

IN THE SUPREME COURT OF APPEALS, STATE OF WEST VIRGINIA

WILLIAM JACK STUCK,

Appellant,

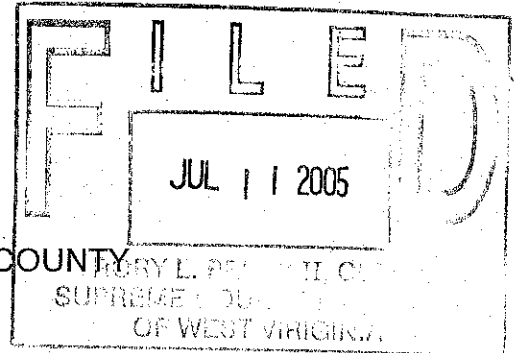
v.

APPEAL NO. 32727

ANNA J. DUNCAN STUCK,

Appellee.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY



BRIEF OF APPELLANT

**To the Honorable Justices of the
Supreme Court of Appeals
of West Virginia**

July 11, 2005

**Charles R. Webb, Esquire
118 Capitol Street, Suite 400
Charleston, West Virginia 25301
State Bar No: 4782
(304) 343-2900**

**Counsel for William Jack Stuck,
Petitioner**

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KIND OF PROCEEDING

Comes now the Appellant, William Jack Stuck, [sometimes hereinafter referred to as "Husband" or "Mr. Stuck"] who requests of this Honorable Court a reversal or remand of the *Order* of the Circuit Court of Kanawha County, West Virginia, by the Honorable Tod J. Kaufman, entered on the 31st day of January, 2005, sustaining the findings of fact, conclusions of law and *Final Order* entered by the Honorable D. Mark Snyder, Family Court Judge for the Eleventh Family Court Judicial Circuit pursuant to a divorce matter.

The final divorce hearing was conducted on the 4th day of August, 2004. The primary issue was the equitable distribution of Husband's premarital residence. Substantial evidence was presented to the Court relating to the execution of two substantially similar prenuptial agreements by the parties one day before their marriage.

Substantial evidence was also presented relating to the intent of a post marital conveyance by deed of the Appellant's premarital residence into the names of both parties as joint tenants with right of survivorship. This occurred approximately six months after the parties were married, during their thirty-one month marriage. Finally, evidence was presented relating to the relative contributions of the parties to the construction and maintenance of the residence.

The Appellant seeks reversal of that provision of the *Order* of the Family Court of Kanawha County which granted the Appellee, Ms. Duncan, one-half interest in the premarital residence of the Appellant.

ASSIGNMENTS OF ERROR

Whether the Family Court abused its discretion or was clearly erroneous in its findings of fact and conclusions of law that the Appellee is entitled to one-half of the Appellant's pre-marital residence.

Whether the Family Court abused its discretion or was clearly in error in failin gto apply the thrid step in the equitable distribution analysis.

STATEMENT OF THE FACTS

The subject marital residence is located on a parcel of property inherited by the Appellant in 1999. The Appellant, a World War II veteran, decided to build a home on the inherited property in the Knollwood subdivision of Charleston, Kanawha County. He began the construction of the home in May, 1999, and completed the same in November, 1999, using his life savings and proceeds from the sale of an inherited house in California. This occurred approximately nine months before the parties were married.

Desiring to protect their premarital assets, on the 18th day of August, 2000, one day before their wedding date, the parties executed a prenuptial agreement which set forth as follows, in relevant part:

THIS AGREEMENT, Made and entered into this the 18th day of August, 2000, by and between WILLIAM JACK STUCK, hereinafter referred to as "Stuck", and ANNA JEAN DUNCAN, hereinafter referred to as "Duncan."...

I.

DISCLOSURE BY PARTIES

*Stuck has had prepared and attached hereto and marked as Exhibit 1, a Disclosure of Stuck's assets. Duncan has had prepared and attached hereto and marked as Exhibit 2 a Disclosure of Duncan's assets. Stuck and Duncan hereby acknowledge **that each is possessed of separate property in her or her own name, acquired prior to the marriage**, and that each has supported himself or herself prior to the marriage. Each has informed the other of her or her means and resources. The parties*

acknowledge that each of them has ascertained and weighed all the facts conditions and circumstances likely to influence his or her judgment herein and that all matters embodied herein, as well as all questions pertinent hereto, have been fully and satisfactorily explained and that each clearly understands and consents to all provisions hereof. The parties further acknowledge that each has had the opportunity to consult with legal counsel of her or her own selection and that each is entering into this Agreement freely, voluntarily and with full knowledge. **The parties understand that by entering into this Agreement, they mutually waive all rights that each may have to support, including alimony and equitable distribution of property in the event of separation or divorce and by entering into this Agreement the survivor may receive as surviving spouse less than the would have otherwise been entitled to receive. It is further declared that by virtue of the contemplated marriage, neither party shall acquire any right, title or claim to any real or personal property of the other and that such property shall descend and be distributed to the parties respective distributes and heirs, as may be provided in their respective Last Will and Testament or by the laws of the applicable jurisdiction as though no marriage had taken place. ...**

IV.

CONSIDERATION TO DUNCAN ON STUCKS DEATH

If Stuck shall die during the course of this marriage to Duncan, Duncan shall receive the following:

A. Joint Tenants Property. **All assets that have during the parties marriage been placed and titled in both parties names as joint tenants with right of survivorship.**

B. Insurance Proceeds. The proceeds of any life insurance policy on Stuck's life upon which Duncan has been named as specific beneficiary.

V.

CONSIDERATION ON DIVORCE

1. **Upon divorce each party hereto waives any and all claims which he/she may have for support, curtesy, equitable distribution of property or any and all rights that he/she may have in the property, both real and personal of the other party.**

VI.

PROPERTY ACQUIRED AFTER THE DATE OF MARRIAGE

The parties hereto agree that of any after the date of marriage neither party shall have a claim or interest in any property or interest in property owned by the other before the marriage or acquired by the other party after the marriage. As used herein, property shall include capital stock, bonds, partnership interests, real estate, inventory or other assts, whether real or personal, or any other investment or asset obtained by

each party in her own separate name, whether by purchase, gift, inheritance or otherwise.

VII.

1. The provisions of the Agreement shall not prohibit either Stuck or Duncan from making any gift, in any amount, to her or her respective spouse, and that gift shall become the separate property of the donee spouse.

2. During the continuation of said marriage, each of the parties is to have the full right to acquire, own, control, and dispose of her or her separate property the same as if the marriage did not exist, and each of the parties is to have the full right to dispose of and sell any and all real or personal property now or hereafter owned by each of them without the other party joining, and said transfer by either of the parties of this contract shall convey the same title that said transfer would convey had the marriage not existed. ...[emphasis added]

This agreement was drafted by Mr. Stuck's attorney.

Later, on the same day, the parties executed a second *Prenuptial Agreement-In Duplicate* drafted by Ms. Duncan's attorney. The *Prenuptial Agreement-In Duplicate* states, in relevant part, as follows:

PRENUPTIAL AGREEMENT – IN DUPLICATE

THIS PRENUPTIAL AGREEMENT, made this the 18th day of August, 2000, by and between WILLIAM JACK STUCK, prospective husband, and ANNA JEAN DUNCAN, prospective wife.

This AGREEMENT is made in consideration of a contemplated marriage of the parties.

1. The parties have the intent and desire to define and set forth the respective rights of each other, in and to the property of the other after they are married.

2. The parties indent and desire that all property owned respectively by each of them at the time of their marriage shall respectively be their separate property except as otherwise provided in this Agreement.

3. At the time of this Agreement, both parties own real estate, and they have other properties, including bank accounts, which are not specifically set forth.

4. The parties hereby agree as follows:

(a) That each party covenants and agrees that he or she will and does relinquish all claims of inheritance, dower, courtesy, descent and

distribution in and to all property, both real and personal, owned by the parties prior to the day of their marriage.

(b) **Any property acquired after the marriage will be owned by the parties equally, but the accretions or replacement of assets presently owned by either party shall be a part of the mutually owned property.**

(c) The parties further mutually agree to execute and acknowledge upon request of the other or of his heirs or her heirs, devisees, personal representatives or assigns any and all proper assurances of release or conveyance to enable each party hereto or their heirs, devisees, personal representatives or assigns to bargain, sell and convey or devise or to will or otherwise dispose of any property now owned free and clear of any real or apparent claim that might accrue by virtue of their said contemplated marriage.

(d) **It is the intention of the parties to own property together after their marriage and in that case, they will take the necessary steps to be certain that any property acquired by both of them is held in joint tenancy with the right of survivorship, including any and all real or personal property.**

5. At the time of drafting this Prenuptial Agreement each of us has a Will, and it is the intention of the parties that the Wills that we have created shall remain in full force and effect and not be modified by this Agreement other than as set forth herein. [emphasis added]

The next day, on August 19, 2000, Mr. Stuck and Ms. Duncan were married. On the date of the marriage he was 78 years old and she was 70 years old. Both parties had substantial assets which they acquired through the years, both having been married before. Appellant was a widower and Appellee was a widow.

Six months later, Appellant conveyed by deed his premarital residence into the names of both parties as joint tenants with right of survivorship.

After only thirty-one months of marriage, the parties separated on April 1, 2003. Shortly thereafter, the Appellee filed a *Petition for Divorce* and the Appellant timely filed an *Answer*.

A temporary hearing was conducted on the 11th day of August, 2003. At the conclusion of the temporary hearing, the Court, *inter alia*, ordered Appellee's counsel to submit a memorandum of law regarding the validity of the prenuptial agreement he had drafted. The *Temporary Order* was entered on the 3rd day of September, 2003.

Subsequent thereto, Appellant filed a *Motion to Disqualify* Appellee's counsel, alleging that her counsel had a conflict of interest in the case inasmuch as he could potentially be called as a witness relating to the facts, circumstances, and intent in executing the second *prenuptial agreement* drafted by him and representations he made to the parties during the execution of the second *prenuptial agreement* he prepared. The *Motion to Disqualify* further alleged that, according to the pretrial deposition testimony of Appellee, she was advised by her counsel that the prenuptial agreement drafted by Appellant's counsel and the prenuptial agreement drafted by him, were identical.

The Family Court Judge never ruled on the *Motion to Disqualify* nor was a hearing ever scheduled on the same.

The depositions of both parties were taken prior to the final hearing.

On the 4th day of August, 2004, the parties appeared before the Honorable D. Mark Snyder, Family Court Judge for the Family Court of Kanawha County, and presented unto the Court their evidence relating primarily to one issue: the disposition of the premarital residence of Appellant.

At the conclusion of the hearing the Family Court Judge advised the parties that the Court would make a decision within thirty days of the hearing

date and instructed the parties to prepare and present to the Court their respective findings of fact and conclusions of law. On the 17th day of November, 2004, the Court entered its Order.

The findings of fact, conclusions of law and order to which the Appellant seeks reversal are as follows:

10. *There were two prenuptial agreements prepared prior to the marriage but the transfer of the residence and the automobile were some time after the marriage and the Court finds that as to these two items the prenuptial agreements have no effect as both agreements contemplate owning and transferring property after the marriage.*
11. *It was the Respondent's position that the conveyance of real estate was simply a protection mechanism as asked for by the petitioner to assure she had an abode should something happen to the Respondent and that there was no long term plan for conveyance in contemplation of separation and divorce. Counsel for the Respondent cites the cases of Charlton v. Charlton, 186 W.Va. 670, 413 S.E.2d 911 (1991) and Burnside v. Burnside, 194 W.Va. 263, 460 S.E.2d 264 (1995) in an attempt to make the point that property transferred to a marital estate creates only a presumption that such property was a gift to the marriage and that the actions of the Respondent in transferring the property was not intended as a gift or was the result of some coercion, duress, and deception. The Charlton case dealt only with monies transferred to the marital estate. In the case at issue real property was deeded in the form of transfer of a house, with the primarily agreed intended purpose was so that the petitioner would have a place should the respondent pass. However, those limitations on a gift of a deeded piece of real property, even if true, without further stated limitation have the additional complications of the statute of frauds and complicates other evidentiary matters as well. Public policy would also weigh against going outside of the transfer document and would create disastrous evidentiary issues on which the courts would have to analyze and speculate.*

*The court finds that there was no under coercion duress [sic] or deception and thus, under the previous principles cited, the court finds that the deed is the controlling document and the petitioner has an ownership share of the stated property at 2605 Larwood Drive. This court, under the circumstances and the **controlling law***

stated, does specifically not rule on the equitable aspects of the transfer.

12. *The Court finds that the testimony of the Defendant's [sic] witnesses and the Defendant [sic] are an attempt to modify a written agreement which is clear on its face. The Court finds that the residence is marital property and that Mr and Mrs Stuck are owners of said property as joint tenants with right of survivorship in the surviving spouse. Accordingly, under the circumstances of this case the Court does grant Mrs Stuck's motion to dissolve the temporary order that forbade the transfer of property and allows Mrs Stuck to convey her interest in the property which would terminate the survivorship. ...*

..BASED ON THE FINDINGS OF FACT AND CONCLUSIONS OF LAW THIS COURT DOES HEREBY ORDER AND ADJUDGE AS FOLLOWS: ...

1. *The Court does find that the residential real estate is owned by the parties as joint tenants. The court orders that the survivorship relationship be terminated effective with this order. The respondent and petitioner are ordered to effectuate a new deed or deeds in conformity with this order. [emphasis added]*

It is this *Order* and the underlying findings of fact and conclusions of law of the Family Court and the upholding of the same by the Circuit Court from which your Appellant seeks reversal or remand.

STANDARD OF REVIEW

In syllabus point two of *Lucas v. Lucas*, 215 W.Va. 1, 592 S.E. 2d 646 (2003), this Court held as follows:

In reviewing the challenges to findings made by a family court judge that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard, and questions of law and statutory interpretations are subject to a *de novo* review.

The Family Court abused its discretion or was clearly erroneous in its findings of fact and conclusions of law that the Appellee is entitled to one-half of the Appellant's pre-marital residence.

ARGUMENT

An analysis of a divorce action involving a prenuptial agreement must begin with the seminal case of *Pajak v. Pajak*, 182 W.Va. 28, 385 S.E.2d 384 (1989), where this Honorable Court, in discussing the validity of a prenuptial agreement stated that:

[t]he validity ...is dependant upon its valid procurement, which requires its having been executed voluntarily, with the knowledge of its content and legal effect, under circumstances free of fraud, duress, or misrepresentation; however, although advise of independent counsel at the time parties enter into a prenuptial agreement helps demonstrate that there has been no fraud, duress or misrepresentation, and that the agreement was entered into knowledgeably and voluntarily, such independent advise of counsel is not a prerequisite to enforceability when the terms of the agreement are understandable to a reasonably intelligent adult and both parties have had opportunity to consult with independent counsel.

In its *dicta*, the Court reasoned that prenuptial agreements are favored by public policy and that they enhance, rather than detract from, opportunities to form marriage relationships in the middle age and later.

Typically, a couple marries in their early twenties, has children, and through joint efforts accumulates family assets. If, then, one spouse dies, the surviving spouse may feel a duty to the deceased spouse as well as to the children to protect the assets from claims of the second spouse. Thus, without the ability to enter into enforceable prenuptial agreements that protect assets from the statutory entitlement of a second spouse, an older person with money acquired with the help of his or her spouse in an earlier marriage would be reluctant to remarry.

More relevant to this case, this Court stated that, “[a] person seeking to overcome the presumptive validity of a prenuptial agreement designed to protect assets for the children of a previous marriage has a heavy burden of proof.”

Appellant married his childhood sweetheart, who was age seventeen, when he was nineteen, in 1943. He and his first wife were married for forty-three years until her death in 1986. They raised two daughters and a son who predeceased his mother.

Appellee became a widow approximately two years prior to her marriage to Appellant. She inherited a substantial amount of assets, including a home and a farm. She has three grown daughters.

The resources which Appellant utilized to build his residence consisted of inherited real property and his life savings. Prior to his marriage to Appellee, Appellant decided to build a home in the Knollwood subdivision in Charleston, Kanawha County, on his inherited property. Upon the completion of the home, desiring that there be absolutely no opportunity for his new wife to have an interest to the home except upon his death while married to her, and in order to protect the inheritance of his children, he had executed a prenuptial agreement, the relevant portion of which is set forth as follows:

*The parties hereto contemplate marrying each other in the near future. In anticipation thereof, they desire to fix and determine by ante nuptial agreement the rights and claims of each of them in the property of the other arising by reason of the marriage and to accept the provisions of the Agreement in lieu of all such rights and claims. **Each of the parties is the owner in their own right of property and each has children or a child by a former marriage and it is the intention of the parties that their marriage shall not in any way change their rights in their own property, the rights of their own children, or the rights of their distributes***

[sic] and heirs, except as otherwise provided herein.
[emphasis added]

Later, the agreement discusses the waiver and release by each of them of their intestate right to the other's property in paragraphs II and III. In paragraph IV the prenuptial agreement states as follows:

If Stuck shall die during the course of his marriage to Duncan, Duncan shall receive the following:

A. Joint Tenants Property. *All assets that have during the marriage been placed and titled in both parties names as joint tenants with right of survivorship.* [emphasis added]

Finally, the last relevant paragraph is paragraph V which states as follows:

Consideration on Divorce

1. *Upon divorce each party hereto waives any and all claims which he/she may have for support, curtesy, equitable distribution of property or any and all rights that he/she may have in the property, both real and personal of the other party.*

On the same date, Appellee had prepared a second *Prenuptial Agreement-In Duplicate*. Appellee and her attorney represented to Appellant that the *Prenuptial Agreement-In Duplicate* was identical to the prenuptial agreement signed earlier in the day by the parties and prepared by Appellant's attorney. In reliance upon the representations of Appellee and her counsel that the second prenuptial agreement was simply so that each party would have an identical and mutual prenuptial agreement, he executed the same on the same day of August 18, 2000. That prenuptial agreement states in relevant part:

4. *The parties hereby agree as follows:*

(a) *That each party covenants and agrees that he or she will and does relinquish all claims of inheritance, dower, courtesy, descent and distribution in and to all property, both real and personal, owned by the parties prior to the day of their marriage.*

(c) The parties further mutually agree to execute and acknowledge upon request of the other or of his or her heirs, devisees, personal representatives or assigns any and all proper assurances of release or conveyance to enable each party hereto or their heirs, devisees, personal representatives or assigns to bargain, sell and convey or devise or to will or otherwise dispose of any property now owned free and clear of any real or apparent claim that might accrue by virtue of their said contemplated marriage.

No Intent To Gift

After executing the so-called mutual, duplicate prenuptial agreements, the parties married the following day. Almost immediately, Appellee began to badger and pressure Appellant into executing a deed from him individually to them as husband and wife of his premarital residence, claiming that if he were to die before her, she would have no place to live. This was factually untrue as Appellee owned a home in Fayette County. She sold the home during the marriage but did not contribute any of the proceeds to the marriage [Duncan, deposition 9/18/03, p.9]. She also owned a farm in Roane County. [Id. at p. 13]. She also owned approximately sixty seven thousand dollars in certificates of deposits. In an effort to cease her badgering, but knowing that she would only get the house in the event of his death, he agreed to execute a deed as a joint tenant with right of survivorship only. It is important for this Court to note that he did not execute a deed as a tenant in common such that it would have vested her an immediate and undivided one-half interest in the marital residence. His choice of a joint tenant with the right of survivorship was consistent with the *prenuptial agreements* and his desire to protect his property for the benefit of his daughters. As drafted, the deed was only intended as a probate instrument upon

his untimely death while being married to Appellee. Appellee's own deposition testimony bears out her understanding of his intent:

Q.How did it come about that the two of you or one or more of you decided to put the house into your names, joint tenants with right of survivorship?

A. He - - He talked to Mary. I don't know what they - - what they talked about, you know, more or less, and he called her. He told me, he said, "Jean, I'm going to have this house put in your name," he said, "so that it will be yours if anything should happen to me." And he said - - I said - - he said, you told me that you, when we married, that you had to have some security, that you didn't have a home now and you wouldn't have a home, and if it didn't - - If the house wasn't in both names, then I wouldn't have a house because I knew what - - I would be put out if something happened to him. Then he said, well, he said, "this is just not right in one way." That's one of the reasons I felt like I was a boarder there and not a wife.

Q. Uh huh.

A. He said, if anything happens to you, then it would go to your family. I mean, you know.

Q. Uh huh. So you believe the overriding reason to put it in your name is you had given up your home and you wanted to make sure, **upon death**, if something happened to him, it would go to you? [emphasis added]

A. Uh huh.

Q. All right.

A. ...(continuing) that I had to have some security of a home --

Q. Okay.

A. (continuing) because if I sold mine, which wasn't -- I didn't get much money from my home. Sixty is not a lot of money.

[Duncan, deposition pp. 25-29]

At the final hearing Appellee was consistent with her earlier deposition testimony regarding the intent of Appellant to only have his house in the event of his death and not a divorce:

Q. *I just want to ask you a few follow-up questions. Whenever this deed situation was discussed, Mr. Stuck discussed with you, didn't he, that he had concerns that your kids thought they would end up with his property and not his kids. He discussed that you, didn't he?*

A. *He did.*

Q. *And it was never intended for that to occur, that you side of the family get half this property if you separated. That was never intended, was it?*

A. *Not by me.*

Q. *Okay. What was intended by you and by him was that if he died, you got to stay in the house. Right? Is that correct? You have to speak out loud.*

A. *Yes.*

Q. *And there ever never any intention for you to be able to take fifty percent of the property if you got divorced because you didn't really pay for any of that property. Right?...*

A. *I don't know....*

Q. *..You didn't have any discussions with Mr. Stuck that "Hey, if I get divorced, I get half of this property?"*

A. *I planned if something should have happened to him. I was going to give it in a will to the girls.*

Q. *If something happened to him, his girls.*

A. *Yes, his girls.*

Q. *Okay. And that was all under the scenario that he died, you got the property. Right?*

- A. Yes. And then when – before I died, I was going to have so that his family would get it.
- Q. Well, what is happening now was never intended or contemplated by you two when you executed that deed. Correct? ...
- Q. When you executed that deed, there certainly wasn't any discussion or intent on your part that you take half the property if you got a divorce?
- Q. You don't know whether there was any discussions between you and Jack as to whether if you got divorced, you got half that property when you signed that deed? Did you have any discussions like that?
- A. No.
- Q. The only discussions were if he died, is that fair to you and make sure you wouldn't get kicked out. Right? ...
- Q. The only discussion was I will take care of you if I die. Right?...
- Q. When you discussed this deed with Jack and the reason for it, the reason for it because you told him that you were afraid that if he died, you would be kicked out on the street by his kids. Is that correct? And I don't want - ...
- Q. You guys weren't thinking or talking about divorce when you prepared that deed, were you? ...
- A. No.
- Q. Okay. And certainly the purpose of the deed was not intended for you to take half the property in the event of divorce? ...
- Q. That wasn't the purpose of the deed, was it?
- A. I don't think so. I don't know.
- Q. Okay. Now, you told Mr. Stuck that your concern was that if he died, you'd be kicked out on the street. Right? Is that true?

- A. Yes.
- Q. *That wasn't a fair representation to him, was it? ...*
- Q. *Was it a fair representation that if you had kicked our of that house, you wouldn't have had anyplace to live?*
- A. *Not 'til I bought a place.*
- Q. *Okay. You had a farm, didn't you?*
- A. *There isn't anyplace to live on it. You don't live on ground.*
- Q. *But it was a very valuable piece of property, wasn't it? ...*
- Q. *You've had money and the where-with-all to get another place to live if you ended up out of Jack Stuck's house. Correct?*
- A. *I had the money?*
- Q. *Yeah, and the where-with-all? You had it to get another place to live, didn't you?*
- A. *Yes. I took what I sold for my home and put a down payment on my house.*

[Transcript of Final Hearing, pp. 56-63]

Appellant's recollection of his intent and her pressure was unequivocal, unambivalent and uncontradicted:

- Q. *Okay. There came a time in your marriage and you told me if I'm right or not, that you conveyed a deed over to make the property, this Larwood property joint tenancy property with your wife. Correct?*
- A. Yes.
- Q. *Why did you do that?*
- A. *She badgered to me and hounded me that she get security, that she promised me she'd take care of me for life. She wouldn't put me in a home; she would personally take care of me for life.*

- Q. Okay.
- A. *Under those conditions, I felt obligated to see that my girls would not put her out. I made sure that she had a home to live in.*
- Q. *If you died?*
- A. *If I died, that survivorship. ...*
- Q. *Let me ask this question. Did you have a discussion with your wife when this took place over concerns that if you didn't die and somehow you separated, the concerns you had and what would happen to the property, did you have any discussions with her about that?*
- A. *Well, I wanted to make sure that my kids would receive my inheritance, not her kids, but my kids.*
- Q. Okay.
- A. *But if I died, then I wanted her taken care of. I thought that much of her, but I was lost.*
- Q. *Did you enter into a – And so you went forward under that understanding?*
- A. Yes.
- Q. Was –
- A. *With that understanding.*
- Q. *I think you used the word badgering. Was she bringing up the issue often?*
- A. *Many times. Several times.*
- Q. *Did you- Do you think that – Were you doing this in any way? Was this causing marital problems, this issue?*
- A. *You know, there has to be a feeling there, yes. I'm smart enough to know not to do these things, but I thought enough of Jean, I wanted her to have security. I give her complete controls of my trust. I give her complete controls of my life.*

She give me nothing. I received nothing from her. It was a one-sided marriage.

Q. *Okay. Now, did you have occasion to have a prenuptial agreement drafted?*

A. *Yes.*

Q. *In my office.*

A. *Yes.*

Q. *And is that document one that you and your wife went over?*

A. *Yes.*

Q. *Did you have – Did she get an opportunity to take that to her attorney?*

A. *Yes.*

Q. *Okay. Now, I want to show you a provision in that pre-nuptial agreement, Paragraph No. 4. I think IV over here, this is four, yes. I want to show you, and if you can read A and B to the Court right there. Read that.*

A. *Joint tenants property. All assets that have- during the parties' marriage have been placed and titled in both parties' names as joint tenants with rights of survivorship. Insurance proceeds. The proceeds of any life insurance policy on Stuck's life upon which Duncan has been named as specific beneficiary—*

Q. *Let me show you one part I think you're missing. Before A and B, what's that say?*

A. *If Stuck shall die during the course of his marriage to Duncan, Duncan shall receive the following property:*

Q. *Okay. And what does it say she receives if you die is jointly titled property?*

A. *Yes.*

Q. *And it was specifically put in there that that was the situation where she got jointly held property.*

A. Yes.

Q. Okay. Is there also a provision in that pre-nuptial agreement or did you understand there was a provision in there that all other property that you owned before you got married to her, you would get that?

A. It would be mine.

Q. It would go on to you – to you in any event other than that?

A. Yes.

[Transcript of Final Hearing, pp. 42-47]

Against the great weight of the evidence, the existence of not one, but two prenuptial agreements, the deed which itself was limited to “survivorship” interest and the testimony of the parties as to the clear intent of not making a gift of the home, the Family Court Judge found that the execution of a deed, in and of itself, manifested a gift and superceded the execution of two prenuptial agreements.

In the landmark case of *Whiting v. Whiting*, 183 W.Va. 451; 396 S.E.2d 413 (1990), this Court recognized that joint titling of separate property gives rise to a rebuttable presumption of a gift to the marital estate. “The presumption may be overcome by a showing that the transferring spouse did not intend to transfer the property to joint ownership or was induced to do so by fraud, coercion, duress, or deception.”

It cannot be overemphasized that from the date of the marriage of the parties until the execution of the subject deed six months later, Appellee constantly and relentlessly pressured Appellant into executing a deed transferring his marital residence to them as husband and wife as joint tenants

with rights of survivorship. In *Wood v. Wood*, 184 W.Va. 744, 403 S.E.2d 761 (1991) a similar issue arose wherein this Court stated that "if one party could show that she was coerced into [transferring premarital property] the presumption of a gift would be overcome."

Later, in *Burnside v. Burnside*, 194 W.Va. 263 460 S.E.2d 264 (1995), this Court further elaborated on the principles set forth in *Whiting, infra*. In *Burnside* this Court cited cases from other jurisdictions, one fact situation of which is identical to the case *sub judice* as an example of when a spouse did not intend a joint title designation to constitute a gift or transmutation of property. The Court cited *DeCabrera v. Cabrera-Rosete*, 70 N.Y. S.2d 879, 518 N.E.2d 1168 (1987), for the proposition that "joint title in a cooperative apartment did not constitute a gift to the marital estate when the wife paid the entire purchase price from her separate property. Equally important, the Court cited the case of *In Re Marriage of Benz*, 165 Ill. App. 3d 273, 518 N.E.2d 1316, 116 Illinois (1998), where the Illinois court, faced with facts similar to the case *sub judice* determined that no transmutation took place. The wife in that case received over one hundred sixty thousand dollars from the sale of her family's farm while she was married to her husband. After spending some of the money, she placed one hundred thousand dollars in a trust in her name only. These funds were later transferred to a jointly held trust. When the couple divorced, the husband argued that the facts showed transmutation of the nonmarital funds to the marital relationship. However, the wife testified that her husband kept "pestering" her to place the one hundred thousand dollars in the marital trust. She stated that she finally agreed to the

transfer in order to keep peace in the family, as her husband had become increasingly verbally abusive. She testified that it was never her intent to make a gift of the one hundred thousand dollars. The Appellate Court upheld the lower Court's finding that the money remained separate property in spite of its joint title.

Returning to the facts in the *Burnside* case, this Court has stated that substantial evidence is required that clearly is indicative of a lack of donated intent. "Of course, the best rebuttal evidence would be an instrument of conveyance or a separate written instrument signed by both spouses with an express provision stating that no gift is intended." *Ergo*, in the case at bar, the duplicate, mutual prenuptial agreements executed by the parties prior to their marriage is that separate written instrument that the *Burnside* Court found sufficient and the Family Court Judge in this case should have found sufficient but, in error, did not.

The Family Court abused its discretion and was clearly in error in failing to apply the third step in the equitable distribution analysis.

The Appellant's second assignment of error is that the marital home should not have been divided equally between the parties, pursuant to *West Virginia Code* §48-7-103.

In syllabus point one of *Whiting v. Whiting*, 183 W.Va. 451, 396 S.E.2d 413 (1990), this Court articulated its general procedure for determining equitable distribution in divorce cases:

Equitable distribution under *West Virginia Code* §48-2-1, *et seq.* [now 48-7-701, *et seq.*], is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets. The third step is to divide the

marital estate between the parties in accordance with the principles contained in *West Virginia Code* §48-2-32 [now §48-7-103]. 183 W.Va. at 452-53, 396 S.E.2d at 415-15, syl. pt. 1; see also syl. pt. 2, *Wood v. Wood*, 184 W.Va. 744, 403 S.E.2d 761 (1991); syl. pt. 1, *Signorelli v. Signorelli*, 189 W.Va. 710, 434 S.E.2d 382 (1993); *Maxey v. Maxey*, 195 W.Va. 158, 464 S.E.2d 800 (1995); *Miller v. Miller*, Appeal No. 31634 (WV February 10, 2005)

The first step in the equitable distribution process, determining whether a particular unit of property is marital or separate property, is a question of law. *Whiting*, 183 W.Va. at 454-55, 396 S.E.2d at 416-17. The family court judge found that the subject real estate was marital and not separate. The second step, is the valuation of the marital property. The value is not at issue.

The final step requires division of the marital property and is governed by *West Virginia Code* §48-2-32 [formerly §48-7-103]. While there is a presumption of equal division of the marital property, section §48-7-103 authorizes an alteration of the distribution "only if the circuit court determines that equal division of the marital property is inequitable in view of certain economic and noneconomic contributions to the marital estate by either spouse. *Whiting*, 183 W.Va. at 455, 396 S.E.2d at 417.

In the absence of a valid agreement, the trial court in a divorce case shall presume that all marital property is to be divided equally between the parties, but may alter this distribution, without regard to fault, based on consideration of certain statutorily enumerated factors, including: (1) monetary contributions to marital property such as employment income, other earnings and funds which were separate property; (2) non-monetary contributions to marital property, such as homemaker services, child care services, labor performed without

compensation, labor performed in the actual maintenance or improvement of tangible marital property, or labor performed in the management or investment of assets which are marital property; (3) the effect of the marriage on the income-earning abilities of the parties, such as contributions by either party to the education or training of the other party, or foregoing by either party of employment or education; or (4) conduct by either party that lessened the value of marital property. W.Va. Code §48-2-32(c)(1986) [now §48-7-103]. Syl. Pt. 1, *Somerville v. Somerville*, 179 W.Va. 386, 369 S.E.2d 459 (1988); *Pratt v. Pratt*, 197 W.Va. 102, 475 S.E. 2d 102 (1996).

Indeed, the Family Court apparently intended to apply this third step of the process as it conclude after finding the residence was indeed marital, "That this Court does not specifically rule on the equitable aspects of the transfer." It is clear that the Family Court had intended to address the third step later in its order, but failed to do so.

Appellee could not make a reasonable or rational argument that she made any contribution to the acquisition or preservation of the subject property. As a matter of fact, evidence was presented at the final hearing that during the marriage she owned a house, sold the house and did not contribute any of those proceeds to the marriage.

Q. *[by Mr. LaFon] And she owned a house – and she sold that house?*

A. *[Mr. Stuck] Yes.*

Q. *Did you get any – did any of that money go to may any marital expenses?*

A. *None.*

Q. *She kept it all. Right?*

A. *Right.*

Q. *And when she left the marriage, she took all that money with her. Right?*

A. *Yes.*

Q. *And you don't make any claim to that money, do you?*

A. *No.*

[Mr. Stuck, deposition, p. 42.]

Ms. Duncan's deposition testimony reflects her knowledge that she contributed nothing to the construction of the home:

Q: *And you would agree that the property that the house is constructed on, Mr. Stuck inherited?*

A. *Yes. The property, yes.*

Q. *And that all the funds to build the house came from Mr. Stuck? Right?*

A. *Yes.*

[Ms. Duncan, deposition, p. 25]

While the parties were married Appellant had to sue his builder and had to engage in substantial litigation. No monies were contributed by Appellee to the litigation expenses. [Ms. Duncan, deposition, pp. 29-30]

Equitable Is Not Equal

Equitable is not always equal. In the *Burnside* case, this Court proposed that Ms. Burnside could offer evidence, that although the house was considered marital property under the first step of the process [that being jointly titled] it

should not be equally divided between the parties because she used separate funds to pay off the mortgage. Likewise, in the case at bar, the Family Court Judge failed to apply provisions of *West Virginia Code* §48-7-103 and divide the equity in recognition that one hundred percent of the resources for the acquisition of real property, the construction of the home and litigation regarding the same all came from the Appellant, Mr. Stuck.

In *Larue v. Larue*, 304 S.E.2d 312, 172 W.Va. 158 (1983), this Court discussed the consideration of homemaker services in the equitable distribution process. However, homemaker services are not relevant in this case as the evidence is replete that during the thirty-one month period the parties were married, they were spending the inheritance of Appellant taking trips, gambling and wintering in tropical locales. The parties were hardly ever home and there was absolutely no evidence that Appellee engaged in any homemaker services.

In a case substantially similar to the case at bar, in *Wood v. Wood*, 403, S.E.2d 761, 184 W.Va. 744 (1991), after a seventeen year marriage, the parties divorced. The wife in that case inherited a substantial amount of money and stocks from her family. At the final hearing in the matter, the circuit court awarded unequal distribution of the parties assets and debts and stated that it was justified because Ms. Wood used her inheritance for the down payment of the marital house. On appeal, Mr. Wood alleged the circuit court erred in ordering an unequal distribution of marital property. This Court found that the Circuit Court's unequal distribution of marital property was justified and was a

“rational application of the statute [§48-2-32(c)] [now §48-7-103] to the facts on the record.”

Returning to *Burnside*, this Court discussed, at length, the provisions of *West Virginia Code* §48-2-32(c) [now *West Virginia Code* §48-7-103] where a spouse may offer a variety of evidence to rebut the statutorily created presumption that marital property should be equally divided. The following is an analysis of *West Virginia Code* §48-7-103 as applied to this case.

(1)(A) Employment income and other earnings:	Mr. Stuck-All Ms. Duncan-None
(1)(B) Funds which are separate property	Mr. Stuck- All Ms. Duncan-None
(2) Homemaker services	Mr. Stuck-Some Ms. Duncan-None
(2)(B) Child Care Services	Mr. Stuck-NA Ms. Duncan-NA
(2)(C) Labor performed without compensation	Mr. Stuck-None Ms. Duncan-None
(2)(D) Labor performed in maintenance of property	Mr. Stuck-All Ms. Dunan-None
(2)(E) Labor performed in management of property	Mr. Stuck-All Ms. Duncan-None
(3)(A) Contribution to education/training	Mr. Stuck-NA Ms. Duncan-NA
(3)(B) Foregoing of employment/income earning activity	Mr. Stuck-NA Ms. Duncan-NA
(4) Dissipation/depreciation of value of property	Mr. Stuck-NA Ms. Duncan-NA

Thus, in *Burnside*, the Court suggested that Ms. Burnside could offer evidence that, although the house was considered marital property under the first step of the process, it should not be equally divided between the parties because she used separate funds to pay off the mortgage.

Assuming, *arguendo*, that the Appellant does not prevail on his argument relating to step one of the equitable distribution analysis, clearly, under the third step, the Appellant must prevail as the only contributor to the existence of the home.

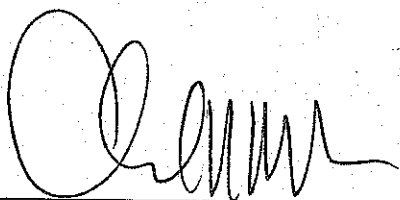
Thus, under any and all theories applicable to this case including, but not limited to, prenuptial agreements, rebuttable presumption of a gift, equitable distribution, unjust enrichment, comparative contribution and source of funds all favor the Appellant and the characterization of the subject property as separate property of Appellant, or, alternatively, upon application of *West Virginia Code* §48-7-103, that he be awarded one hundred percent of the jointly titled property. Clearly, based upon the discussion herein, the Family Court committed error or abused its discretion in finding that Appellee had an interest in Appellant's premarital residence or having found the property to be marital, committed error in failing to apply the third step of the analysis. Consequentially, the failure of the Circuit Court, on appeal, to reverse the decision of the Family Court was likewise in error.

RELIEF REQUESTED

WHEREFORE, your Appellant respectfully requested that the provisions of the *Final Order* granting the Appellee one-half of the former marital residence

be reversed with directions to the Family Court to enter an Order granting the Appellant all right, title and ownership of the residence, or, in the alternative, that the matter be remanded to the Family Court to apply the third-step of the equitable distribution process in compliance with Section 103, Article 7, Chapter 48 of the West Virginia Code, relating to division of marital property; and for all other and further relief as this Honorable Court may deem just and proper.

Your Appellant requests oral argument in support of his brief.



Charles R. Webb, Esquire
GIATRAS & WEBB
118 Capitol Street, Suite 400
Charleston, West Virginia 25301
(304) 343-2900
WV State Bar ID No. 4782

WILLIAM JACK STUCK
By Counsel

IN THE SUPREME COURT OF APPEALS, STATE OF WEST VIRGINIA

WILLIAM JACK STUCK,

Appellant,

v.

APPEAL NO. 32727

ANNA J. DUNCAN STUCK,

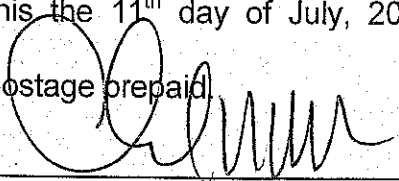
Appellee.

CERTIFICATE OF SERVICE

I, Charles R. Webb, counsel for Appellant, William J. Stuck, do hereby certify that service of the foregoing *Brief of Appellant* in the above styled case have been made upon the following:

Gordon Billheimer, Esq.
Billheimer Law Firm, PLLC
311 Washington Street
Montgomery, WV 25136

this the 11th day of July, 2005, via United States mail, in a sealed envelope,
postage prepaid.


Charles R. Webb, Esquire
GIATRAS & WEBB
118 Capitol Street, Suite 400
Charleston, West Virginia 25301
(304) 343-2900
West Virginia State Bar ID No. 4782