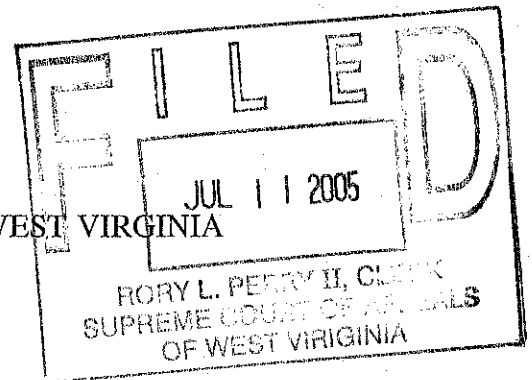


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON



LYNDALL SARAH FERNANDEZ,
Petitioner herein
Respondent below,

vs.

WV Supreme Court Case No. 050397

FREDERICK ALLEN FERNANDEZ,
Respondent herein,
Petitioner below.

APPELLEE'S BRIEF

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I.

PROCEEDING BELOW

This is an appeal of the decision of the Circuit Court of Fayette County, West Virginia, by Order entered December 1, 2004 thereby refusing the appeal of Appellant of the decision of the Family Court of Fayette County, West Virginia entered October 20, 2004 which therein denied the "Petitioner's Motion to Set Aside Final Divorce Decree" in behalf of Petitioner herein, Respondent below.

II.

STATEMENT OF THE FACTS

The concise chronology of the facts and circumstances giving rise to this matter are as follows:

1. On Friday, October 3, 2003 from 9:55 a.m. to 10:05 a.m., Respondent herein, Petitioner below, Frederick Allen Fernandez, conferred with James W. Keenan, Attorney at Law, with regard to expected divorce proceedings to be undertaken by Mr. Fernandez. This initial consultation was accomplished and Mr. Fernandez informed Mr. Keenan that he expected to return and undertake employment of Mr. Keenan in pursuit of his expected divorce.

2. On October 6, 2003, Mr. Keenan's client, Mr. Fernandez, returned to Mr. Keenan's office and Mr. Keenan was employed and Mr. Keenan from 9:00 a.m. to 9:10 a.m. conferred with Mr. Fernandez and the opposing party, Mrs. Fernandez, for the purpose of ascertaining their meeting of the minds as to agreement. During that 10 minute period Mr. Keenan undertook written notes on the agreement and the "New Matter Report" which provided basic information and contract as to the case.

3. Thereafter, commencing at 9:15 a.m. and concluding at 11:00 a.m. on that date, Mr. Keenan's legal assistant, Connie Kessler, met with the parties, prepared an entire divorce package, with the exception of the answer to be filed by Mrs. Fernandez, a joint financial statement and a joint parenting plan and waiver of waiting period for divorce. This documentation was signed by the parties and the documentation notarized and the parties were provided with a copy of the same.

4. On October 6, 2003, Mr. Fernandez accompanied by his Counsel, Mr. Keenan, appeared in the Family Court of Fayette County, West Virginia from 2:45 p.m. to 2:55 p.m. The documentation was presented to the Court, the Court reviewed the documentation, undertook Mr. Fernandez's testimony as to jurisdiction and grounds and the documentation was approved and entered by the Court.

5. The Appellant, Respondent Below, Lyndall Sarah Fernandez, did not file an appeal of the "Final Divorce Decree" which was entered by the Court on October 6, 2003. Paragraph 3 of the "Order and Judgment" portion of the Final Divorce Decree provided that the parties thereby waived any appeal of that Order as they agreed with all terms therein.

6. On or about April 5, 2004, Appellant, Respondent Below, Ms. Fernandez, filed her "Motion to Set Aside Final Divorce Decree".

7. An evidentiary hearing in relation thereto was conducted by the Family Court of Fayette County, West Virginia, on July 2, 2004 and on October 20, 2004, the Family Court of Fayette County, West Virginia, entered its "Order Denying Respondent's Motion to Set Aside Final Divorce Decree".

8. On or about November 2, 2004, Appellant, Respondent Below, Ms. Fernandez, filed her "Petition for Appeal" in the Circuit Court of Fayette County, West Virginia citing only two grounds neither of which made reference to any finding of fact or conclusion of law included in the Family Court's "Order Denying Respondent's Motion to Set Aside Final Divorce Decree", aforesaid, as being clearly erroneous as to the previous or an abuse of discretion as to the latter.

9. By its "Order", the Circuit Court of Fayette County, West Virginia, the Honorable Charles M. Vickers, Circuit Judge, presiding, refused the aforesaid Petition for Appeal with appropriate findings therein and concluding that after its review under the appropriate findings of fact under the clearly erroneous standard and review of the application of law to the findings of fact under an abuse of discretion standard, that the Family Court had held a hearing on the Rule 60(b) Motion, had considered the evidence and made findings of fact and conclusions as to said Motion. This ruling was consistent with §51-2A-14(b) of the *West Virginia Code*, as amended.

10. Appellant, Respondent Below, Ms. Fernandez, filed her "Petition for Appeal" on or about February 15, 2005.

11. Appellee, Petitioner Below, Mr. Fernandez, filed his Response to Petition for Appeal on or about March 17, 2005.

III.

ALLEGED OMISSIONS AND INACCURACIES AND ARGUMENT

Petitioner's Petition for Appeal asserts various facts which are not supported by the record and which, in some circumstances, the Court even made findings of fact contrary thereto. Those are as follows:

1. It is asserted that Mrs. Fernandez operated under a reading disability which inhibited her ability to both read and comprehend written materials. This representation was made to the trial Judge, the Honorable Janet Frye Steele, during proceedings of July 2, 2004. The Court undertook incisive inquiry as to the usual activities and employment of Mrs. Fernandez and failed to find or conclude in any way that Mrs. Fernandez operated under a reading disability.

2. It is asserted that Mrs. Fernandez had not had the opportunity to obtain independent legal advice regarding the divorce. This is absolutely refuted in the record as Mr. Fernandez testified without refuter that the parties had discussed divorce at least 2 weeks beforehand and that Mr. Fernandez had seen Mr. Keenan on Friday, October 3, 2003. Mr. Keenan further represented, without refuter, that he specifically informed Mrs. Fernandez that if she wished to obtain independent legal counsel she could do so and that he was not her counsel and was not going to advise her. This is corroborated by Mr. Fernandez's testimony. Furthermore, after meeting with Mr. Keenan and Mr. Fernandez on the morning of October 6, 2003 from 9:00 to 9:10 a.m. and then Mr. Keenan's legal assistant from 9:15 to 11:00 a.m., the parties departed Mr. Keenan's office and did not return until 2:45 p.m. which was 3 hours and 45 minutes later. During the interim, Mrs. Fernandez had every opportunity in Fayetteville, West Virginia or elsewhere to obtain legal counsel had she wished to do so. Furthermore, Ms. Fernandez testified to the effect that she had spoken with several lawyers following the entry of the Final Divorce Decree with regard to possible appeal of the October 6, 2003 Final Divorce Decree.

3. It is represented that "there was a list of prepared issues" which Appellee's Counsel subsequently discussed with Mrs. Fernandez regarding property settlement. This is refuted by the

record without competing evidence. Mr. Keenan and Mr. Fernandez represented to the Court that the notes of the agreement were taken down during the ten minute conference and the notes of the agreement were given to the legal assistant. The Appellant has, by footnote number 2, asserted that Mrs. Fernandez contests that all issues contained on the list were discussed during the meeting. Competing evidence was offered during the hearing of July 2, 2004 and the Court found that Mrs. Fernandez's representations were simply not credible and that all of the issues were discussed. Furthermore, as revealed by the record of July 2, 2004, meaning the CD thereof, Ms. Fernandez testified that in referring to Mr. Keenan's activities during the discussion of October 6, 2003, "you wrote the whole time we was in there". She further confirmed during inquiry by the sitting Judge, Judge Steele, that she recalled discussion of all of the itemized issues except alimony.

4. It is represented that Mr. Keenan told Mrs. Fernandez "that she should wait in her husband's automobile" while the divorce hearing was being conducted. The record clearly reveals without refuter that Mr. Keenan simply informed Mrs. Fernandez that she was not needed and it was not necessary for her to attend the final hearing in view of the fact that all of the documentation had been signed; Mr. Keenan, on no occasion whatsoever, informed her that she should wait in her husband's automobile in the parking lot.

5. It is represented that Mr. Fernandez received the exclusive use and possession of the significant portion of the parties' marital assets which included the parties' marital home. Appellant fails in her Petition to address the fact that at the time of the hearing of October 6, 2003, the minor child of the parties was 14 years of age; that Mrs. Fernandez would be living rent

free for approximately 46 months and that the parties had refinanced their debts with proceeds from refinancing their mortgage including the parties' automobiles and that Mr. Fernandez took all of that indebtedness by agreeing to pay the debt on the marital residence. The record further supports the finding and conclusion that the agreement of the parties was consistent with their specific desires as expressed on October 6, 2003 to Mr. Keenan.

6. The Appellant errs to refer to Mr. Keenan as having undertaken "fairly unscrupulous conduct". The record supports the finding and conclusion that Mr. Keenan did exactly what is expected of a divorce attorney which is to inform the opposing party that he was not her counsel and that if she wanted counsel, she would have to go elsewhere to get it; that he undertook the agreement as was related to him by the parties; that it was correctly included in a written agreement and in a final divorce decree and that the parties had an opportunity to review and sign the same; that Mr. Keenan acted consistent with his obligation to deal with "opposing counsel" that being Mrs. Fernandez pursuant to the applicable *Trial Court Rule 1.04(g)*, in a straightforward and matter-of-fact fashion. The record supports the conclusion that Mr. Keenan did not in any way offer advice to the opposing party and that the opposing party was given every opportunity to undertake independent counsel in accordance with her desires. Mr. Keenan was obligated to deal with the opposing party as the opposing counsel under the law and did so. The fact that the opposing party undertook the perils of self representation does not under the law inure against Mr. Fernandez, the Petitioner below. Ms. Fernandez confirmed, during the hearing of July 2, 2004, that Mr. Keenan had informed her that he was Mr. Fernandez's lawyer and this was corroborated by the unrefuted testimony of Mr. Fernandez and the representation by Mr. Keenan

as an officer of the Court.

7. The Petitioner further asserts that the Family Court was without "sufficient authority or jurisdiction" to enter the final order in the proceeding. What would the Petitioner advance as being sufficient authority or jurisdiction other than the invocation of the jurisdiction of the Court by appropriate pleadings, the presentation of an agreement as envisioned under the law, the presentation of an agreed-upon final divorce decree and other appropriate documentation. Mr. Fernandez appeared for the final hearing consistent with the parties' agreement and agreed-upon decree, offered evidence as to jurisdiction and grounds, the appropriate documentation was presented and the divorce was finalized. What other authority or jurisdiction is needed? Furthermore, the record reveals that the parties had satisfied §48-7-201 of the *West Virginia Code* by the filing of their joint disclosure of assets and liabilities and that the Court took notice of the filing of the same during its final divorce hearing of October 6, 2003 and it should be noted that inquiry was made of Mr. Fernandez as to whether the agreement was fair and equitable and undertaken by no fraud, duress, coercion or undue influence and the Court noted that the agreement which had been signed was incorporated or set forth in its entirety in the Final Divorce Decree which had been signed by the parties giving full force and effect to §48-6-201(a) of the *West Virginia Code* which provides that if the Court finds that a separation agreement is fair and reasonable, so on and so forth, and that the parties have expressed themselves in terms which, if incorporated in a judicial order, would be enforceable by a Court in a future proceeding(s), "then the Court shall conform the relief . . . to the separation agreement of the parties". Clearly, the Court was required in this case to conform the decree to the separation agreement of the parties.

8. By inquiry of Appellant's Counsel by Judge Steele during the hearing of July 2, 2004, specific grounds as the Rule 60(b) motion was sought. Of the six reasons identified in Rule 60(b), the Appellant's Counsel was able to refer only to Number Six meaning "any other reason justifying relief from the operation of the judgment". In support thereof, Appellant's Counsel asserts, apparently, that the agreement itself was unconscionable. This is not supported by the record. Appellant's Counsel asserts that there was a lack of due process. This is not supported by the record. The agreement of the parties, the pleadings, the Final Divorce Decree and the hearing were all prepared and conducted in accordance with law. The only criticism that Petitioner can level as to the entire litigation was that there was no written notice of the final hearing. However, the record supports the conclusion that the parties on October 6, 2003 were both eager to be divorced, that the parties' signed the waiver of the 20-day waiting period, that the parties knew that Mr. Keenan had requested a hearing that date consistent with their desire and request, that the Appellant, Mrs. Fernandez, had actual notice in fact of the proceeding and as a matter of fact, she specifically with that knowledge, failed to attend the proceeding choosing rather to remain in a vehicle in the parking lot at the Family Court. Appellant's argument that she had no notice of the proceeding is not supported by the record. Her own testimony belies her assertion in the Petition for Appeal. She testified that she indeed knew of the proceeding and chose to remain in the vehicle outside. Appellant asserts in various footnotes and elsewhere, that the Court did not inquire of the whereabouts of Mrs. Fernandez nor did Mr. Keenan or Mr. Fernandez inform the Court as to her whereabouts. The Court is of no obligation to do so nor is Mr. Keenan or Mr. Fernandez under obligation to do so. Appellant asserts that Mr. Keenan may have verbally

advised Mrs. Fernandez of the final hearing but that there was nothing in the record indicating what Mr. Keenan may have advised the Appellant regarding the hearing. The record does not support that conclusion at all; Mrs. Fernandez herself stated, during proceedings of July 2, 2004, that Mr. Keenan informed her that the final hearing was to be conducted and that it was not necessary for her to attend because all of the paperwork had been signed.

9. The Appellant asserts that something was, apparently, improper about the notes of Mr. Keenan as to the substantive agreement and that Mr. Fernandez provided the sole input into the preparation of the property settlement agreement. The record does not support this finding or conclusion at all. The record supports the conclusion that Mr. Keenan took notes on Mr. Fernandez's explanation of the agreement in the presence of Mrs. Fernandez. Furthermore, Mrs. Fernandez read and signed the agreement and proposed final divorce decree which explicitly and specifically sets forth the agreement. The record reveals that Mrs. Fernandez conferred with counsel in Beckley, West Virginia during the time for appeal of the Final Divorce Decree rendered on October 6, 2003. The record reveals that an appeal was not filed because Mrs. Fernandez, according to the representation of her Counsel, did not have sufficient funds. This is not a reason under the law to extend a period of appeal and all of the issues which have been asserted by Appellant in her Petition for Appeal are appellate issues. The Motion to Set Aside Final Divorce Decree is simply an oblique effort to overturn a lawful decree which has not been appealed. Mrs. Fernandez simply suffers "buyer's remorse" after the entry of the Decree. The record does not support unconscionability with regard to the substantive agreement; the record does not support unconscionability as to procedure of undertaking the agreement; the record does

not support any argument as to surprise, "bushwhack", or misconduct of an adverse party. The record supports the findings and conclusions that Mrs. Fernandez undertook litigation; that she was her own counsel in the litigation under the applicable *Trial Court Rule 1.04(g)*; that she had an opportunity to have input into the agreement, to negotiate with her husband and her husband's attorney; that she had an opportunity to undertake independent counsel and did not do so; that she had an opportunity to attend the final hearing and knowingly failed to do so; that she had an opportunity to file an appeal of the Final Divorce Decree, and that she did not do so.

Finally, the authority cited by the Appellant almost without exception refers to cases in which judgment was granted by default and the Court reversed the judgment based upon lack of notice. This is clearly not the factual circumstance of the instant case; the Appellant, Mrs. Fernandez, had notice in fact and was counsel of record and simply failed to attend the final hearing of October 6, 2003. All of this is borne out by the record of July 2, 2004.

The leading case that the Appellant cites in her behalf is the matter of Preece vs. Preece, 195 W.Va. 460 (1995).

The Appellant misstates the precedential value of that case. That case involves one in which the Court could not conclude that the trial court had engaged in sufficient inquiry as required by the law to determine whether the instant separation agreement was fair *and to assure that the financial disclosure requirements of the law were observed*. See Preece at 195 W.Va. At Page 466. In this case the trial court took notice that the parties had indeed filed a joint disclosure.

The Appellant once again has failed to identify any finding of fact of the Family Court of Fayette County, West Virginia, which is clearly erroneous and has failed to identify any

conclusion of law or application of law to the facts as being an abuse of discretion and has failed, importantly, to demonstrate any fashion by which the Circuit Court of Fayette County, West Virginia, improperly ruled pursuant to the applicable standards of review when it denied the Appellant's appeal by its Order of December 1, 2004.

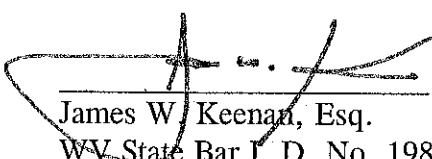
With a final reiteration, Appellant's Counsel will close by pointing out that as part of the Final Divorce Decree initially entered in relation to this matter, the parties in writing, waived any appeal of that Order as they agreed with all terms therein.

IV.

SUMMARY AND CONCLUSION

For the foregoing reasons, Appellee requests that Appellant's appeal be denied and that the Orders of the Circuit Court and Family Court of Fayette County, West Virginia referred to hereinbefore be confirmed and given full force and effect.

Respectfully submitted,



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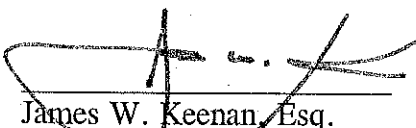
FREDERICK ALLEN FERNANDEZ,
Respondent herein,
Petitioner below.

CERTIFICATE OF SERVICE

I, James W. Keenan, do hereby certify that I have served a true copy of the foregoing
"Appellee's Brief" by facsimile and/or United States first class mail this 11th day of July, 2005,
to Counsel and the Court as follows:

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