported by either any facts or a cursory review of the law governing equal protection and due process.

5. The Family Court's finding -- that the Appellant had sexual relationships with J. Shelly and Rodney Stalnaker after the date the parties separated -- is supported by substantial evidence in the record. Accordingly, the Family Court's findings were not clearly erroneous.

II. STATEMENT OF THE CASE

Both Appellant Patricia Lee and Appellee Charles W. Lee had been married to other people before they began a relationship. Patricia Lee (hereinafter "Ms. Lee") had

been married to James C. with whom she had a daughter, S.C.¹ Ms. Lee was 43 years old when she signed the Prenuptial Agreement. Charles W. Lee (hereinafter "Mr. Lee") had been married twice, and he was 50 years old on the date he signed the Prenuptial Agreement that is at issue. He was 53 years old on the date of the final hearing conducted on May 28, 2010, in Upshur County Family Court.

The parties originally met in March 2005, and they lived together for over two years before they married on July 28, 2007. Before Mr. Lee presented Ms. Lee with an engagement ring, Mr. Lee let Ms. Lee know that he wanted a prenuptial agreement before they married. As testified to by Mr. Lee, he brought up the subject of a prenuptial agreement a second time. (Transcript of Mr. Lee's Testimony, p. 4). In her Petition for Appeal, Ms. Lee concedes that Mr. Lee had, in fact, discussed his desire that the couple enter into a prenuptial agreement during the couple's year-long engagement. (Petition for Appeal, p. 5, ¶ 4). Although it may have been upsetting to have been presented with a prenuptial agreement, it certainly was not a surprise to Ms. Lee.

To prepare the prenuptial agreement, Mr. Lee did not consult an attorney. Nor did Ms. Lee. Rather, Mr. Lee downloaded a form from the Internet and used that form to work with Ms. Lee to prepare their prenuptial agreement. (Transcript, p. 5). They began a discussion of the terms of the prenuptial agreement on July 15, 2007 when Mr. Lee presented the form to Ms. Lee. The couple's preparation of their prenuptial agreement extended over a period of seven days. The parties both testified that they discussed the terms for approximately 17 hours. (Petition for Appeal, p. 6, ¶ 5; Transcript, p. 6; Decree of Divorce, p. 2, ¶ 11). To prepare the prenuptial agreement,

¹ S.C. was eight years old when the Prenuptial Agreement was signed. Mr. Lee is not, however, S.C.'s father and does not owe a duty of support to her.

Ms. Lee made notes on various drafts of the agreement, and Mr. Lee then incorporated the changes by typing them and presenting Ms. Lee with a new draft. (Transcript of Mr. Lee's Testimony, pp. 5, 39, 42; Decree of Divorce, p. 2, ¶ 11). In fact, the draft that was signed by both parties indicates that they decided to delete a clause as evidenced by strike-throughs that they both initialed. (See Prenuptial Agreement).

During the negotiations, neither party consulted an attorney. (Decree of Divorce, p. 2, ¶ 12). Nor did either party ask the other to provide further information or documentation of the other's financial affairs. There was absolutely no evidence that Mr. Lee ever prevented or discouraged Ms. Lee from consulting an attorney concerning the prenuptial agreement.

Presumably, Ms. Lee had some knowledge of Mr. Lee's finances because she was assisting him with the management of his rental property, a business that he had developed before he married Ms. Lee. (Transcript, p. 25). Additionally, she was aware of the fact that, despite his income that he earned as an employee of the Internal Revenue Service, his income was not always sufficient to buy groceries. (Transcript, p. 31). Mr. Lee testified that Ms. Lee knew that he had on occasion had to buy groceries with his credit card. (Transcript, p. 24). During the course of the divorce, it became apparent that Mr. Lee had a negative net worth and the majority of his income serviced the debt associated with his rental property.

The parties signed the Prenuptial Agreement on July 17, 2007, and they married on July 28, 2007, over a week later. Less than two years later, the parties separated on June 12, 2009. (Decree of Divorce, pp. 1, 2, ¶¶ 4, 7). They separated after Mr. Lee disclosed that he had had an affair. (Transcript, p. 3). Although Mr. Lee admitted to

having an affair, the basis for the divorce was irreconcilable differences. (Decree of Divorce, p. 2, ¶ 7).

Ms. Lee remained in possession of the residence where the couple had lived. This residence was not jointly owned by the parties. Rather, it had been purchased by Mr. Lee before the marriage. In addition, Mr. Lee paid all utilities on the residence. In the Decree of Divorce entered on July 2, 2010, the Family Court found that the rental value of the residence was \$700 per month. (Decree of Divorce, p. 5, ¶ 3). The purpose of the finding was to allow Mr. Lee to claim a reduction of his income for tax purposes.

In any event, neither party has requested that the Prenuptial Agreement be invalidated or set aside. (Decree of Divorce, p. 2, ¶ 10). Rather, the pivotal issue in this case is found in Paragraph 10 of the Prenuptial Agreement that reads as follows:

In the event that there is a separation of the parties, the following will occur regarding spousal support:

-In the event of separation, Charles will provide Patti housing at no cost at Route #9, Box 366, Buckhannon until she decides to move or until she enters into another relationship. The provision of housing will include basic and "nationwide" phone service for the same period of time. As well as all other household expenses, with a limit of \$500.00 per month, until such time as her minor children graduate from high school.

-Patti will be provided one of the family vehicles in the event of separation or divorce. She will be responsible for maintaining it and its continued operation.

As can be inferred from the text of this paragraph, this provision was drafted by the parties because it refers to the parties by name. In fact, Ms. Lee stated that she had requested that Paragraph 10 be inserted into the Prenuptial Agreement. (Petition for Appeal, p. 7, ¶ 13). It should also be noted that Mr. Lee is not in any way contesting the

provision that Ms. Lee would receive one of the family vehicles. Pursuant to the terms of Decree of Divorce, Ms. Lee received possession of the Chrysler Sebring automobile. Although Ms. Lee was required to maintain and insure the car, Mr. Lee was required to pay the loan for it. (Decree of Divorce, p. 3, ¶¶ 17, 18).

The specific issue in dispute in this case is the meaning of the term "another relationship" and correspondingly whether Ms. Lee would continue to have the right to live in a house owned by Mr. Lee and whether Mr. Lee would be required to pay household expenses up to the amount of \$500.00 per month. Under the terms of the Prenuptial Agreement, Ms. Lee was entitled to these benefits until she decided to move or until she entered into "another relationship."

Not surprisingly, the term "another relationship" was not defined in the Prenuptial Agreement. There is a reference in Paragraph 19 to a prohibition on "secret relationships." (Prenuptial Agreement, ¶ 19). In the Family Court, Mr. Lee argued that the term "relationship" in both of the paragraphs meant the same thing. In contrast, Ms. Lee argued that the term "another relationship" meant another "another marriage." However, Mr. Lee pointed out that the term "another relationship" must mean something less than "another marriage" because people cannot enter into secret marriages. Although the parties presented these arguments to the Family Court, it can be concluded, after a review of the Prenuptial Agreement, that what the parties meant by the term "another relationship" was simply not included in the agreement.

At the final hearing in this case, the Family Court heard testimony from each of the parties concerning the circumstances of the preparation of the Prenuptial Agreement and to their intent or definition of the term "another relationship" when they

prepared the Prenuptial Agreement. Ms. Lee testified that she meant that "another relationship" was a relationship that resulted in an engagement or marriage and that, by implication, would provide her housing. Mr. Lee, however, testified that he did not specifically agree to Ms. Lee's version of the conversation. In other words, she testified that the term must mean "another serious or committed relationship." In contrast, Mr. Lee testified that the term meant another traditional dating or sexual relationship. (Transcript of Mr. Lee's Testimony, p. 10).

With regard to the issue of another relationship, Ms. Lee claimed that she had objected to the term "another relationship" by stating that the clause was unfair because it would require her to remain celibate to receive the benefit of the Prenuptial Agreement. She claims that Mr. Lee responded by stating that he did not expect her to remain celibate but did not want another man living in the house. In contrast, Mr. Lee testified that: "I don't recall if that is the only statement I made or if I made it just that way or what." He further testified that: "I believe there was quite a bit of discussion about when she was entering another relationship, whether or not that person would have a house for her to move to or whatever. I don't know the whole gist of narrative." (Transcript of Mr. Lee's Testimony, p. 13).

In the Decree of Divorce, the Family Court found that Ms. Lee did, in fact, enter into another relationship as contemplated in the agreement. (Decree of Divorce, p. 15). With regard to this issue, the Family Court found that Ms. Lee actually entered into three different relationships after the parties had separated, and two of the men with whom

she had relationships spent overnights at the residence in question.² Ms. Lee, herself, testified that she met a man on the Internet, Jim Walker, and that she visited with him three or four times in Kentucky. She further admitted that she had had a sexual relationship with him, but denied having sexual relations in the subject residence. He did, however, visit her at the residence while the divorce was pending. (Petition for Appeal, p. 10, ¶ 26).

Based upon the testimony of a third party, Christopher Cutright, who was the fiancé of one of Ms. Lee's daughter, the Family Court found that Ms. Lee had entered into a second relationship that fell within the definition of the term "another relationship." Mr. Cutright testified that he had come home to the subject residence with Ms. Lee and Mr. Shelly after they had been in a bar. Mr. Cutright testified that, based upon various sounds he heard, that Mr. Shelly and Ms. Lee had sexual relations in the next room. He also stated that Mr. Shelly told him that he and Ms. Lee engaged in sex that night. With regard to the third relationship, evidence was offered that Ms. Lee spent extended periods of time with Rodney Stalnaker at his residence and visited him regularly while he was incarcerated in the Pruntytown Correctional Center. Based upon these facts, the Family Court concluded that Ms. Lee had entered into "another relationship" as contemplated in the Prenuptial Agreement, and accordingly, found that she was no longer entitled to the spousal support provisions established by Paragraph 10. (Decree of Divorce, p. 3, ¶ 15).

² After the parties had separated, Mr. C., Ms. Lee's ex-husband and father of S.C. moved into the subject residence. Mr. Lee has not, however, contended that Ms. Lee had entered into another relationship with Mr. C. (Petitioner Appeal, pp. 11-12, ¶ 32; Decree of Divorce, p. 3, ¶ 16).

In the alternative, the Family Court found that Ms. Lee would not be entitled to spousal support under the factors established by West Virginia Code § 48-6-301(b), the statute governing the establishment of spousal support, if the Prenuptial Agreement were set aside. (Decree of Divorce, p. 4, ¶ 24). Although the Family Court found that Ms. Lee was not entitled to continue to live in the residence, Mr. Lee voluntarily waived any right to claim the amount of \$1,198.44 from Ms. Lee, even though the claim would have equalized the amount to which each party was entitled to under equitable distribution. (Decree of Divorce, p. 4, ¶¶ 21, 22). Additionally, Ms. Lee was awarded \$1,500 in attorney fees. (Decree of Divorce, p. 4, ¶ 15). Further, she did not assume any liability for marital debt. (Decree of Divorce, p. 4, ¶ 23). Finally, Ms. Lee received the benefit of Paragraph 10 from the date of separation on June 12, 2009 until October 2010, the time at which she moved out of the residence³ The Family Court had entered a stay with regard to the provisions of the Decree of Divorce that would require her to vacate the subject property. In response to the Decree of Divorce, Ms. Lee appealed the Family Court's ruling with respect to Paragraph 10 of the Prenuptial Agreement.

By Order Denying Petition for Appeal entered on October 15, 2010, the Circuit Court reviewed the record and concluded that the term "another relationship" was not synonymous with the term "de facto marriage" set forth in West Virginia Code § 48-5-707(a)(1), the position advanced by Ms. Lee, because there was no evidence that the parties had contemplated or intended to use this definition. After reviewing the record, the Circuit Court concluded that the term "another relationship" was patently ambiguous

³ Although evidence concerning the condition of the subject residence is not in the record for this appeal, it should be noted that the subject residence required substantial cleaning, and numerous items of personal property were missing after Ms. Lee moved out.

because it was susceptible of different meanings. However, the Circuit Court correctly concluded that the Prenuptial Agreement should not be construed against Mr. Lee if he were considered to be the sole drafter of the Prenuptial Agreement. The Circuit Court, after reviewing applicable legal authority, recognized that this rule of construction only applies if the parties' intent cannot first be ascertained by extrinsic evidence of the parties' intent. *Klapp v. United Ins. Group Agency*, 663 N.W.2d 447 (Mich. 2003); *United Vending Corp. v. Lacas Corp.*, 190 A.2d 298 (Pa. 1963); *Burns Mfg. Co. v. Boehm*, 356 A.2d 763 (Pa. 1976); *E.I. du Pont de Nemours and Co. v. Shell Oil Co.*, 498 A.2d 1108 (Del. 1985). The Circuit Court, therefore, concluded that the Family Court did not abuse its discretion when it did not construe the ambiguity of the term against Mr. Lee.

On appeal to the Circuit Court, Ms. Lee also argued that Mr. Lee should be equitably estopped from asserting his definition of the term "another relationship." She based this argument on a conversation that she alleged took place during the negotiations over the terms of the Prenuptial Agreement. As noted previously, Mr. Lee testified that Ms. Lee's account of the statement was not presented in light of the context of the conversation. Based upon the disputed testimony in the record, the Circuit Court concluded that Ms. Lee had not met the applicable burden of proof of clear, precise and unequivocal evidence, the standard that must be met to apply the doctrine of equitable estoppel. See *Brown v. Crozer Coal & Land Co.*, 144 W. Va. 296, 107 S.E.2d 777 (1959).

In addition, the Circuit Court found that the Family Court's decision did not violate Ms. Lee's rights to equal protection under the Fourteenth Amendment and her right to

due process under the Fifth Amendment. As the Circuit Court correctly concluded, the result that was reached in the Family Court was the product of the parties' bargain. Further, the Circuit Court found that the Family Court had not made a clear error with regard to its factual findings. Based upon this analysis and conclusion, the Circuit Court denied Ms. Lee's Petition for Appeal and affirmed the Decree of Divorce. It is from this ruling that Ms. Lee now appeals.

III. SUMMARY OF ARGUMENT

Both parties are asking this Court to enforce a Prenuptial Agreement that they prepared after they engaged in negotiations that lasted for a total of 17 hours and spanned over the course of a week. The specific issue in dispute is the parties' intent with regard to the term "another relationship" and whether Mr. Lee had any duty to continue to provide Ms. Lee with spousal support in the form of a residence as specified by the Prenuptial Agreement. The term "another relationship" is undoubtedly ambiguous because it does not provide any clear guidance to either party with regard to their rights and duties insofar as the duration of spousal support is concerned. Because the term is ambiguous, the Family Court properly allowed the parties to testify as to their intent with regard to the term. It would have been error had the lower courts construed the term against Mr. Lee because the Family Court was able to make a finding as to the parties' intent or definition of the term "another relationship." A contract may only be construed against the drafter if other principles of contract interpretation, such as the consideration of extrinsic evidence of intent, fail. Nor should Mr. Lee have been estopped from asserting his intent with regard to the term. As recognized by the Circuit Court, Ms. Lee simply failed to meet the required burden of proof to apply the doctrine

of equitable estoppel. Further, the rulings of the lower courts did not violate Ms. Lee's rights to equal protection and due process of law. Although Ms. Lee made this claim in her assignments of error, she did not present any analysis that would support a finding that her constitutional rights were somehow violated. Finally, a review of the record fails to indicate that the Family Court's findings with regard to Ms. Lee's relationships were unsupported by substantial evidence in the record. For these reasons, it can be concluded that the lower courts did not err in either their factual findings or analysis of applicable law.

IV. ARGUMENT OF LAW

A. Standard of Review

It is well established that:

In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*. Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).

In addition to the general standard of review for the findings and conclusions of a family court, it should be noted that: "the question as to whether a contract is ambiguous is a question of law to be determined by the court." Syl. Pt. 1, in part, *Berkeley County Public Service District v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968). This Court has also established a standard of review with regard to the factual findings that a lower court makes when it determines the intent of the parties in a dispute involving interpretation of a contract. "[W]hen a trial court's answers rest not on plain meaning but on differential findings by a trier of fact, derived from extrinsic

evidence as to the parties' intent with regard to an uncertain contractual provision, appellate review proceeds under the 'clearly erroneous' standard." *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 101, 468 S.E.2d 712, 715 (1996).

B. The Circuit Court Correctly Concluded that the Term "Another Relationship" as Set Forth in the Prenuptial Agreement was Ambiguous.

In general, West Virginia law recognizes and permits the use of prenuptial or antenuptial agreements. A "prenuptial agreement" is defined as:

An agreement between a man and woman before marriage, but in contemplation and generally in consideration of marriage, by which the property rights and interest of the prospective husband and wife, or both of them, are determined, or where property is secured to either or both of them, are determined, or where property is secured to either or both of them, to their separate estate, or to their children or other persons. W. Va. Code § 48-1-203.⁴

Not only have prenuptial agreements been defined by statute, this Court has held that "prenuptial agreements are presumptively valid." *Ware v. Ware*, 224 W. Va. 599, 604, 687 S.E.2d 382, 387 (2009). See also *Pajak v. Pajak*, 182 W. Va. 28, 385 S.E.2d 384 (1989); *Gant v. Gant*, 174 W. Va. 740, 329 S.E.2d 106 (1985) (overruled in part by *Ware*, 224 W. Va. 599, 687 S.E.2d 382 with regard to the burden of proof of the validity

⁴ In its entirety, West Virginia Code § 48-1-203 provides that: "Antenuptial agreement" or "prenuptial agreement" means an agreement between a man and woman before marriage, but in contemplation and generally in consideration of marriage, by which the property rights and interests of the prospective husband and wife, or both of them, are determined, or where property is secured to either or both of them, to their separate estate, or to their children or other persons. An antenuptial agreement may include provisions that define the respective property rights of the parties during the marriage, or upon the death of either or both of the parties. The agreement may provide for the disposition of marital property upon an annulment of the marriage or a divorce or separation of the parties. A prenuptial agreement is void if at the time it is made either of the parties is a minor.

of a prenuptial agreement where one party is represented by counsel and the other is not).⁵ Further, this Court has held that:

For a pre-nuptial agreement to be enforceable, it is not necessary that before the agreement was executed the parties meticulously disclosed to one another every detail of their financial affairs: it is sufficient if the party against whom the agreement is to be enforced had a general idea of the other party's financial condition and there was no fraud or concealment that had the effect of inducing the party to be charged into entering an agreement that otherwise would not have been made. Syl. Pt. 2, *Pajak v. Pajak*, 182 W. Va. 28, 385 S.E.2d 384 (1989).

With regard to the interpretation of contracts, this Court has recognized that: "It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." Syl. Pt. 2, *Bennett v. Dove*, 166 W. Va. 772, 277 S.E.2d 617 (1981). Although a contract, if its terms are clear, should be applied as written, certain terms of a contract may be ambiguous. "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." Syl. Pt. 1, *Berkeley County Public Service District*, 152 W. Va. 252, 162 S.E.2d 189.

Providing more guidance on the identification of ambiguity in contracts, this Court has recognized that: "A contract is considered ambiguous if it is 'reasonably susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction.'" *Jessee v. Aycoth*, 202 W. Va. 215, 218, 503

⁵ It should be noted again that neither party in this case is contesting the validity of the prenuptial agreement. They are simply contesting the interpretation of Paragraph 10, which is one provision of the Prenuptial Agreement that they both prepared.

S.E.2d 528, 531 (1998) (quoting *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 65, n. 23, 459 S.E.2d 329, 342, n. 3 (1995)). Further, this Court recognized that: "Ambiguity in a statute or other instrument consists of susceptibility of two or more meanings and uncertainty as to which was intended." *Jessee*, 202 W. Va. 215, 218, 503 S.E.2d 528, 531 (quoting Syl. Pt. 13, *State v. Harden*, 62 W. Va. 313, 58 S.E. 715 (1907)). Similarly, this Court expressly stated that: "Contract language usually is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations under taken." *Fraternal Order of Police, Lodge No. 69*, 196 W. Va. 97, 101, 468 S.E.2d 712, 716.

At the outset, it should be noted that neither party is requesting that the Prenuptial Agreement be set aside or invalidated. In her Petition for Appeal, Ms. Lee presents arguments concerning the emotional pressure she experienced when Mr. Lee began the discussion of the terms of the Prenuptial Agreement and the fact that she did not consult an attorney when they prepared the Prenuptial Agreement. These arguments, however, are not relevant to the interpretation of the Prenuptial Agreement. They would be relevant if she were requesting that the Prenuptial Agreement be invalidated. See *Pajak*, 182 W. Va. 28, 385 S.E.2d 384.

In the instant case, Ms. Lee argues that the Circuit Court erred when it found that the term "another relationship" was ambiguous and should have applied the plain, grammatical meaning of the term. However, this argument overlooks the record in this case in which the Circuit Court reviewed the dictionary definitions of both words: "another" and "relationship" in reaching the conclusion that the term was ambiguous.

As noted by the Circuit Court, the definition of the term "another" means: "1) different or distinct from the one first considered; 2) some other; 3) being one more in addition of one or more of the same kind." *Merriam Webster's Collegiate Dictionary*, 10th ed., 1994. Based only on the definition of the word "another," the term can be defined as a "different relationship" or "some other relationship." Resorting to an examination of the plain, grammatical meaning of the phrase is not, therefore, dispositive of the meaning of the term or the parties' intent. What Ms. Lee is really arguing is that the term "another relationship" means "another committed relationship" or "another relationship with a man who will provide me with housing," language that is conspicuously absent from the Prenuptial Agreement.

On its face, the term "another relationship" is ambiguous because it fails to establish with any degree of certainty the conditions that must be met in order for the spousal support provisions contained in Paragraph 10 to be in effect. It does not inform either Mr. Lee or Ms. Lee what his or her rights or duties are under the contract. Although the term "another relationship" seems to imply something more than a casual acquaintance, it certainly does not address the quality and nature of a relationship that would terminate Mr. Lee's obligation to continue to provide both a home and to pay for household expenses for Ms. Lee. The Circuit Court, therefore, did not err when it determined that the term "another relationship" was ambiguous. In fact, a finding that the term is ambiguous appears to be the only plausible conclusion after considering the record in this case.

C. The Circuit and Family Courts Correctly Determined the Parties' Intent with Regard to the Term "Another Relationship."

After a court has determined that a contract term is ambiguous, it must then apply the rules of construction in order to reach a conclusion as to the meaning of the term. *Payne v. Weston*, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995). This Court has expressly held that: "Extrinsic evidence may be used to aid in the construction of a contract if the matter in controversy is not clearly expressed in the contract, and in such case the intention of the parties is always important and the court may consider parol evidence in connection therewith with regard to conditions and objections relative to the matters involved." Syl. Pt. 2, in part, *Berkeley County Public Service*, 152 W. Va. 252, 162 S.E.2d 189.

In the instant case, the Family Court found that the term "another relationship" included the types of relationships that were contemplated by the Prenuptial Agreement. In fact, the Family Court found that the relationships with Jim Walker, J. Shelly and Rodney Stalnaker fit the parties' meaning of the term "another relationship." These were relationships that were more than casual acquaintances. At least two of the three of the relationships involved sexual relations and overnight stays in the residence that was provided to Ms. Lee pursuant to the terms of Paragraph 10 of the Prenuptial Agreement. The Family Court made this finding after hearing each party testify as to their intent when they signed the Prenuptial Agreement. The Family Court also heard both the parties and Ms. Lee's future son-in-law testify with regard to the other relationships that Ms. Lee engaged in. The Family Court did not make any clear error with regard to these findings because there is substantial evidence in the record to support the findings. In turn, the Circuit Court correctly recognized the deference that

must be given as to the findings of fact of the lower court. Therefore, neither of the lower courts made any clear error with regard to the factual finding that supports the result that should be reached in this case -- that Ms. Lee was no longer entitled to the spousal support provisions set forth in Paragraph 10 of the Prenuptial Agreement because she had entered into, not one, but three other relationships.

In her brief, Ms. Lee argues that the lower courts erred because neither court construed the contract against Mr. Lee, the person whom she identifies as the drafter of the agreement. This argument is faulty because the evidence indicates that the form was downloaded from the Internet, and both parties negotiated with regard to the terms of the Prenuptial Agreement. Paragraph 10, the particular paragraph at issue, was a paragraph that the parties customized. This finding is evidenced by the fact the parties' names were included in the paragraph. Further, Ms. Lee, in her Petition for Appeal, expressly stated that Paragraph 10 was inserted at her request. (Petition for Appeal, p. 7, ¶ 13). Mr. Lee may have typed the drafts, but the document as a whole and Paragraph 10, in particular, was the result of the parties' negotiations that spanned over a week and involved 17 hours of negotiation.

Ms. Lee's argument -- that the clause should be construed against Mr. Lee -- fails for another reason. As recognized by the Circuit Court in its Order Denying Petition for Appeal, the rule of contract interpretation that indicates that an ambiguous contract must be construed against the drafter may only be applied if the finder of fact has first tried, but has failed to discern the parties' intent. See *Klapp*, 663 N.W.2d 298; *Burns Mfg. Co.*, 356 A.2d 763; *E.I. du Pont de Nemours*, 498 A.2d 1108. The rule of contract interpretation on which Ms. Lee relies, the doctrine of *contra proferentem*, is generally

considered a rule of last resort and is only applied if a court cannot discern the parties' intent by using other rules of interpretation. II Williston on Contracts § 32:12 (4th ed.). See also *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, n. 2 (2nd Cir. 1983). As aptly explained by the Michigan Supreme Court, the rule of *contra proferentem* is applied as follows:

[I]f the extrinsic evidence indicates that the parties intended their contract to have a particular meaning, this is the meaning that should be given to the contract, regardless of whether this meaning is in accord with the drafter's or the nondrafter's view of the contract. In other words, if a contract is ambiguous regarding whether a term means "a" or "b," but relevant extrinsic evidence leads the jury to conclude that the parties intended the term to mean "b," then the term should be interpreted to mean "b," even though construing the document in the nondrafter's favor pursuant to an application of the rule of *contra proferentem* would produce an interpretation of the term as "a." *Klapp*, 468 Mich. 459, 471, 663 N.W.2d 447, 455.

After reviewing the record of the Family Court, the Circuit Court concluded that the Family Court did not err when it did not construe the Prenuptial Agreement against Mr. Lee. The Circuit Court, in line with well-established legal authority, recognized that a contract should be construed against a drafter only if other means of interpretation fail. Here, the Family Court heard the testimony and made factual findings with regard to the parties' intent. Since the lower courts were able to determine the parties' intent, the Prenuptial Agreement should not have been construed against Mr. Lee. Therefore, neither of the lower courts erred.

Although Ms. Lee may argue that West Virginia has not recognized the doctrine of *contra proferentem*, a review of West Virginia case law indicates that this Court has allowed the introduction of extrinsic evidence to determine intent when a court has

determined that a contract term is ambiguous and the contract was the result of negotiations between the parties. See *Frederick Management Co. v. City Nat'l Bank of W. Va.*, 2010 WL 4723412; *Berkeley County Public Service Dist.*, 152 W. Va. 252, 162 S.E.2d 189. In the cases that this Court has construed contracts against a drafter, there has not been extrinsic evidence of intent. See e.g., *West Virginia Ins. Co. v. Lambert*, 193 W. Va. 681, 458 S.E.2d 774 (1995). Although this Court has not expressly recognized the doctrine of *contra proferentem* in case law, the hierarchy of the rules of contract interpretation do not conflict with the case law decided thus far by this Court.

D. There is no Evidence in the Record that Supports a Conclusion that the Parties Intended the Term "Another Relationship" to Mean the Legislatively Defined Term "De Facto Marriage."

The West Virginia Legislature has established that: "An obligation that compels a person to pay spousal support may arise from the terms of a court order, and antenuptial agreement or a separation agreement." W. Va. Code § 48-8-101(a).⁶ In addition, "spousal support is divided into four classes which are: (1) permanent spousal support; (2) temporary spousal support, otherwise known as spousal support *pendente lite*; (3) rehabilitative spousal support; and (4) spousal support in gross." W. Va. Code § 48-8-101(b). The Legislature has expressly recognized that fault may be considered

⁶ West Virginia Code § 48-8-101(a) and (b) provides that: An obligation that compels a person to pay spousal support may arise from the terms of a court order, an antenuptial agreement or a separation agreement. In an order or agreement, a provision that has the support of a spouse or former spouse as its sole purpose is to be regarded as an allowance for spousal support whether expressly designated as such or not, unless the provisions of this chapter specifically require the particular type of allowance to be treated as child support or a division of marital property. Spousal support may be paid as a lump sum or as periodic installments without affecting its character as spousal support. (b) Spousal support is divided into four classes which are: (1) Permanent spousal support; (2) temporary spousal support, otherwise known as spousal support *pendente lite*; (3) rehabilitative spousal support; and (4) spousal support in gross.

with regard to an alimony award. W. Va. Code § 48-8-104.⁷ The Legislature has also expressly allowed for rehabilitative spousal support to provide a limited period of support that will allow a party to become gainfully employed. W. Va. Code § 48-8-105(a).⁸ When awarding spousal support, a court is required to consider the 20 factors set forth in West Virginia Code § 48-6-301(b).⁹

⁷ West Virginia Code § 48-8-104 provides that: In determining whether spousal support is to be awarded, or in determining the amount of spousal support, if any, to be awarded, the court shall consider and compare the fault or misconduct of either or both of the parties and the effect of the fault or misconduct as a contributing factor to the deterioration of the marital relationship.

⁸ West Virginia Code § 48-8-105(a) provides that: The court may award rehabilitative spousal support for a limited period of time to allow the recipient spouse, through reasonable efforts, to become gainfully employed. When awarding rehabilitative spousal support, the court shall make specific findings of fact to explain the basis for the award, giving due consideration to the factors set forth in section 8-103 of this article. An award of rehabilitative spousal support is appropriate when the dependent spouse evidences a potential for self-support that could be developed through rehabilitation, training or academic study.

⁹ West Virginia Code § 48-6-301(b) provides that: The court shall consider the following factors in determining the amount of spousal support, child support or separate maintenance, if any, to be ordered under the provisions of parts 5 and 6, article five of this chapter, as a supplement to or in lieu of the separation agreement: (1) The length of time the parties were married; (2) The period of time during the marriage when the parties actually lived together as husband and wife; (3) The present employment income and other recurring earnings of each party from any source; (4) The income-earning abilities of each of the parties, based upon such factors as educational background, training, employment skills, work experience, length of absence from the job market and custodial responsibilities for children; (5) The distribution of marital property to be made under the terms of a separation agreement or by the court under the provisions of article seven of this chapter, insofar as the distribution affects or will affect the earnings of the parties and their ability to pay or their need to receive spousal support, child support or separate maintenance: Provided, That for the purposes of determining a spouse's ability to pay spousal support, the court may not consider the income generated by property allocated to the payor spouse in connection with the division of marital property unless the court makes specific findings that a failure to consider income from the allocated property would result in substantial inequity; (6) The ages and the physical, mental and emotional condition of each party; (7) The educational qualifications of each party; (8) Whether either party has foregone or postponed economic, education or employment opportunities during the course of the marriage; (9) The standard of living established during the marriage; (10) The likelihood that the party seeking spousal support, child support or separate maintenance can substantially increase his or her income-earning abilities within a reasonable time by acquiring additional education or training; (11) Any financial or other contribution made by either party to the education, training, vocational skills, career or earning capacity of the other party; (12) The anticipated expense of obtaining the education and training described in subdivision (10) above; (13) The costs of educating minor children; (14) The costs of providing health care for each of the parties and their minor children; (15) The tax consequences to each party; (16) The extent to which it would be inappropriate for a party, because said party will be the custodian of a minor child or children, to seek employment outside the home; (17) The financial need of each party; (18) The legal obligations of each party to support himself or herself and to support any other person; (19) Costs and care associated with a minor or adult child's physical or mental disabilities; and (20) Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable grant of spousal support, child support or separate maintenance.

The West Virginia Legislature has also established the concept of a "de facto marriage." W. Va. Code § 48-5-707.¹⁰ This statute establishes a procedure through which a payor spouse may petition a court to reduce or terminate a spousal support award when a payee spouse enters into a "stable marriage-like relationship." W. Va. Code § 48-5-707(a)(2)(A).

Ms. Lee has argued that the term "another relationship" should be synonymous or equivalent to the term "de facto marriage." However, as pointed out by the Circuit Court, there was no evidence that the parties considered the term "de facto marriage" as set forth in West Virginia Code § 48-5-707 when preparing the Prenuptial Agreement. Interpreting the term "another relationship" as a "de facto marriage" is tantamount to grafting a legislative definition into an agreement prepared by lay persons who did not consider the legislatively defined concepts and obligations of spousal support when they prepared the agreement. If this type of definition were to be retrospectively applied, it would only be equitable to impose all the statutory rights and obligations that the West Virginia Legislature has established with regard to spousal support.

In this case, the Family Court considered the factors established by the statute governing spousal support, West Virginia Code § 48-6-301(b), and concluded that Ms. Lee would not have been entitled to an award of spousal support absent the provisions of the Prenuptial Agreement. Ms. Lee, therefore, received a substantial benefit from

¹⁰ West Virginia Code § 48-5-707(a)(1) provides that: In the discretion of the court, an award of spousal support may be reduced or terminated upon specific written findings by the court that since the granting of a divorce and the award of spousal support a de facto marriage has existed between the spousal support payee and another person.

the Prenuptial Agreement in that she obtained temporary spousal support that she may not have otherwise been entitled to. Further, she was provided a motor vehicle pursuant to the provisions in Paragraph 10 even though the marital estate had a negative value. Given the evidence in record, including the terms and language of the Prenuptial Agreement, the lower courts did not err when they found that the term "another relationship" was not synonymous with the term "de facto marriage."

E. Ms. Lee Has Failed to Establish that She is Entitled to the Application of the Doctrine of Promissory or Equitable Estoppel.

The elements for applying the doctrine of equitable estoppel have been established as: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise." Syl. Pt. 3, in part, *Everett v. Brown*, 174 W. Va. 35, 31 S.E.2d 685 (1984). Prior to the holding of *Everett*, this Court recognized that: "Equitable estoppel cannot arise merely because of action taken by one on a misleading statement made by another. In addition thereto, it must appear that the one who made the statement intended or reasonably should have expected that the statement would be acted upon by the one claiming the benefit of estoppel, and that he, without fault himself, did act upon it to his prejudice." Syl. Pt. 4, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965). See also Syl. Pt. 3, *Spradling v Spradling*, 118 W. Va. 308, 190 S.E. 537 (1937).

More recently, this Court held that:

The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a

concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice. Syl. Pt. 3, *Ryan v. Rickman*, 233 W. Va. 646, 584 S.E.2d 502 (2003) (quoting Syl. Pt. 6, *Stuart v. Lake Washing Realty Corp.*, 141 W. Va. 627, 92 S.E.2d 891 (1956)).

Further, this Court has recognized that: "The burden of proof is upon the party asserting estoppel and it must be made to appear affirmatively by clear, precise and unequivocal evidence." *Brown v. Crozer Coal & Land Co.*, 144 W. Va. 296, 305-06, 107 S.E.2d 777, 784 (1959) (quoting 7 Michie's Jurisprudence, Estoppel, § 39).

Ms. Lee bases her theory of equitable estoppel on a single statement that Mr. Lee allegedly made during the course of 17 hours of negotiation that stretched over a period of a week. According to Ms. Lee's theory, she claims that she was induced to sign the Prenuptial Agreement when Mr. Lee stated that he did not expect her to remain celibate but that he did not want to have another man living in the subject residence. However, Mr. Lee disputes that the statement was made in the isolated manner that Ms. Lee claims. Rather, he credibly testified that: "I don't recall if that is the only statement I made or if I made it just that way or what." He further testified that: "I believe there was quite a bit of discussion about when she was entering another relationship, whether or not that person would have a house for her to move to or whatever. I don't know the whole gist of the narrative." (Transcript of Mr. Lee's Testimony, p. 13). Given the facts upon which both parties agree -- the facts involving the fairly lengthy negotiations in which they engaged -- the Family Court correctly concluded that Mr. Lee was not estopped from asserting that Ms. Lee had entered into another relationship or from

asserting his intent with regard to the term "another relationship." And the Circuit Court, in an in-depth analysis of the testimony, concluded that Ms. Lee had failed to meet the burden required of her, that of clear, precise and unequivocal evidence. Given the undisputed testimony concerning the type of negotiations in which they engaged, the evidence on which Ms. Lee bases her argument is anything but clear, precise and unequivocal, the burden that must be met to apply the equitable estoppel doctrine.

Nor does the evidence concerning the negotiations indicate that Mr. Lee either made false representations or concealed material facts, the standard required by *Ryan*. Rather, the evidence demonstrates that the parties, neither of whom were lawyers or sought the benefit of legal advice, bumbled their way through negotiations. Not surprisingly, the result of their negotiations was the ambiguous, undefined contract term of "another relationship." Because the evidence does not meet the standard noted in *Ryan*, Mr. Lee should not be estopped from asserting his defense to Ms. Lee's claim that he must continue to provide spousal support to Ms. Lee under the terms of Paragraph 10 of the Prenuptial Agreement.

F. Although Ms. Lee has Claimed that She was Denied Equal Protection and Due Process of Law, She has not Discussed any Evidence or Presented an Analysis that Provides a Basis for this Conclusion.

Relying on decisions of the United States Supreme Court, this Court has recognized that:

Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner. *Reed v. Reed*, 404 U.S. 71, 75, 92 S. Ct. 251, 253-54, 30 L. Ed. 2d 225, 229 (1971). The claimed discrimination must be a product of state action as distinguished from a purely private activity. See *Burton v. Wilmington Parking Authority*, 365 L. Ed. 2d 45 (1961).

Israel v. W. Va. Secondary Schools Activities Commission,
182 W. Va. 454, 458, 388 S.E.2d 480, 484 (1989).

Analyzing an equal protection and substantive due process claim, this Court observed that: "When addressing actions of the federal government, the United States Supreme Court has traditionally found that the concept of equal protection is embodied in the Due Process Clause of the Fifth Amendment." 182 W. Va. at 461, 388 S.E.2d at 487.

In her third assignment of error, Ms. Lee claims that the lower courts violated her right to equal protection and due process under the law. Although she refers to these terms in her assignment of error, she has not explained how she was treated differently from similarly situated persons, a necessary element of an equal protection claim. Nor has she provided any analysis that indicates how her substantive due process rights were violated. As the Circuit Court correctly pointed out, the result reached in this case occurred because the parties entered into a contract, albeit one with an ambiguous term. Ms. Lee's claim of constitutional violations is just that -- a claim that lacks factual or legal support.

G. There is Substantial Evidence in the Record to Support the Factual Findings of the Family Court Concerning Ms. Lee's Relationships with J. Shelly and Rodney Stalnaker.

This Court has unequivocally established that:

In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*. Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).

Explaining what the "clearly erroneous" standard means, this Court noted that: "[O]n appeal the factual findings of a trial court will not be disturbed where there is substantial

evidence to support the findings." *Boarman v. Boarman*, 194 W. Va. 118, 459 S.E.2d 395, n. 2 (1995). In *Boarman*, this Court further explained that it will not overturn the factual findings of a lower court unless "the evidence plainly and decidedly preponderates against such finding." *Boarman*, 194 W. Va. at 122, 459 S.E.2d at 399. As is well-established, the factual findings of a family court are accorded substantial deference on appeal. *Syllabus, Carr*, 216 W. Va. 474, 607 S.E.2d 803.

The Family Court's finding concerning the nature of Ms. Lee's relationship with J. Shelly was supported by the testimony of a third party, Ms. Lee's future son-in-law, a relatively rare occurrence given the nature of the evidence. Although Ms. Lee has attempted to attack her future son-in-law's testimony, her bare denial concerning her relationship with J. Shelly and her attacks on his credibility do not provide a basis from which it can be concluded that the finding was not supported by substantial evidence in the record. The Family Court heard the testimony and had the opportunity to observe the demeanor of the witnesses. The finding of the Family Court regarding J. Shelly should not, therefore, be overturned on appeal.

The findings concerning Rodney Stalnaker are similar to the findings concerning J. Shelly. Ms. Lee describes Mr. Stalnaker as a former boyfriend and claims that their relationship consisted only of a few lunch dates. However, there was evidence that Ms. Lee had enough of a relationship with Mr. Stalnaker to visit him regularly while he was incarcerated. This fact provides a basis from which to conclude that the relationship was more significant than Ms. Lee admits to. As is the case with J. Shelly, the Family Court heard the testimony and evaluated the credibility of the witnesses. Ms. Lee's bare denials concerning her relationship with Mr. Stalnaker do not provide a basis from which

it can be concluded that the evidence plainly and decidedly preponderates against the finding that the Family Court made.

V. CONCLUSION

As recognized by the Circuit Court, the term "another relationship" as it was used in Paragraph 10 of the Prenuptial Agreement is patently ambiguous. Given this ambiguity, the Family Court correctly considered the parties' intent with regard to the term and found that Ms. Lee had entered into three relationships as contemplated in the Prenuptial Agreement. Since it was able to determine the parties' intent, the lower courts, according to the rules governing contract interpretation, properly declined to construe the Prenuptial Agreement against Mr. Lee. Although Ms. Lee made an unsupported claim that her rights to equal protection and due process were violated, she did not provide any analysis that would support such a conclusion. Finally, the Family Court's findings with regard to Ms. Lee's three other relationships were supported by substantial evidence in the record. Therefore, the Family Court's findings are not clearly erroneous, the standard that must be met in order to overturn the factual findings of a lower court.

WHEREFORE, the Appellee respectfully requests that this Court affirm the rulings of the Upshur County Family and Circuit Courts and provide any further relief that this Court determines is just and appropriate.

CHARLES W. LEE
Appellee

By Counsel

Teresa Lyons

Teresa J. Lyons (WV Bar ID 8047)
HEDGES LYONS & SHEPHERD, PLLC
141 Walnut Street
Morgantown, WV 26505
304-296-0123

Peter J. Conley (WV Bar ID 798)
SIEGRIST & WHITE, PLLC
P.O. Drawer 2550
Clarksburg, WV 26302-2550
304-624-6391

Counsel for Appellee Charles W. Lee

CERTIFICATE OF SERVICE

I, Teresa J. Lyons, do hereby certify that I served a true and correct copy of the foregoing *Brief of Appellee Charles W. Lee* upon J. Burton Hunter, III, One West Main Street, Buckhannon, WV 26201-9435, by U.S. Mail, postage prepaid, this 31st day of May 2011.

Teresa J. Lyons
Teresa J. Lyons