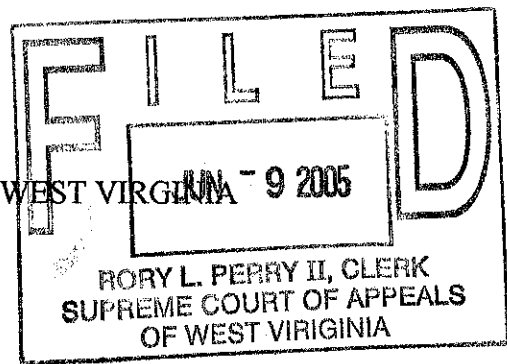


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
AT CHARLESTON



LYNDALL SARAH FERNANDEZ

Appellant,

v.

West Virginia Supreme Court Case No. 32671

FREDERICK ALLEN FERNANDEZ,

Appellee.

APPELLANT'S BRIEF

Submitted By:

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
AT CHARLESTON

LYNDALL SARAH FERNANDEZ,

Appellant,

v.

West Virginia Supreme Court Case No. 32671

FREDRICK ALLEN FERNANDEZ,

Appellee.

APPELLANT'S BRIEF

Now comes the Appellant, Lyndall Sarah Fernandez, and as and for her Brief requesting reversal of that certain Order entered by the Circuit of Fayette County, West Virginia on December 1, 2004 states as follows:

I.

PROCEEDING BELOW

The Appellant, Lyndall Sarah Fernandez, appeals the Order of the Circuit Court of Fayette County, West Virginia, entered on December 1, 2004, which upheld the October 20, 2004 Order of the Family Court of Fayette County, West Virginia, which denied Appellant's Motion to Set Aside Final Divorce Decree previously entered by the Family Court of Fayette County, West Virginia on October 6, 2003. For the reasons set forth below, the Appellant, Lyndall Sarah Fernandez, prays that the Orders of the Circuit Court of Fayette County, West Virginia, dated December 1, 2004, and the

Order of the Family Court of Fayette County, West Virginia, dated October 20, 2004 be reversed.

II.

STATEMENT OF THE FACTS

The parties to this proceeding were divorced following a very brief proceeding which occurred before the Family Court of Fayette County, West Virginia on October 6, 2003.

On that date, the Appellant, Lyndall Sarah Fernandez, accompanied by her former husband, Fredrick Allen Fernandez, traveled to Mr. Fernandez's attorney's office in Fayetteville, Fayette County, West Virginia for the apparent purpose of seeking legal advice regarding a divorce proceeding. At this time, the parties had been married for approximately fourteen (14) years and eleven (11) months and had one one (1) minor child born from their marriage. The Appellant, Lyndall Sarah Fernandez, was employed as a caregiver with a gross monthly income of Six Hundred Fifty Dollars (\$650.00) per month. The Appellee, Fredrick Allen Fernandez, was employed as an underground mine supervisor with a gross monthly income of Seven Thousand Dollars (\$7,000.00) per month, according to the Child Support Formula prepared by the Family Court at the final hearing in this action.<sup>1</sup> Mrs. Fernandez also operated under a reading disability which inhibited her ability to both read and comprehend written materials. Mrs. Fernandez's husband, the Appellee herein, was aware of the fact that his wife had a seventh grade reading comprehension level at the time of

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<sup>1</sup>There is no explanation in the record of this proceeding as to the discrepancy between Mr. Fernandez's gross monthly income as noted on the Joint Financial Statement filed by the respective parties with the Court and that contained in the Child Support Formula. Mr. Fernandez had noted on the Joint Financial Statement that he had gross monthly earnings of Four Thousand Five Hundred Dollars (\$4,500.00) per month, as opposed to the Child Support Formula, which indicates that Mr. Fernandez had gross monthly earnings of Seven Thousand Dollars (\$7,000.00) per month.

the scheduled October 6, 2003 attorney visit.

After spending an unknown period of time in Mr. Fernandez's attorney's office on October 6, 2003, Mrs. Fernandez was personally served with a copy of a Petition for Divorce, with accompanying Summons, which had been filed in the Fayette County Circuit Clerk's office at 1:49 p.m., on October 6, 2003. The Summons issued by the Fayette County Circuit Clerk's office advised Mrs. Fernandez that she had a period of twenty (20) days from receipt of service to file an Answer to her husband's Divorce Petition with the Fayette County Circuit Clerk's Office. At that time, Mrs. Fernandez had not had the opportunity to obtain independent legal advice regarding the divorce proceeding between the respective parties herein. Ten (10) minutes later, at 1:59 p.m. on October 6, 2003, the Appellant, Lyndall Sarah Fernandez, filed a pro se Answer to her husband's Petition for Divorce in the Fayette County Circuit Clerk's office. At or about that time, there was apparently some further discussions between the Appellee, Fredrick Allen Fernandez, accompanied by his counsel, and Mrs. Fernandez, regarding property settlement negotiations. At that time, there was a list of pre-prepared issues which Appellee's counsel subsequently discussed with Mrs. Fernandez regarding property settlement; following this meeting between Appellee, his counsel, and Mrs. Fernandez, a property settlement agreement was prepared by Appellee's counsel's office staff reflecting the purported agreement between the respective parties, which both parties also subsequently signed before Appellee's counsel's secretary.<sup>2</sup> During the process of preparing the Property Settlement Agreement, Appellee's counsel's secretary also assisted the respective parties

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<sup>2</sup>Mrs. Fernandez has indicated on the record of this proceeding that Appellee's counsel's secretary did not identify herself as a notary public at the time that the purported agreement between the parties was signed. Mrs. Fernandez also contests that all issues contained on the list submitted by Appellee's counsel were discussed during the course of the October 6, 2003 meeting.

in preparing a Joint Financial Statement and Joint Parenting Plan for filing with the Family Court of Fayette County, West Virginia. The purported Property Settlement Agreement, Joint Financial Statement and Joint Parenting Plan were subsequently filed in the Fayette County Circuit Clerk's office at 3:01 p.m. on October 6, 2003. Later that same day on October 6, 2003, at 3:21 p.m., Appellee's counsel proceeded to file the Return of Service with the Fayette County Circuit Clerk's office indicating that the Appellant, Lyndall Sarah Fernandez, had chosen to accept service of Appellee's Petition for Divorce.<sup>3</sup> At that same time, at 3:21 p.m. on October 6, 2003, Appellee's counsel also filed a Consent to Final Hearing Before Expiration of Time to Answer which had been signed by both of the respective parties herein, consenting to allow the Family Court of Fayette County, West Virginia to conduct a final hearing in the parties divorce proceeding prior to the expiration of the twenty (20) day time period provided in Rule 4 of the *West Virginia Rules of Civil Procedure* for Mrs. Fernandez to file a responsive pleading to Mr. Fernandez's Petition for Divorce.

Then again, earlier in the day on October 6, 2003, beginning at 2:45 p.m., according to records obtained by Appellant's counsel from the Fayette County Family Court, and prior to the time that many of the aforementioned documents had been filed by Appellee's counsel with the Fayette County Circuit Clerk's office, the Appellee and his counsel proceeded before the Family Court Judge in Fayette County with the intent of finalizing the divorce proceedings between the parties herein. The Appellant, Lyndall Sarah Fernandez, received no formal notice of the purported final hearing in the parties' divorce proceeding; this is in spite of the fact that Mrs. Fernandez did not

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<sup>3</sup>No explanation has been provided by Appellee's counsel as to why the Acceptance of Service signed by the Appellant, Lyndall Sarah Fernandez, was filed subsequent to the filing of Appellant's Answer to the Petition for Divorce, the purported Property Settlement Agreement, Joint Financial Statement and Joint Parenting Plan.

waive her right to receive formal written notice of the final hearing in her Answer to Appellee's Petition for Divorce. Appellee's counsel, while proceeding to the final hearing with Appellee, advised the Appellant, Lyndall Sarah Fernandez, that there was no need for her attend the impromptu hearing and that she should wait in her husband's automobile in the parking lot of the Family Court Judge's office in Fayetteville, West Virginia.<sup>4</sup>

When the spoils of the parties' approximately fifteen (15) year marriage had been equitably divided by the Family Court, pursuant to the October 6, 2003 Property Settlement Agreement purportedly reached between the parties, the Appellee, Fredrick Allen Fernandez, had received the exclusive use and possession of the significant portion of the parties' marital assets, which included the parties' marital home and the exclusive possession of his 401K Plan through his employment, a portion of which had been accumulated during the parties' marriage. The Appellee further obtained a waiver, pursuant to the parties' Separation Agreement, of the Appellant's claim for any form of alimony, in spite of the vast disparity in income of the respective parties and the parties' approximately fifteen (15) year marriage. The Appellant, Lyndall Sarah Fernandez, received the sole and exclusive use and possession of her 1993 Crown Victoria automobile and a certain outbuilding belonging to Appellant situate at the former marital residence, in addition to her personal belongings. The Appellee received a total of One Hundred Twelve Thousand Dollars (\$112,000.00) in marital assets, according to their designated value taken from the parties' Joint Financial Statement prepared on October 6, 2003, and the Appellant, Lyndall Sarah Fernandez,

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<sup>4</sup>The Appellee, nor his counsel, advised the Family Court Judge of the Appellant being present in the Court's parking lot at the time of convening the final hearing in this matter, nor did the Family Court Judge ask of the Appellant's whereabouts prior to proceeding to final hearing on this action.

received an automobile with a value of Two Thousand Two Hundred Dollars (\$2,200.00), according to the parties' Joint Financial Statement, with a lien on the vehicle of the same value.<sup>5</sup>

The Appellant, Lyndall Sarah Fernandez, upon receiving a copy of the Final Divorce Decree from the Fayette County Circuit Clerk's office, but due to her reading comprehension level, did not understand her rights of appeal as set forth in the Family Court Judge's office's notice and, therefore, did not appeal any provisions of the October 6, 2003 Final Order to the Circuit Court of Fayette County, West Virginia. Later, upon consultation with an attorney, Mrs. Fernandez was advised that, incidental to signing the Property Settlement Agreement prepared by Appellee's counsel on October 6, 2003, that she had waived her interest in all of her husband's pension plans, had waived any interest which she had formerly held in the former marital residence, and had forever waived her right to receive spousal support from the Appellee.

On April 5, 2004, the Appellant, Lyndall Sarah Fernandez, by her present counsel, filed a Motion to Set Aside the October 6, 2003 Final Divorce Decree pursuant to Rule 60(b) of the *West Virginia Rules of Civil Procedure*.<sup>6</sup> Aside from alleging fairly unscrupulous conduct on the part of Appellee's counsel during the process of finalizing the parties' divorce action, Mrs. Fernandez alleged allegations in her Rule 60(b) motion that she did not fully understand the provisions of the

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<sup>5</sup>There is nothing in the Joint Financial Statement submitted by the parties to the Court which indicates the actual value of the outbuilding received by the Appellant, Lyndall Sarah Fernandez, incidental to the parties Property Settlement Agreement, dated October 6, 2003. There is also no supporting financial documentation with the Joint Financial Statement verifying the values to certain property items designated on the Statement or the liens purportedly attached thereto.

<sup>6</sup>The Appellant, Lyndall Sarah Fernandez, filed her motion to set aside the October 6, 2003 Final Divorce Decree within one (1) year from the date of entry of said Order as required under the provisions of Rule 60(b) of the *West Virginia Rules of Civil Procedure*.

Property Settlement Agreement prepared by Appellee's counsel, that she did not have sufficient opportunity to obtain independent legal advice regarding the Property Settlement Agreement prior to signing the same, that she had failed to receive formal written notice of the final hearing scheduled before the Family Court in this action and that the Family Court was without sufficient authority or jurisdiction, in view of Mrs. Fernandez's lack of attendance at the final hearing, to enter the Final Order in the parties' divorce proceeding or to ratify the provisions of the Property Settlement Agreement previously signed by the respective parties earlier that day.

A hearing was subsequently conducted before the Family Court of Fayette County, West Virginia on the Appellant's Motion to Set Aside Final Divorce Decree on July 2, 2004 at which time the Family Court denied Appellant's motion. Appellant, Lyndall Sarah Fernandez, subsequently appealed the denial of her Rule 60(b) motion to the Circuit Court of Fayette County, West Virginia. By Order entered on December 1, 2004, the Circuit Court of Fayette County, West Virginia denied Mrs. Fernandez's Petition for Appeal. The Appellant, Lyndall Sarah Fernandez, now appeals to this Honorable Court from the December 1, 2004 Order of the Circuit Court of Fayette County, West Virginia.

### III.

#### ISSUES PRESENTED

- I. WHETHER THE FAMILY COURT JUDGE ERRED IN DENYING PETITIONER'S MOTION TO SET ASIDE THE OCTOBER 6, 2003 FINAL DIVORCE DECREE?
- II. WHETHER THE FAMILY COURT JUDGE ERRED IN PROCEEDING TO FINAL HEARING IN THIS ACTION, AND IN RATIFYING THE PROPERTY SETTLEMENT AGREEMENT IN ISSUE HEREIN WHEN THE PETITIONER HAD NOT BEEN SERVED WITH NOTICE OF THE FINAL HEARING, AND WAS NOT PRESENT AT THE FINAL HEARING, AND WHEN THE PROPERTY

SETTLEMENT AGREEMENT SIGNED BY THE RESPECTIVE PARTIES  
APPEARED ON ITS FACE TO BE INEQUITABLE TO THE PETITIONER  
AFTER A FIFTEEN YEAR MARRIAGE TO THE RESPONDENT HEREIN?

IV.

ARGUMENT

- A. THE FAMILY COURT OF FAYETTE COUNTY, WEST VIRGINIA ERRED IN REFUSING TO SET ASIDE THE OCTOBER 6, 2003 FINAL DIVORCE DECREE. THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA FURTHER ERRED IN UPHOLDING THE FAMILY COURT'S DECISION DENYING THE PETITIONER'S MOTION TO SET ASIDE FINAL DIVORCE DECREE PURSUANT TO RULE 60(b) OF THE *WEST VIRGINIA RULES OF CIVIL PROCEDURE*.

Rule 60(b) of the *West Virginia Rules of Civil Procedure* provides that:

"On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule shall not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, petitions for rehearing, bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

In analyzing the applicability of Rule 60(b) of the *West Virginia Rules of Civil Procedure*, this Court has recognized on a number of different occasions that the rule should be given a liberal construction. See, e.g. *Kelly v. Belcher*, 155 W.Va. 757, 773, 187 S.E.2d. 617, 626 (1972); *Graley v. Graley*, 174 W.Va. 396, 327 S.E.2d 158, 160 (1985). If there is any doubt as to whether relief should be granted, such doubt should be resolved in favor of setting aside the judgment or order so that the case can be heard on the merits. See *McDaniel v. Romcno*, 155 W.Va. 875, 878, 190 S.E.2d 8, 11 (1972).

This Court has also previously recognized that only the West Virginia Supreme Court of Appeals has the power to promulgate rules for the conduct of all judicial cases and proceedings. To that end, this Court has adopted the *West Virginia Rules of Civil Procedure* to be followed by trial courts of record in this state. These rules apply to actions for divorce and are to be construed so as to do substantial justice. *Bego v. Bego*, 177 W.Va. 74, 350 S.E.2d 701 (1986). In *Bego*, this Court also expressly recognized the applicability of Rule 60(b) of the *West Virginia Rules of Civil Procedure* to an action seeking to set aside a final divorce decree.

In the instant case, the October 6, 2003 Final Divorce Decree should be set aside pursuant to Rule 60(b) of the *West Virginia Rules of Civil Procedure* on several different grounds. First of all, the Order should have been set aside under Rule 60(b) because the Appellant, Lyndall Sarah Fernandez, received no formal notice of the spontaneously scheduled final hearing; this is in spite of the fact that the Appellant, Lyndall Sarah Fernandez, did not waive her right to receive notice of hearing in her pro se Answer to Appellee's Petition for Divorce, which had been filed earlier in the day at the Fayette County Circuit Clerk's office.

This Court has previously recognized the application of Rule 60(b) of the *West Virginia*

*Rules of Civil Procedure* to cases involving failure to properly notice a party to trial or other hearing. See *Cordell v. Jarrett*, 171 W.Va. 596, 301 S.E.2d 227 (1982); *Midkiff v. Keeney*, 180 W.Va. 55, 375 S.E.2d 419 (1988); *Blankenship ex rel. Blankenship v. Bowen's Roof Bolts Sales and Service, Inc.*, 184 W.Va. 587, 402 S.E.2d 256 (1991). In all of the foregoing cases, this Court reversed decisions of the circuit courts, which had denied the respective appellants' Rule 60(b) motions, for failure to receive proper notice of hearing from the opposing party or the court. This Court ultimately held that the decisions of the circuit courts denying the Rule 60(b) motions constituted an abuse of discretion. The same standard should be applied in the instant case, where the Appellant, Lyndall Sarah Fernandez, did not receive formal notice of the spontaneously scheduled October 6, 2003 final hearing before the Family Court of Fayette County, West Virginia. This is also in spite of the fact that Appellant had been physically present at Appellee's counsel's office for an unknown period of time earlier in the day.

Further compounding the problem with Appellant's failure to receive formal notice of the October 6, 2003 final hearing is that Appellee's counsel had apparently advised Appellant shortly before the scheduled hearing that there was no need for her attend the proceedings which had been scheduled just moments earlier with the Court.<sup>7</sup> These facts are largely undisputed in the record of this proceeding. Such conduct on the part of Appellee's counsel calls into question the motivations of counsel in rendering such advice to the Appellant, particularly when the parties had reached a purported property settlement agreement and were proceeding to the Family Court to ask that the

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<sup>7</sup>While Appellee's counsel asserts that he verbally advised Appellant of the October 6, 2003 final hearing, there is nothing in the record of this proceeding indicating what Appellee's counsel may have advised Appellant regarding the hearing, or that Appellant understood the nature and purpose of the hearing

purported agreement be ratified by the Court. Based upon the representations of Appellee's counsel, the Appellant, Lyndall Sarah Fernandez, proceeded to wait in the Appellee's automobile, which was parked in the parking lot at the Family Court's offices.<sup>8</sup>

This Court has also previously recognized the application of Rule 60(b) of the *West Virginia Rules of Civil Procedure* to situations involving a party's inability to retain counsel and unconscionable conduct on the part of an opposing party. See generally *Graley v. Graley*, 174 W.Va. 396, 327 S.E.2d 158 (1985). In the context of domestic relations matters, this Court has also seen fit to apply the liberal interpretation provided to Rule 60(b) of the *West Virginia Rules of Civil Procedure* to situations where the moving party failed to timely appeal the underlying Order from which relief is sought. See *State of West Virginia ex rel. Bess v. Berger*, 203 W.Va. 662, 510 S.E.2d 496 (1998).

Under the facts and circumstances of the instant case, adequate grounds also exist to set aside the October 6, 2003 Final Divorce Decree due to Appellant's inability to obtain independent counsel prior to signing the purported property settlement agreement, as well as the conduct of the Appellee and his counsel, both during the process of negotiating the purported property settlement agreement and in dissuading the Appellant from attending the scheduled final hearing. Of particular concern to Appellant and her counsel in the instant appeal is that Appellant has testified that she did not understand the contents of any of the divorce paperwork which she signed at Appellee's counsel's office on October 6, 2003. This is because at the time of the meeting between Appellant,

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<sup>8</sup>Even though Appellee and his counsel were aware of Appellant's presence in the parking lot at the Family Court offices on October 6, 2003, there is nothing in the record from the October 6, 2003 final hearing which indicates that either the Appellee or his counsel advised the Court of the Appellant's presence in the parking lot, nor did the Court inquire as to the Appellant's whereabouts prior to the time of convening the final hearing in this matter.

Appellee and Appellee's counsel on October 6, 2003, the Appellant had only a seventh grade reading level which inhibited Appellant's ability to either read or comprehend the legal documents which were subsequently typed by Appellee's counsel's office staff and placed before the Appellant for her signature. Appellant has testified that not only did she have extreme difficulty in reading or comprehending the legal papers prepared incidental to the divorce proceeding, but also that no one at Appellee's counsel's office undertook to read the documents to Appellant prior to procuring her signature on the same.

Another concern of Appellant and her counsel in the instant appeal involves the manner in which the purported property settlement agreement was negotiated by the Appellee, his counsel and the Appellant, Lyndall Sarah Fernandez. The Appellee, Fredrick Allen Fernandez, has admitted that he was aware of the Appellant's reading difficulties at the time of the October 6, 2003 attorney consultation. Unfortunately, however, such circumstances did not deter the Appellee or his counsel from undertaking to attempt negotiations with the Appellant prior to affording Appellant the opportunity to consult with counsel of her own choosing. A brief meeting was then held between Appellee, his counsel and Appellant to discuss the terms of the proposed property settlement agreement.<sup>9</sup> While Appellee's counsel has denied that he undertook to serve in a advisory capacity to the Appellant, Appellee's counsel has not denied that he undertook to discuss the provisions of the purported property settlement agreement with Appellant in the apparent effort to obtain

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<sup>9</sup>Appellee's counsel has submitted a list of ten property issues which were allegedly discussed by Appellee's counsel with Appellant on October 6, 2003. Appellant denies that all items on the list supplied by Appellee's counsel were actually discussed during the course of the meeting. Appellee's counsel has proffered that the list in question was prepared at the direction of the Appellee herein, who provided the sole input into preparation of the property settlement agreement at issue herein.

Appellant's agreement on the Appellee's list of issues. Under such circumstances, it is difficult to comprehend how Appellant, then pro se, could have reached a reasoned and informed agreement with Appellee regarding property settlement, particularly, as Appellee's counsel has openly admitted, when the Appellant had no actual input into the preparation of the agreement itself, and in view of the Appellant's readily apparent educational deficiencies.

When Appellant, Lyndall Sarah Fernandez, was able to afford to obtain legal advice regarding the October 6, 2003 Final Divorce Decree, and after being advised of her rights under the law, Appellant promptly filed to have the October 6, 2003 Final Divorce Decree set aside under Rule 60(b) of the *West Virginia Rules of Civil Procedure*.

In concluding that a Rule 60(b) motion is inapplicable to the facts and circumstances of this case, the Family Court of Fayette County, West Virginia clearly erred. The Family Court's ruling is inconsistent with the prior precedent of this Court regarding the requirement of notice of hearing, and adopts an extremely unfair result for the Appellant herein. In essence, the Family Court's decision to refuse to set aside the October 6, 2003 Final Divorce Decree seeks to open the door for cutthroat domestic lawyers to proceed to take advantage of relatively uneducated, pro se litigants in West Virginia, and then to proceed to finalize their cases on ill informed decisions without notice of hearing. Surely circumstances of this nature will not be condoned by this Honorable Court.

Therefore, the December 1, 2004 Order of the Circuit Court of Fayette County, West Virginia, which affirmed the Family Court's October 20, 2004 Order denying Petitioner's Motion to Set Aside Final Divorce Decree, should be reversed.

**B. THE FAMILY COURT JUDGE ERRED IN PROCEEDING TO FINAL HEARING ON THIS ACTION ABSENT NOTICE TO PETITIONER HEREIN AND IN RATIFYING THE PROPERTY SETTLEMENT AGREEMENT.**

Pursuant to the provisions of *West Virginia Code* Chapter 51, Article 2A, Section 14(b) and *West Virginia Code* Chapter 51, Article 2A, Section 15, this Court reviews findings of fact made by the Family Court Judge under a clearly erroneous standard and must review the application of law to the facts under an abuse of discretion standard. The Appellant, Lyndall Sarah Fernandez, submits unto this Honorable Court that the standard for reversal set forth in *West Virginia Code* 51-2A-14(b) and *West Virginia Code* 51-2A-15, respectively, are present under the facts and circumstances of the instant case in that the Family Court of Fayette County, West Virginia proceeded to final hearing in this action without proper notice of hearing to the Appellant herein and proceeded to ratify a purported property settlement agreement between the respective parties which provides for an extremely inequitable and unjust result to the Appellant, Lyndall Sarah Fernandez.

The time frame for conducting final hearings in divorce proceedings is controlled by the provisions of Rule 21 of the *Rules of Practice and Procedure for Family Court*, which provides as follows:

**“Rule 21. Final Hearings**

(a) Conversion of hearing to final hearing. - By agreement of all parties placed on the record, any hearing may be converted to a final hearing if sufficient evidence is presented to sustain the cause of action and resolve all issues.

(b) Restriction on time for final hearing. - Except for good cause shown and placed on the record, a final hearing shall not be conducted prior to expiration of the time in which the respondent is required to serve an answer.”

The immediate problem presented in the instant proceeding is that Appellee and his counsel failed to properly notify Appellant of the scheduled final hearing, in spite of the fact that Appellant did not waive her right to receive notice of the final hearing in her pro se Answer to the Appellee's Petition for Divorce. While the Family Court should have been aware of this circumstance in advance of convening the final hearing, the Family Court chose to disregard the lack of notice in this proceeding and proceeded to conduct the hearing without the Appellant being present. In doing so, there is nothing in the record from the October 6, 2003 final hearing indicating that the Family Court inquired of the Appellant's whereabouts in advance of convening the hearing, or that the Family Court had been advised by Appellee or his counsel of Appellant's presence in the parking lot prior to the time that the hearing was convened. In this regard, the Family Court clearly abused its discretion.

There is also nothing in the record from the October 6, 2003 final hearing before the Family Court of Fayette County, West Virginia which indicates that the requirements of Rule 21 of the *Rules of Practice and Procedure for Family Court* were adhered to prior to the time that the hearing was convened. For example, there is nothing in the record from the October 6, 2003 final hearing indicating good cause as to why the hearing had to be held in the span of only a few hours from the time that Appellee's Petition for Divorce had been filed. In this regard, one must certainly question the sense of urgency experienced by the Appellee and his counsel in their attempts to finalize this matter with the Court in the Appellant's absence. While Appellant apparently signed a Consent to Final Hearing Before Expiration of Time to Answer at Appellee's counsel's office shortly before the scheduled hearing, the Appellant did not waive her right to receive notice of hearing incidental to signing this document, nor is the record perfectly clear on whether Appellee's counsel explained

the consent form to Appellant prior to her signing the same or that Appellant properly understood what she was signing.

The ultimate result from the October 6, 2003 unnoticed final hearing was the ratification of a purported property settlement agreement signed by the parties herein which appears wholly inequitable on its face. The property settlement agreement was ratified by the Family Court without Appellant appearing to testify in this proceeding. As a result, the Family Court was denied the opportunity to question the Appellant, Lyndall Sarah Fernandez, regarding the terms of the property settlement agreement which she had signed at Appellee's counsel's office just hours earlier, and to elicit the required testimony from the Appellant that she fully understood the terms of the agreement, that the agreement represented the full and complete agreement between Appellant and Appellee, that Appellant had been provided with the opportunity to obtain independent legal advice regarding the legal ramifications of the agreement, that Appellant had obtained an adequate financial disclosure from Appellee prior to entering into the agreement and that the Appellant entered into the purported agreement freely and voluntarily and of her own free will, and that the agreement was not the result of fraud, duress or coercion being applied to Appellant to otherwise enter into said agreement.

*West Virginia Code* Chapter 48, Article 7, Section 102, provides that:

“In cases where the parties to an action commenced under the provisions of this chapter have executed a separation agreement, then the court shall divide the marital property in accordance with the terms of the agreement, unless the court finds:

- (1) That the agreement was obtained by fraud, duress or other unconscionable conduct by one of the parties; or
- (2) That the parties, in the separation agreement, have not expressed themselves in terms which, if incorporated into the judicial order, would be enforceable by a court in future proceedings; or
- (3) That the agreement, viewed in the context of the actual contributions of the respective parties to the net value of the marital property of the parties, is so inequitable as to defeat the purposes of this section, and such agreement was inequitable at the time the same was executed.”

This Court has previously addressed the requirements for ratification of property settlement agreements in *Preece v. Preece*, 195 W.Va. 460, 465 S.E.2d 917 (1995), which is a case eerily similar to the instant action. In *Preece*, a wife sought to challenge a final divorce decree ratifying a purported separation agreement on grounds of procedural irregularities, and by challenging the lower court’s authority to ratify the purported separation agreement when wife did not attend the final hearing due to lack of formal notice. Much like the instant action, the husband contended that he was not required to send the wife formal notice of the hearing as wife had actual notice of the date and time of the final hearing. This Court ultimately reversed the lower court’s order ratifying the property agreement by finding that the lower court had failed to conduct sufficient inquiry regarding the separation agreement prior to ratifying the same, particularly when the wife was not present at the final hearing to provide testimony regarding the agreement. In doing so, this Court stated as follows:

“Pursuant to *West Virginia Code* § 48-2-16(a), a lower court shall conform its order to the separation agreement of the parties ‘if the court finds the agreement is fair and reasonable, and not obtained by fraud, duress or other unconscionable conduct by one of the parties . . .’ and also finds that the parties have expressed themselves in terms which would be enforceable by a court in future proceedings. In *Gangopadhyay v. Gangopadhyay*, 184 W.Va. 695, 403 S.E.2d 712 (1991), we addressed the court’s obligation to determine the fairness of an oral property settlement agreement. While our discussion in *Gangopadhyay* focused on the heightened necessity of court review created by the oral nature of that agreement, we elucidated several general principles applicable to the present case. We emphasized that the court’s inquiry into the issue of whether the agreement is fair and reasonable ‘requires a disclosure of the financial background of the parties sufficient to justify the conclusion of the court or master. The foundation of that particular requirement is based in statutory law, not simply in common law arising from the oral nature of the agreement in *Gangopadhyay*. Thus, that inquiry by the court, while discussed in *Gangopadhyay* in the context of oral agreements, is necessary in all divorce cases involving a separation agreement.”

In *Buckler v. Buckler*, 195 W.Va. 705, 466 S.E.2d 556 (1995), this Court went on to hold

that:

“*West Virginia Code* § 48-2-16(a) essentially creates a formula under which court approval of a separation agreement is a condition precedent to the incorporation of that agreement into a final divorce decree. A necessary corollary to the requirement of a finding of fairness or reasonableness is an investigation sufficient to justify such a finding. Especially when interpreted in conjunction with the financial disclosure provisions of *West Virginia Code* § 48-2-33, *West Virginia Code* § 48-2-16(a) compels a lower court to investigate the financial resources or circumstances of the parties and to accumulate clear and definitive evidence regarding such financial concerns and the value of properties being apportioned.

In the instant proceeding, the Family Court abused its discretion in ratifying the purported property settlement agreement signed by the parties not only in view of Appellant's absence from the hearing, but also because the purported agreement reached between the respective parties was wholly inequitable to Appellant on the face of the agreement itself. In essence, following her fifteen (15) year marriage to the Appellee, Appellant received a 1993 automobile with a value of Two Thousand Two Hundred Dollars (\$2,200.00) and lien of equal value, an outbuilding with an undisclosed value and her personal belongings. Appellee received marital assets from the purported property settlement agreement with an aggregate value, according to the parties' Joint Financial Statement, of One Hundred Twelve Thousand Dollars (\$112,000.00) and a waiver of alimony from the Appellant. The total allotted to the Appellee under the terms of the purported agreement also does not include items of personal property listed on the Joint Financial Statement to which the parties assigned no values. In ratifying the purported agreement, the Family Court conducted no inquiry whatsoever regarding the circumstances under which the agreement was reached and made no inquiry as to the financial resources or circumstances of the parties. Under such circumstances, it is difficult to comprehend how the Family Court could sufficiently find that this purported agreement was fair and reasonable.

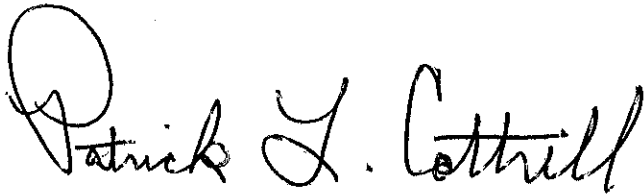
As the Family Court clearly abused its discretion in conducting a hearing and ratifying the purported property settlement under these circumstances, the October 20, 2004 Order of the Family Court of Fayette County, West Virginia and the December 1, 2004 Order of the Circuit Court of Fayette County, West Virginia, should be reversed.

V.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Appellant, Lyndall Sarah Fernandez, respectfully prays that the Court schedule this matter for oral argument before this Court, that this Court reverse the December 1, 2004 Order of the Circuit Court of Fayette County, West Virginia, that she be awarded her attorney fees and costs incurred in the prosecution of this action, and for such other, further and general relief as this Honorable Court deems just and appropriate under the circumstances of this case.

LYNDALL SARAH FERNANDEZ,  
By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
AT CHARLESTON

LYNDALL SARAH FERNANDEZ,

Appellant,

v.

West Virginia Supreme Court Case No. 32671

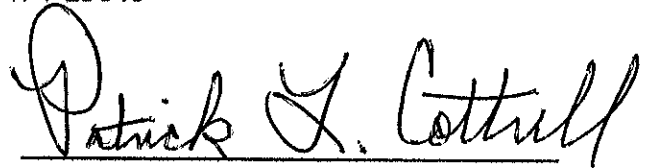
FREDRICK ALLEN FERNANDEZ,

Appellee.

CERTIFICATE OF SERVICE

I, PATRICK L. COTTRELL, counsel of record for the Appellant herein, do hereby certify that I served a copy of the foregoing APPELLANT'S BRIEF upon counsel of record in this matter by hand delivery and by placing a true and exact copy of the same in the regular course of the United States Mail, postage prepaid, unto the following named individuals at the last known addresses listed below this 9th day of June, 2005, unto:

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PATRICK L. COTTRELL