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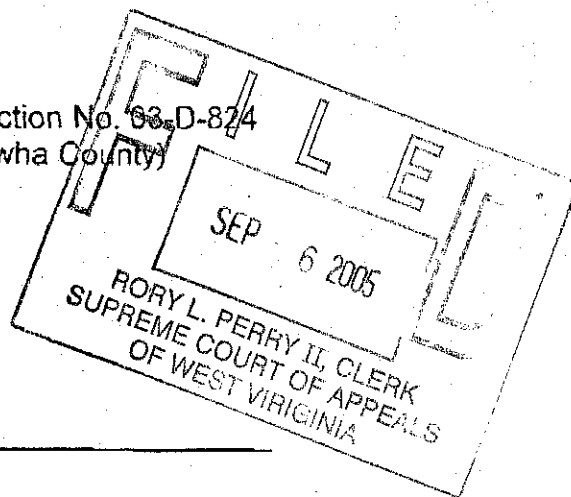
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WILLIAM JACK STUCK,  
Appellant,

v.

ANNA J. DUNCAN STUCK,  
Appellee.

Civil Action No. 03-D-824  
(Kanawha County)



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**BRIEF ON BEHALF OF ANNA J. DUNCAN STUCK, APPELLEE**

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**BRIEF ON BEHALF OF ANNA J. DUNCAN STUCK, APPELLEE**

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Comes now the Appellee, Anna J. Duncan Stuck, by her counsel, and presents her Brief pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure.

**I. OMISSIONS, ERRORS OR INACCURACIES IN APPELLANT'S  
"KIND OF PROCEEDING" AND "STATEMENT OF FACTS"**

Appellant Stuck has provided accurate information pursuant to the "Kind of Proceeding" and "Statement of Facts" sections of his Brief.

**II. RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR**

**APPELLANT'S ASSIGNMENT OF ERROR**

A. Whether the family court abused its discretion or was otherwise clearly erroneous in its findings of fact and conclusions of law that the Appellee is entitled to one-half of the value of the Appellant's pre-marital residence.<sup>1</sup>

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<sup>1</sup> In this first assignment of error, Appellant states the family court's findings of fact and conclusions of law erroneously. The family court actually found that "the residence is marital

### APPELLEE'S RESPONSE

In rendering its decision in this matter, the findings of fact and inferences drawn by the family court were supported by substantial evidence and the family court made findings of fact essential to the proper resolution of the legal questions involved; thus, the Family Court neither abused its discretion nor was clearly erroneous in its findings of fact and conclusions of law that the parties herein are owners of the residential real estate located at 2605 Larwood Drive as joint tenants with right of survivorship in the surviving spouse..

B. Whether the Family Court abused its discretion or was clearly in error in failing to apply all three steps in the equitable distribution analysis.

### APPELLEE'S RESPONSE

The family court did not abuse its discretion and was not clearly in error "in failing to apply all three steps in the equitable distribution analysis" pursuant to the dictates of *Whiting v. Whiting*, 396 S.E.2d 413 (W.Va. 1990), in that Appellant Stuck's argument herein is based on a faulty reading of the family court's decision and totally ignores the "circumstances and the controlling law stated," as referenced by the family court in its ruling.

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property and that Mr. and Mrs. Stuck are owners of said property as joint tenants with right of survivorship in the surviving spouse." See No. 12, Findings of Fact and Conclusions of Law and Final Order.

III. POINTS AND AUTHORITIES RELIED UPON

CASES

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STATUTES

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OTHER

*Black's Law Dictionary*, 6<sup>th</sup> Ed ..... 15

#### IV. STANDARD OF REVIEW

When considering the correctness of decisions rendered by a circuit court that was based upon a Family Court's ruling, this Court applies a multifaceted review, as follows:

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 the law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

*Clifford K. and Tina B. v. Paul S.*, 2005 W.Va. LEXIS 58 (2005), citing *Syl. Carr v. Hancock*, 607 S.E.2d 803 (W.Va. 2004).

Syllabus Pt. 2, *Stephen L. H. v. Sherry L.H.*, 465 S.E.2d 841 (W.Va. 1995)

states:

Under the clearly erroneous standard, if the findings of fact and the inferences drawn by a family law master are supported by substantial evidence, such findings and inferences may not be overturned even if a circuit court may be inclined to make different findings or draw contrary inferences.

#### V. ARGUMENT

**A. IN FINDING THAT THE RESIDENTIAL REAL ESTATE LOCATED AT 2605 LARWOOD DRIVE IS MARITAL PROPERTY AND THAT THE PARTIES HEREIN ARE OWNERS OF SAID PROPERTY AS JOINT TENANTS WITH RIGHT OF SURVIVORSHIP IN THE SURVIVING SPOUSE, THE FAMILY COURT WAS NOT CLEARLY ERRONEOUS IN ITS FINDING OF FACTS AND DID NOT ABUSE ITS DISCRETION IN APPLYING THE LAW TO THE FACTS.**

The Circuit Court of Kanawha County neither erred nor abused its discretion in rendering its decision in this matter. In his Brief, Appellant Stuck focuses on the two prenuptial agreements, dated August 18, 2000, both of which were executed one day before the parties' marriage. The parties first executed a prenuptial agreement, which had been prepared by Appellant William Jack Stuck's attorney, Timothy J. LaFon, and then later that day, the parties executed a second prenuptial agreement, prepared by Appellee Anna Jean Stuck's attorney, Gordon Billheimer.

The family court judge stated in No. 10 of his Findings of Fact, as follows:

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.

Indeed, neither prenuptial agreement has any bearing on whether the marital home is in fact marital property because Appellant Stuck went beyond the parameters of both prenuptial agreements when he later conveyed the Larwood Drive residence into the names of William Jack Stuck and Anna Jean Stuck, his wife, as joint tenants with the right of survivorship in the surviving spouse with no other limits and modifications.

By this conveyance by deed, dated March 14, 2001, Appellant Stuck clearly and unequivocally expressed his intent that the Larwood Drive home no longer be considered his separate property, but instead be marital property subject to equitable distribution, pursuant to *Whiting, supra*, where, two days

after their marriage, the husband transferred title to certain Maryland property into his and his wife's names jointly. This Court further provided in *Whiting*, as follows:

Mr. Whiting is therefore presumed to have donated whatever separate interest he may have had in the property to the marital estate. The property is presumed to have been marital in character, and, as no evidence was offered to rebut the presumption, the proceeds of its sale were also marital property within the meaning of our equitable distribution statutes.

*Id.* at 423.

While the prenuptial agreements are not probative with regard to the issues herein, it is interesting that Section VII (1) of the agreement prepared by Appellant Stuck's attorney states that "[t]he 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." Appellant Stuck's conveyance of the property to Appellee Stuck was clearly a gift under controlling West Virginia law. *Whiting* states in Syllabus Pt. 3 that "[w]here, during the course of the marriage, one spouse transfers title to his or her separate property into the joint names of both spouses, a presumption that the transferring spouse intended to make a gift of the property to the marital estate is consistent with the principles underlying our equitable distribution statute." See also Syllabus Pt. 2, *Charlton v. Charlton*, 413 S.E.2d 911 (W.Va. 1991), which cites *Whiting, supra*.

In further explanation of his decision, the family court judge provided in No. 11 of his Findings of Fact, as follows:

It was the Respondent's position that the conveyance of the 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 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 that 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.

The family court judge further found pursuant to No. 12 of his Findings of Fact that "the testimony of the Defendant's witnesses and the Defendant are an attempt to modify a written agreement which is clear on its face."

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The family court judge's concern for the "time honored " Statute of Frauds is well-placed. This Court, in *Cottrell v. Numberger*, 47 S.E.2d 454, 463-464 (W.Va. 1948) provides an excellent discussion of the sanctity of the Statute of Frauds, West Virginia Code § 36-1-3,<sup>2</sup> as follows:

The Statute of Frauds is a time honored statute. The need of a statute of that character became evident in England during the reign of Charles II and it was enacted in 1676. In some form it has been the law of this State and of the Commonwealth of Virginia since the beginning of the statehood of each. It was designed to prevent fraud and perjury in connection with the sale and the transfer of lands and other designated transactions. Though it may never be made the instrument of fraud which it was intended to prevent, it is just as necessary and equally important that it should not be ignored or circumvented in any set of circumstances which comes within its scope unless its application, in a particular instance, results in fraud or leads to inequitable conduct. These statements as to the necessity of that statute apply with equal force to the statute which deals with conveyances and requires the creation and the conveyance of specified estates and interests in land to be by deed or will. Code, 36-1-1. The dangerous consequences which would follow the relaxation of the requirements of these wise and salutary statutes to permit the creation and the transfer of various interests and estates in land by parol would inevitably produce intolerable confusion and destructive instability in the law of real property. To sanction the substitution of verbal declarations for written instruments in the creation or the transfer of certain interests and estates in land is to reject the wholesome experience of the past for uncertain memory and unrecorded expression and, in so doing, to adopt a course which is necessarily fraught with danger. This risk should never be undertaken except

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<sup>2</sup> West Virginia Code § 36-1-3 states as follows: "No contract for the sale of land, or the lease thereof for more than one year, shall be enforceable unless the contract or some note or memorandum thereof be in writing and signed by the party to be charged thereby, or by his agent. But the consideration need not be set forth or expressed in the writing, and it may be proved by other evidence."

to prevent, in a clear case, the injustice which results from fraud or inequitable conduct; and whenever doubt on this point exists the requirements of these statutes should be strictly adhered to and enforced.

Appellant Stuck's Brief provides copious excerpts from the deposition and final hearing testimony of the parties, which are wholly unavailing in light of *Cottrell's* discussion of the Statute of Frauds, above. Appellant Stuck's attempts to rebut the presumption of gift by the "substitution of verbal declarations for written instruments," is a good example of the type of parol evidence which concerned the *Cottrell* Court. For instance, Appellant Stuck asserts that "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." (See, Brief of Appellant, pp. 22-23) Importantly, however, after hearing the testimony of the parties, the family court judge found no coercion, duress or deception in the execution of the deed. (See, No. 11, Findings of Fact and Conclusions of Law and Final Order) This Court provided in *Stephen L.H. v. Sherry L.H.*, 465 S.E.2d 841, 852-853 (W.Va. 1995), that "[t]here are many critical aspects of an evidentiary hearing which cannot be reduced to writing and placed in a record, c.g., the demeanor of witnesses." The Court continued:

These factors may affect the mind of a trier of fact in forming an opinion as to the weight of the evidence and the character and credibility of the witnesses. Thus, the importance of these factors should not be ignored by a reviewing court. Given a family law master's intimate familiarity with the proceedings, the family law master is in the best position to weigh evidence and assess credibility in making the ultimate ruling on disputed issues.

A survey of relevant decisions from other jurisdictions, involving similar facts to the instant matter, is highly instructive with regard to resolution of the issues herein.

In *Bowen v. Bowen*, 575 S.E.2d 553 (S.C. 2003), the husband and wife entered into an antenuptial agreement prior to their marriage "in an attempt to predetermine the financial consequences of any later separation, divorce, or death, and to preserve each party's separate property." *Id.* at 555. Four parcels of land were purchased and titled in both husband and wife's names during the marriage. Two of the lots were conveyed by third parties to husband and wife "for and during their joint lives and upon the death of either of them, then to the survivor of them, his or her heirs or assigns." Two other parcels were conveyed by third parties to husband and wife "as tenants by the entirety, with the right of survivorship." *Id.* During the couple's divorce proceedings, the husband testified that he did not intend to make a gift of the undivided one-half interest in the properties to his wife. He argued that the properties had been jointly titled "as an estate planning device." Pursuant to the decision affirming the lower tribunal, the Supreme Court of South Carolina stated: "The Master found that the antenuptial agreement did not alter the result because **'nothing in the antenuptial agreement prevented [Husband] from being more generous than he contracted to be.'**" *Id.* at 556 (Emphasis added). The South Carolina Court concluded:

The [antenuptial] agreement restricted each spouse's right to acquire an ownership interest in the other's

separate property, but it did not address a spouse's right to jointly title newly acquired property. Although Husband paid the entire purchase price for each of the properties, he chose to allow the properties to be jointly titled. If Husband had desired the four properties to be his separate property upon a divorce, pursuant to their antenuptial agreement, he should have had the properties conveyed and titled in his name alone. **Under the terms of the agreement, the land, which was purchased with Husband's separate funds, would have remained his separate property had he not chosen to have the properties jointly titled.** Treating the parties as "single persons before [the] marriage" as required under the antenuptial agreement, Wife acquired her interests in the properties by holding title with her husband.

*Id.* (Emphasis added)

In the case of *In Re Marriage of Jackie Cullman*, 541 N.E.2d 1274 (Ill. 1989), the husband and wife (Jackie and Philip) executed a prenuptial agreement three days before their marriage which provided in part that each party's listed assets were to be considered as his or her nonmarital property. *Id.* at 1275. When Jackie filed for divorce she did not dispute "the validity or general interpretation of the prenuptial agreement." *Id.* at 1276. She claimed, however, that the Kildeer house in which she and her husband, Philip, were living -- which was placed in joint tenancy -- was marital property. *Id.* The lower court ruled that the Kildeer house, which had been purchased in part from the sale of Phillip's nonmarital Deerfield house, was his sole, nonmarital property. On appeal, the Appellate Court of Illinois held that "Philip failed to present the clear and convincing evidence necessary to rebut the legal presumption that he created marital property in placing the Kildeer home in joint tenancy." *Id.* at 1278. The appellate court further provided:

Philip additionally argues that the presumption of gift is negated by the fact the parties kept separate bank accounts. **We find, however, that the careful segregation of all other property just as easily supports the inference that the Kildeer home was deliberately put in joint tenancy to give Jackie a marital interest in it.**

*Id.* (Emphasis added)

In *Coffman v. Adkins*, 338 N.W. 2d 540 (Iowa 1983), Lester and Edith Adkins entered into an antenuptial agreement two days before their wedding in which they "retained the right to control and dispose of their separate estates as though no marriage had taken place." Moreover, Lester and Edith "agreed to relinquish all rights in and claims to the property of the other, including dower, support allowance, and distributive share rights." *Id.* at 542. Lester subsequently (after the marriage) sold a farm which had been a part of his separate property and placed the proceeds from the sale in certificates of deposit and bank accounts in joint tenancy accounts. After Lester died, the co-executors of his estate unsuccessfully attempted to have the lower court "construe the antenuptial agreement as defeating defendant's right to the jointly held property." On appeal, the co-executors argued that Edith's "acceptance of title to the joint bank accounts and certificates places her in breach of the antenuptial agreement." *Id.*

In affirming the lower court, the Court of Appeals of Iowa stated as follows:

The agreement guarantees to each spouse the right to dispose of his or her property free from any claim of or interference by the other spouse. It does not purport to prevent transfers between spouses so long as they are made voluntarily. **Decedent had the right to make any transfer of his property which he desired.** By transferring monies into joint tenancy with his wife, he exercised this right consistently with

the provisions of the antenuptial agreement. It may not be entirely logical for a man to enter into a contract to keep his property separate from his wife's and then transfer it into joint tenancy with her, but that does not constitute a legal basis on which this court could void a transfer freely made.

*Id.* at 543. (Emphasis added)

The Iowa court further noted that Edith was "no more obligated by the [antenuptial] agreement to renounce her interest in these certificates than she would be to return to the plaintiff birthday and Christmas presents given her by the decedent which were purchased with his separate funds." *Id.*

Thus, the family court judge's decision rests on a firm bedrock of well-reasoned legal analysis, supported by substantial evidence. The family court neither abused its discretion nor was clearly erroneous in its findings of fact and conclusions of law that the residential real estate located at 2605 Larwood Drive is marital property and that the parties herein are owners of said property as joint tenants with right of survivorship in the surviving spouse.

**B. IN "FAILING TO APPLY ALL THREE STEPS IN THE EQUITABLE DISTRIBUTION ANALYSIS" PURSUANT TO *WHITING*, AS APPELLANT SUGGESTS, THE FAMILY COURT NEITHER ABUSED ITS DISCRETION NOR COMMITTED REVERSIBLE ERROR IN THAT APPELLANT'S ARGUMENT IS BASED ON A FAULTY READING OF THE FAMILY COURT'S DECISION AND IGNORES THE "CIRCUMSTANCES AND THE CONTROLLING LAW STATED," AS REFERENCED BY THE FAMILY COURT IN ITS RULING.**

In his second argument, Appellant Stuck takes the family court to task for "failing to apply the third step in the equitable distribution analysis" pursuant to

the dictates of *Whiting, supra*. A fatal error in Appellant's argument on this point is the fact that Appellant incorrectly quotes the family court's ruling, as follows:

Indeed, the Family Court apparently intended to apply this third step of the process as it conclude [sic] 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.

See , "Brief of Appellant," p. 26 (Emphasis added)

Actually, the family court stated in the second paragraph, last sentence of No. 11, Findings of Fact and Conclusions of Law and Final Order, as follows: "This court, under the circumstances and the controlling law stated, **does specifically not rule** on the equitable aspects of the transfer." (Emphasis added)

In misquoting and misapprehending the language of the order, Appellant Stuck attempts to create error where there is none.

Moreover, the family court found, as follows:

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 property, even if true, without further stated limitation have the added 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.

See, No. 11, Findings of Fact and Conclusions of Law and Final Order

Further, Appellant Stuck's argument wholly ignores the "circumstances and the controlling law stated," as referenced by the family court in its ruling. In that the family court found 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," (*id.*, No. 12), it is important to this analysis that *Black's Law Dictionary*, 6<sup>th</sup> Ed., defines "joint tenancy" as follows:

An estate in fee-simple, fee-tail, for life, for years, or at will, arising by purchase or grant to two or more persons. Joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. The primary incident of joint tenancy is survivorship, by which the entire tenancy on the decease of any joint tenant remains to the survivors, and at length to the last survivor.

Type of ownership of real or personal property by two or more persons in which each owns an undivided interest in the whole and attached to which is the right of survivorship. Single estate in property owned by two or more persons under one instrument or act. (citation omitted) An estate held by two or more persons jointly, each having an individual interest in the whole and an equal right to its enjoyment during his or her life.

Moreover, this Court recently provided in Footnote 17, *Maupin v. Sidiropolis*, 600 S.E.2d 204, 211 (W.Va. 2004), that "[a]n estate in joint tenancy is one held by two or more persons jointly, with equal rights to share in its enjoyment during their lives, and having as its distinguishing feature the right of survivorship, by virtue of which the entire estate, upon the death of a joint tenant, goes to the survivor." The Court further provided in *Maupin* footnote:

A joint tenancy is held "by the moiety or half and by the whole." The interpretation of this phrase seems to be that such tenants are seised of the entire estate for the purposes of tenure and survivorship but of only an undivided part or interest for the purpose of forfeiture or immediate alienation. (footnotes omitted)

*Id.*

Thus, Appellant Stuck's misguided attempt to find error in the family court's "failure" to apply the third step in the equitable distribution analysis is wholly without merit. The concept of joint tenancy precludes any argument that Appellant "be awarded one hundred percent of the jointly titled property," as Appellant Stuck suggests in his Brief. It is important to note that as a part of its final order, the family court ordered "that the survivorship relationship be terminated effective with this order." Based on the arguments and authorities provided herein, it would have been entirely inappropriate for the family court to have engaged in a "step three" equitable analysis of the residential property, as Appellant suggests.

**VI. CONCLUSION**

Therefore, based on the foregoing arguments and authority, Appellee Anna J. Duncan Stuck respectfully requests that this Court affirm the orders of the lower tribunals.

Respectfully Submitted,

**APPELLEE, ANNA J. DUNCAN STUCK**  
By Counsel.

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**CERTIFICATE OF SERVICE**

I, Gordon Billheimer, counsel for the Appellee, Anna J. Duncan Stuck, do hereby certify that I have served a true and exact copy of the foregoing "Brief On Behalf Of Anna J. Duncan Stuck, Appellee" on the following party, by U.S. first class mail, properly addressed and postage prepaid:

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Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

\_\_\_\_\_  
**GORDON BILLHEIMER**