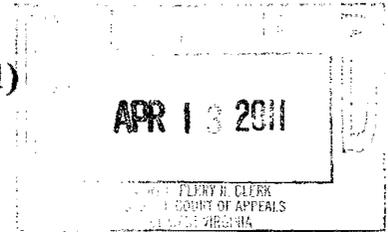


**IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA**

**DOCKET NO.: 11-0073 (09-D-1501)**



IN RE: THE MARRIAGE OF:

MARGARET P. ZICKEFOOSE,

RESPONDENT BELOW,  
PETITIONER,

vs.

JOSEPH L. ZICKEFOOSE,

PETITIONER BELOW,  
RESPONDENT.

**PETITIONER'S BRIEF**

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Uldrick v. Uldrick, 196 W. Va. 663 474 S. E. 2d 593 (1996)  
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## ASSIGNMENTS OF ERROR

1. Whether the Circuit Court erred in reducing alimony to \$500.00 a month for eighteen (18) months.
2. Whether the Circuit Court erred in stating the Family Court Judge had not considered the totality of the circumstances where the Family Court Judge addressed each of the factors in West Virginia Code §48-6-301(b).
3. Whether the Circuit Court erred in finding that the Family Court Judge should have considered the underpinning of the particular disabilities of the parties.
4. Whether the Circuit Court erred in finding the decision of the Family Court was arbitrary and capricious where the Family Court Order addressed each of the factors in West Virginia Code §48-6-301(b), and where the income of the Respondent (Petitioner below) was \$1,062.28 over and above his living expenses and the respondent below, Petitioner (Respondent below) had living expenses that were \$1,104.00 more than her disability income.
5. Whether the Circuit Court erred in finding the Family Court's decision was arbitrary and capricious because it is against public policy to disregard the totality of the circumstances underpinning the particular disability awards in this case.

## STATEMENT OF THE CASE

The parties were married on May 1, 2004, in Kanawha County, West Virginia. Supplemental Appendix at 17, 48, and 138. At the time of the marriage the former husband worked at minimum wage jobs for the first part of the marriage. Supplemental Appendix at 55 and 75. The former husband applied for and received his veteran's disability benefits during the marriage. The parties resided in a house belonging to the former wife, which was not asserted to be marital property. Supplemental Appendix at 101.

After obtaining his veteran's disability benefits, the former husband moved out. The former husband asserted the separation occurred in April, 2008. Supplemental Appendix at 47. The former wife testified that they had attempted to reconcile and they last had sexual relations on May 22, 2009. Supplemental Appendix at 95. The former husband denied this. Supplemental Appendix at 80.

During the marriage the former wife worked as a teacher making about \$1,900.00 per month. Supplemental Appendix at 27 and 140. During the marriage the former husband brought an involuntary commitment proceeding, and had the former wife committed to Mildred Mitchell Bateman Hospital in April, 2008. Supplemental Appendix at 52.

After the former wife no longer worked, the former husband gave her some money from time to time until May, 2009, and she was no longer working as a teacher making \$1,900.00 after he received his veteran's disability benefits. Supplemental Appendix at 57.

The former wife applied for Social Security Benefits. In 2009, she was granted Social Security Disability Benefits beginning effective December 1, 2007, based upon her having fibromyalgia, severe depression, anxiety and bipolar disorder. Supplemental Appendix at 250 to 254. The decision also mentions she suffers from agoraphobia. The former wife draws \$780.00 in Social Security Disability Benefits. Supplemental Appendix at 22 and 100.

The former husband filed his petition for divorce on July 13, 2009. Supplemental Appendix at 4. The former wife duly filed an Answer which admitted irreconcilable differences. Supplemental Appendix at 51 The parties reached an oral agreement on all property issues Supplemental Appendix at 139. The oral property settlement agreement divided the motor vehicles and items of personal property of the parties.

The issue of spousal support was litigated. The parties presented testimony before the Family Court on January 28<sup>th</sup>, 2010. Supplemental Appendix at 41. The former husband

claimed that the former wife had engaged in drinking alcoholic beverages and testified that this contributed to the disintegration of the marriage. Supplemental Appendix at 49. The former wife testified that the former husband drank excessively, and also engaged in behavior which disrupted the marriage by going out drinking and returning to the home in a drunken state. Supplemental Appendix at 99.

At the time of the divorce, the former wife was 48 years of age and the former husband was 63 years of age. Supplemental Appendix at 139. No children were born of the marriage. There was no evidence that either of the parties had contributed to the education or training of the other party where the former was a licensed teacher at the time of the marriage and the former husband worked at minimum wage jobs and then sought his veteran's disability benefits. The parties did not contest the marital domicile was the wife's house, and was separate property.

At the time of the divorce hearing, the former wife's income was \$780.00 per month from Social Security Benefits. Supplemental Appendix at 22. The former wife asserted her reasonable and necessary living expenses were \$1,884.00 per month. Supplemental Appendix at 27 and 99. The former husband did not present evidence to seriously contest the \$1,884.00 in living expenses claimed by the former wife were reasonable and necessary.

At the time of the divorce the former husband's income was \$4,366.66 per month, of which \$1,451.00 is from social security benefits, \$2,823.00 is from Veteran's benefits, and \$92.66 is from a retirement fund. Supplemental Appendix at 9. The former husband claimed reasonable and necessary living expenses of \$3,304.38. Of that \$3,304.38, the husband claimed \$600.00 was for recreation and \$597.30 was for gasoline expenses and \$160.00 for miscellaneous expenses. Supplemental Appendix at 61. On cross examination the former husband testified the gasoline expense was incurred visiting friends in Kanawha Valley and

the miscellaneous expense was for newspapers and lottery tickets. Supplemental Appendix at 79 and 80.

The Family Court entered a Final Divorce Order on June 3<sup>rd</sup>, 2010. Supplemental Appendix at 138. The Family Court granted the former wife \$1,000.00 per month in permanent alimony. Supplemental Appendix at 144. The Family Court found the effect of drinking to have minimal effect on the disintegration of the marriage and the parties were equal in fault. Supplemental Appendix at 142.

The Family Court in its order of Final Divorce did not definitively resolve whether the date of separation was April, 2008, as claimed by the former husband, or was on May 22, 2009, as claimed by the former wife. Rather, the Family Court found the marriage was of short duration.

In the Final Divorce Order, the Family Court listed each of the factors contained in West Virginia Code §48-6-301(b) which are to be considered in awarding spousal support or alimony. The Family Court then stated the Court's reasoning in applying each of those factors to the facts of this case. The Family Court found as follows:

“Where the parties have been formally married, an award of alimony may be appropriate, and while the length of the marriage is one of the factors which may be considered in setting the amount of alimony, it is one of many, and not the exclusive factor. Porter v. Porter, supra.

With respect to factor (1) and (2) of West Virginia Code §48-6-301, the Court finds that the marriage in the instant case was a relatively short marriage. The period during the marriage when the parties lived together is also relatively short regardless of whether April, 2008, or May 22, 2009, is considered the date of separation.

The Court finds that no finding of substantial fault or misconduct by the Respondent should be made where any unusual behavior or suicidal threats alleged by the Petitioner were a result of the Respondent's mental disability, and that any fault alleged by the parties due to drinking by the other is minimal in nature and equal in fault.

With respect to factors (4), (6), (7) and (10) of West Virginia Code §48-6-301, the Respondent is permanently disabled and the Petitioner is retired, and there is likely to be no significant change in the parties income or earning capacities.

With respect to factors (8) and (11) of West Virginia Code §48-6-301, neither of the parties have forgone education or training during the marriage and neither contributed to the other's education or training.

There are no children and no tax consequences of any significance involved, and factors (13), (14), (15), (16) and (18) of West Virginia Code §48-6-301 are of little or no consequence in this case.

With respect to factor (19) of the West Virginia Code §48-6-301, the parties have not presented sufficient evidence to show a need for special health care costs of any significance.

With respect to factor (9) of West Virginia Code §48-6-301, the Petitioner enjoys a standard of living as good or better than the standard of living established during the marriage, while the living expenses submitted by the Respondent are for a standard of living lower or approximately the same as that established during the marriage.

With respect to factor (3) of West Virginia Code §48-6-301, the present income and recurring earnings of the parties, the Petitioner has recurring income of \$4,366.66 and the Respondent has recurring income of \$780.00.

With respect to factor (17) of West Virginia Code §48-6-301, the Respondent has a financial need of \$1,884.00, while the Petitioner has a financial need no greater than \$3,304.38.

Based upon consideration of the above factors contained in West Virginia Code §48-6-301, and based upon the financial need of the Respondent, and in view of the ruling in Sloan v. Sloan, supra, that the length of marriage is merely one factor among many, the Court finds the Respondent should be awarded \$1,000.00 per month alimony to be paid by the Petitioner and such award of alimony or spousal support should be permanent but not chargeable to the estate of the Petitioner upon his demise.

Pursuant to West Virginia Code §48-8-106, the Court finds that the award of \$1,000.00 per month alimony need not be paid out of the Petitioner's veteran's benefits such as to invoke 10 U. S. C. §1408, and that the Petitioner has \$1,543.00 in other income from which to pay alimony." Supplemental Appendix at 142 to 143.

The Family Court found the former husband's income exceeds his living expenses by \$1,062.28 over and above the \$3,304.38 he claimed in reasonable living expenses per month.

The Family Court found the former wife's income was \$780.00 and her reasonable and necessary expenses to be \$1,884.00 per month. The Family Court awarded the former wife \$1,000.00 per month in permanent alimony. Supplemental Appendix at 144.

The former husband filed a Motion for Reconsideration of the Family Court's award of \$1,000.00 per month in permanent alimony. Supplemental Appendix at 146. The former husband alleged, among other things, in the Motion for Reconsideration that the Family Court had improperly considered veteran's disability benefits in making the award of \$1,000.00 per month in permanent alimony. The former wife asserted that it would not be equitable to fail to consider the former husband's veteran's benefits payments in determining

spousal support. The former wife also pointed out that the \$1,000.00 per month award in alimony could be paid from income received by the former husband from income received by the former husband from sources other than his veteran's disability benefits. Supplemental Appendix at 162. The former wife took the position that most jurisdictions which have addressed the issue have allowed veteran's disability benefits to be considered in determining an award of alimony. Supplemental Appendix at 166. The Family Court denied the former husband's Motion for Reconsideration. Supplemental Appendix at 169.

The former husband appealed to the Circuit Court of Kanawha County, West Virginia. After oral argument on the matter on December 10<sup>th</sup>, 2010, the Circuit Court entered a final order titled, "Final Order," in which the Circuit Court reversed the Family Court's award of \$1,000.00 per month in permanent alimony and awarded the former wife alimony of \$500.00 per month for eighteen (18) months. Supplemental Appendix at 3.

In its Final Order, the Circuit Court states as follows:

"On the other hand it would not be equitable to fail to consider veteran's disability benefits available to the Petitioner in determining spousal support.

Many State Courts have held that the receipts of veteran's disability benefits can be used to calculate alimony payments out of other money that is available. See Womack v Womack, 307 Ark 269, 818 S. E. 2d 958 (1991); In Re Marriage of Bahr, 29 Kan App. 2d 846, 32 P. 3d 1212 (Kan App. 2001); Allen v. Allen, 650 SO 2d 1019 (Fla App. 2d Dist. 1994); Murphy v Murphy, 302 Ark. 157, 787 S. W. 2d 684 (1990); Repash v. Repash, 148 Vt. 70 528 A. 2d 744 (1987); In the Matter of Morales, 214 P. 3d 81 Or. App. 132 (Or. App. 2009); Steiner v. Steriner, 788 So. 2d 771 (Miss 2001); and Holmes v. Holmes, 7 Av. App. 472, 375 S. E. 2d 387 (1999).

Questions relating to alimony are within the discretion of the court unless arbitrary or capricious. An award of alimony will not be disturbed unless there has been an abuse of discretion. See Polliccion v Polliccion, 585 S. E. 2d 28, 214 W. Va. 28 (2003). It is not an abuse of discretion for the Court to consider veteran's disability benefits as a resource to the Petitioner in making an award of spousal support unless it is arbitrary and capricious.

The decision of the Family Court Judge was arbitrary and capricious because it is against public policy for the Family Court Judge to disregard the totality of the circumstances underpinning the particular disability awards in this case and then to consider these awards in an equitable way in lifetime spousal support for four (4) years of marriage." Supplemental Appendix at 2 to 3.

The Circuit Court's Order mentions four (4) of the factors contained in West Virginia Code §48-6-301(b): the length of the marriage, the present employment or income of the parties, the financial needs of the parties, and the former wife's disability. The Circuit Court did not state it was reversed based upon a clearly erroneous finding of fact by the Family Court, and it did not use the phrase "abuse of discretion" in reversing the Family Court's order.

The former wife, Petitioner herein, appeals to the Honorable Court from the Order the Circuit Court which it reversed the Family Court's order granting her \$1,000.00 per month in permanent alimony, and instead, granted \$500.00 per month in alimony for eighteen (18) months.

### **SUMMARY OF ARGUMENT**

The Circuit Court reversed the Family Court's award of permanent alimony to the former wife of \$1,100.00 per month, and awarded \$500.00 per month for eighteen (18) months instead. The Circuit Court found the Family Court's decision was arbitrary and capricious because it is against public policy to disregard the totality of the circumstances underpinning the particular disability awards in this case. Supplemental Appendix at 3.

The Circuit Court did not explain how it arrived at an award of alimony of \$500.00 per month for eighteen (18) months. More importantly, the Circuit Court did not correctly apply an abuse of discretion standard in reviewing the Family Court's Order. See Robinson v. Coppala, 212 W. Va. 632, 575 S. E. 2d 242 (2002). This Court should review the standard of review applied by the Circuit Court as a question of law requiring de novo review. See Carr v Hancock, 216 W. Va. 474, 607 S. E. 2d 803 (2004). It is our position that the Circuit Court did not correctly apply an abuse of discretion standard of review; that the

Family Court's application of the law to the facts does not constitute an abuse of discretion; and that the Order of the Family Court should be reinstated.

The factors to be considered in awarding spousal support are set forth in West Virginia Code §48-6-301(b). The Family Court's Order awarding \$1,000.00 per month permanent alimony addressed each of these factors. Supplemental Appendix at 140. The Circuit Court's Order reversing the Family Court's Order mentions only four (4) of the statutory factors. Supplemental Appendix at 1 to 3. The Circuit Court's Order appears to have considered mainly the type of disability of the parties and the short length of marriage without due consideration to the other statutory factors including the disparity in income.

None of the factors contained in West Virginia Code §48-6-301(b) specifically require a Family Court to examine the underpinnings of a particular disability award made to one or both parties. A Court is to consider the totality of the circumstances in making an award of alimony. Polliccion v. Polliccion, 585 S. E. 2d 28, 214 W. Va. 28 (2003). The Circuit Court's order mentioned only four (4) factors contained in the statute and found the Family Court's decision was arbitrary and capricious for disregarding the underpinnings of the particular disability awards in this case, which is not a statutory factor a Family Court is required to make findings about.

The Circuit Court applied an incorrect standard to review of a Family Court's decision. A Circuit Court should review findings of fact made by a family law master only under a clearly erroneous standard, and it should review the application of law to the facts under an abuse of discretion standard. Robinson v. Coppala, 212 W. Va. 632, 575 S. E. 2d 242 (2002). The Circuit Court's finding that the Family Court was arbitrary and capricious to disregard the underpinnings of the particular disability awards in this case was not a correct review under an abuse of discretion standard. The Circuit Court, in essence,

substituted its judgment for that of the Family Court.

The parties were married and lived together about four (4) years. Supplemental Appendix at 138. At the beginning of the marriage the former husband worked at minimum wage jobs, and the former wife was a school teacher making about \$1,900.00 per month. Supplemental Appendix at 27 and 55. The parties lived in the former wife's house during the marriage. During the marriage, the former husband was awarded disability benefits from the veteran's administration for PTSD and psychological problems. Supplemental Appendix at 60. The former wife was awarded disability benefits by the social security administration after separation but with an effective date of disability of December 1, 2007. Supplemental Appendix at 250. The former husband's income is \$1,062.28 over and above his living expenses even if some sizable recreation and miscellaneous expenses are considered reasonable and necessary. Supplemental Appendix at 77. The former wife's need and reasonable living expenses of \$1,884.00 are \$1,104.00 more than her disability income. Supplemental Appendix at 77. The former husband's total income is \$4,366.66 per month of which \$2,823.00 is from veteran's benefits, \$92.66 is from a retirement fund, and \$1,451.00 is from social security benefits. Supplemental Appendix at 9. The former wife's reasonable living expenses exceed her income, and the former husband's income exceeds his reasonable living expenses. The former husband received his disability benefits during the marriage and his income increased from minimum wage to \$4,366.66 per month. During the marriage the former wife became disabled and her income decreased from about \$1,900.00 per month to \$780.00 per month in social security disability benefits. The Family Court Order addresses each statutory factor for awarding spousal support and awards spousal support based upon all the statutory factors. The Family Court's reasoning in applying the law to the facts does not constitute an abuse of discretion.

The Circuit Court's failure to review the Family Court's factual finding about disability under a clearly erroneous standard is an error of law. The standard of review for an error of law made by the Circuit Court is de novo review. Carr v Hancock 216 W. Va. 474, 607 S. E. 2d 803 (2004). In the case at bar the Circuit Court failed to apply the proper standard of review to the Order of the Family Court, and the Order of the Circuit Court should be reversed and the Order of the Family Court reinstated.

**STATEMENT REGARDING ORAL  
ARGUMENT AND DECISION**

The Petitioner, by counsel, Randall W. Galford, believes that oral argument is unnecessary pursuant to Rule 18 (a) (4) of the Rules of Appellate Procedure because the facts and legal argument are adequately presented in the brief and record on appeal, and the decisional process would not be significantly aided by oral argument.

## ARGUMENT

1. **Whether the Circuit Court erred in reducing alimony to \$500.00 a month for eighteen (18) months.**

The parties were married on May 1, 2004. The date of separation was disputed. The Family Court found the marriage was of short duration whether May 22, 2009 or April, 2008, was adopted as the date of separation. Supplemental Appendix at 139. The parties had no children. The divorce was granted on the grounds of irreconcilable differences. An oral property settlement was agreed upon by the parties, and approved by the Family Court. Supplemental Appendix at 138. Marital property was not disputed. In the oral property settlement the parties divided personal property essentially in the manner in which they had divided possession of it at the time of separation. Supplemental Appendix at 9, 23, and 138. The only issue decided by the Family Court was spousal support or alimony.

Financial disclosures were filed, and the testimony of the parties presented on the issue of alimony. During the marriage the former husband was adjudicated disabled, and he receives total income of \$4,366.66 per month of which \$1,451.00 is from social security benefits, \$2,823.00 is from veteran's benefits, and \$92.66 is from a retirement fund. Supplemental Appendix at 9. The former wife was found to be disabled by the Social Security Administration with the date of disability effective December, 1, 2007. Supplemental Appendix at 250-254. She received \$780.00 per month in social security disability benefits. Supplemental Appendix at 22. The former wife claimed \$1,884.00 per month is reasonable and necessary living expenses. Supplemental Appendix at 99.

At the beginning of the marriage the former wife was employed as a teacher making about \$1,900.00 per month. Supplemental Appendix at 74. The former husband worked at minimum wage jobs. Supplemental Appendix at 75. Both suffer from psychological

problems which resulted in findings by veteran's administration, and social security administration, respectively, that each had become disabled during the marriage. The former husband had the former wife involuntarily committed for mental or psychological treatment during the marriage after she had threatened to commit suicide. Supplemental Appendix at 52. There was testimony about drinking by both of the parties during the marriage. Supplemental Appendix at 52 and 99. The former husband also presented his opinion of the extent of disability of the former wife. Supplemental Appendix at 91. The former wife did not contest that the former husband was disabled.

Courts of equity have jurisdiction in suits for divorce only by virtue of authority conferred upon them by statute. Cobb v Cobb, 145 W. Va. 107, 113 S. E. 2d 193 (1960). An award of spousal support is permitted by West Virginia Code §48-8-101. The effect of fault or misconduct on an award of spousal support is addressed in West Virginia Code §48-8-104. The factors to be considered in awarding spousal support are set forth in West Virginia Code §48-6-301(b), which lists twenty (20) factors.

It has been held that the Court must consider the totality of the circumstances in awarding alimony. Polliccion v. Polliccion, 585 S. E.2d 28, 214 W. Va. 28 (2003). It is our position that where the Court derives its jurisdiction by statute, the statutory factors encompass the totality of the circumstances the Court must consider in awarding alimony. It has been held that it is not necessary to make specific findings as to each statutory factor to be considered in awarding alimony, but findings must be made as to those factors applicable and appropriate to the case. Banker v Banker, 196 W. Va. 535, 474 S. E 2d 465 (1996). In that regard, it has been held in awarding alimony, that while the length of the marriage is one of the factors which may be considered in setting the amount of alimony, it is only one of many, and not the exclusive factor. Porter v Porter, 212 W. Va. 682, 575 S. E. 2d 292

(2002). It has also been held that absent a finding of substantial fault or misconduct on the part of the spouse seeking spousal support, spousal support is to be based on the financial position of the parties. Sloan v. Sloan, 219 W. Va. 105, 632 S. E. 2d 45 (2006).

In the instant case, no adultery was alleged. The former husband alleged fault or misconduct by the former wife due to drinking and testified about it. Supplemental Appendix at 49. The Family Court Order stated as follows in finding no misconduct due to drinking: “(P) The Court finds that no finding of substantial fault or misconduct by the Respondent [former wife] should be made where any unusual behavior or suicidal threats alleged by the Petitioner [former husband] were a result of the Respondent’s [former wife] mental disability, and that any fault alleged by the parties due to drinking by the other is minimal in nature and equal in fault.” Supplemental Appendix at 142. The Family Court’s Order then addresses each of the statutory factors in 48-6-301(b).

The Family Court found that the former husband is retired and the former wife is permanently disabled, and there is unlikely to be a significant change in the parties’ income or earning capacities. Supplemental Appendix at 142. The Family Court considered that the former wife had living expenses of \$1,884.00 per month which were reasonable and necessary living expenses and her income was \$780.00 per month, while the former husband’s income exceeded his reasonable living expenses by at least \$1,062.28. Supplemental Appendix at 140. The Family Court awarded the former wife \$1,000.00 per month in permanent alimony.

The Circuit Court reversed the Family Court’s order and awarded the former wife \$500.00 per month in alimony for eighteen (18) months. The Circuit Court does not state any basis or its rationale for determining the amount it awarded in alimony. The Circuit Court does not state the alimony it awarded is rehabilitative alimony nor give a rationale for

awarding eighteen (18) months of alimony.

The Circuit Court stated a rationale for reversing the Family Court by stating the Family Court's decision was arbitrary and capricious because it is against public policy to disregard the totality of the circumstances underpinning the particular disability awards in this case. Supplemental Appendix at 3. This does not, however, explain the Circuit Court's findings or reasoning in granting temporary alimony.

In West Virginia Code §48-6-301(b)(6), the Court should consider, "The ages and the physical, mental and emotional condition of each party." The factual findings of a Family Court should be reviewed by a Circuit Court under a clearly erroneous standard, and the application of the law to the facts should be reviewed under an abuse of discretion standard. Robinson v. Coppala, 212 W. Va. 632, 575 S. E. 2d 242 (2002). In the case at bar, this Court should review the Circuit Court's decision de novo to determine whether the Circuit Court failed to correctly apply an abuse of discretion standard of review to the Family Court's Order, and that the Final Order of the Circuit Court should be reversed, and the Order of the Family Court reinstated.

- 2. Whether the Circuit Court erred in finding the Family Court Judge had not considered the totality of the circumstances where the Family Court Judge addressed each of the factors in West Virginia Code §48-6-301(b).**

The jurisdiction of divorce cases is purely statutory, and the court possesses no powers in such cases involving matters of property beyond those conferred by statute. McKinney v Kingdon, 162 W. Va. 319, 251 S. E. 2d 216 (1978). Courts are conferred the jurisdiction to award spousal support by statute. West Virginia Code §48-8-101. "The court in ordering a divorce may require either party to pay spousal support in accordance with the

provisions of article 8-101, et seq., of this chapter.” West Virginia Code §48-5-602.

The effect of fault or misconduct on an award of spousal support is addressed in West Virginia Code §48-8-104, which states as follows:

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

The factors considered in awarding spousal support are set forth in West Virginia Code §48-6-301(b) which states as follows:

“(b) The court shall consider the following factors in determining the amount of spousal support, child support or separate maintenance, if any, to be ordered under the provisions of parts 5 and 6, article five of this chapter, as a supplement to or in lieu of the separation agreement:

- (1) The length of time the parties were married;
- (2) The period of time during the marriage when the parties actually lived together as husband and wife;
- (3) The present employment income and other recurring earnings of each party from any source;
- (4) The income-earning abilities of each of the parties, based upon such factors as educational background, training, employment skills, work experience, length of absence from the job market and custodial responsibilities for children;
- (5) The distribution of marital property to be made under the terms of a separation agreement or by the court under the provisions of article seven of this chapter, insofar as the distribution affects or will affect the earnings of the parties and their ability to pay or their need to receive spousal support, child support or separate maintenance: *Provided*, That for the purposes of determining a spouse's ability to pay spousal support, the court may not consider the income generated by property allocated to the payor spouse in connection with the division of marital property unless the court makes specific findings that a failure to consider income from the allocated property would result in substantial inequity;
- (6) The ages and the physical, mental and emotional condition of each party;
- (7) The educational qualifications of each party;
- (8) Whether either party has foregone or postponed economic, education or employment opportunities during the course of the marriage;
- (9) The standard of living established during the marriage;
- (10) The likelihood that the party seeking spousal support, child support or separate maintenance can substantially increase his or her income-earning abilities within a reasonable

time by acquiring additional education or training;

(11) Any financial or other contribution made by either party to the education, training, vocational skills, career or earning capacity of the other party;

(12) The anticipated expense of obtaining the education and training described in subdivision (10) above;

(13) The costs of educating minor children;

(14) The costs of providing health care for each of the parties and their minor children;

(15) The tax consequences to each party;

(16) The extent to which it would be inappropriate for a party, because said party will be the custodian of a minor child or children, to seek employment outside the home;

(17) The financial need of each party;

(18) The legal obligations of each party to support himself or herself and to support any other person;

(19) Costs and care associated with a minor or adult child's physical or mental disabilities; and

(20) Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable grant of spousal support, child support or separate maintenance.” West Virginia Code §48-6-301(b).

In the case at bar, the Circuit Court reversed the Order of the family Court which awarded \$1,000.00 per month to the former wife for permanent spousal support, and the Circuit Court awarded \$500.00 for eighteen (18) months in spousal support. Supplemental Appendix at 3. In reversing the Family Court, the Circuit Court found “. . . it is against public policy for the Family Court Judge to disregard the totality of the circumstances of the particular disability awards in this case and then to consider these awards in an equitable manner as lifetime spousal support for a four (4) year marriage.” Supplemental Appendix at 3.

The Circuit Court’s order specifically states how each of the factors found in West Virginia Code §48-6-301(b) was applied by the Family Court to the facts of this case. The twentieth factor permits a Court to consider such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable grant of spousal support. Factor twenty of West Virginia Code §48-6-301(b) (20) is permissive in allowing the Court to consider other factors not specifically listed in the statute but it does not require that other

matters be considered.

It is the Petitioner's position that the Family Court considered the totality of the circumstances where it considered and addressed each of the statutory factors. It has been held that it is not necessary to make specific findings as to each statutory factor to be considered in awarding alimony, but that finding as to each statutory factor to be considered in awarding alimony, but that findings must be made as to those factors applicable and appropriate to the case. Banker v Banker, 196 W. Va. 535, 474 S. E. 2d 465 (1996).

The underpinnings of the particular disability awards is not a statutory factor a trial Court is required to consider in determining alimony. The underpinnings or basis for disability awards may be a matter the trial Court is permitted to consider under the catchall factor contained in West Virginia Code §48-6-301(b)(20); but it is not a required factor applicable in this case. The Family Court's finding in paragraph (P) of the Family Court Order that the former wife is permanently disabled sufficiently addresses her disability. Supplemental Appendix at 140.

The Family Court's Order addresses how it applies each of the statutory factors to its findings of fact. Supplemental Appendix at 142. On the other hand, the Circuit Court's Order only specifically addresses four (4) factors: the length of the marriage, the present employment or income of the parties, the financial needs of the parties, and the former wife's disability. The Circuit Court does not address factor nine (9) about whether the former wife's standard of living is the same as that established during marriage when she worked as a teacher before her disability. Supplemental Appendix at 60 and 143. The Circuit Court does not address misconduct, nor suicidal behavior by the former wife. The Circuit Court does not state whether it finds that other factors do or do not apply, or whether the Circuit Court is considering the totality of the circumstances.

The trial Court should consider the totality of the circumstances when determining an award of alimony. Corbin v Corbin, 157 W. Va. 967, 206 S. E. 2d 898 (1974). The Circuit Court failed to consider the totality of the circumstances in reversing the Family Court's order and setting alimony of \$500.00 per month for eighteen (18) months. Further, the Circuit Court was not the trial Court in the instant case, and its standard of review should have been under a clearly erroneous standard for findings of fact made by the Family Court, and under an abuse of discretion standard for application of the law to the facts by the Family Court. Robinson v Coppala, 212 W. Va. 632, 575 S. E. 2d 242 (2002). The Circuit Court failed to apply an abuse of discretion to the order of the Family Court about whether the Family Court properly considered the totality of the circumstances where the Family Court addressed each statutory factor.

This Court held that it will apply an abuse of discretion standard of review to the application of law to the facts by a trial Court. McVey v McVey, 189 W. Va. 197, 429 S. E. 2d 239 (1993). The Family Court's Order meets this standard and sufficiently considers the totality of the circumstances where the Order addresses each statutory factor. The order of the Family Court should be reinstated.

**3. Whether the Circuit Court Erred in finding the Family Court Judge should have considered the underpinnings of the particular disabilities of the parties.**

At the beginning of the four year marriage the former husband worked at minimum wage jobs. Supplemental Appendix at 55 and 75. The former wife worked as a teacher during the part of the marriage. Supplemental 27 and 140. During the marriage the former husband sought and was granted veterans disability benefits. Supplemental Appendix at 74. At the

time of divorce the former husband received \$1,451.00 per month from social security benefits, \$2,823.00 per month from veteran's disability benefits, and \$92.66 from a retirement fund. Supplemental Appendix at 9 and 77.

The former wife began experiencing psychological problems during the marriage, and was hospitalized when the former husband had her involuntarily committed to Mildred Mitchell Bateman Hospital in April, 2008. Supplemental Appendix 82. The former wife subsequently applied for social security benefits and was granted social security disability benefits by decision dated September 17, 2009, which social security decision found she was disabled and unable to work effective December 1, 2007. Supplemental Appendix at 250. The former wife suffers from fibromyalgia, depression, anxiety and psychological problems. (Supplemental Appendix at 250). One of her psychological problems is agoraphobia. (Supplemental Appendix at 67 and 91). She also suffers from other psychological problems serious enough to have warranted an involuntary commitment. Supplemental Appendix at 82.

At hearing the former husband testified to his lay opinion that the former wife could work and was not disabled from working. Supplemental Appendix at 52. He testified that he believed she had a drinking problem, as well. Supplemental Appendix at 52. The former husband did not present any medical or expert testimony that the former wife could work or was not disabled or was disabled from alcohol abuse. The former husband did not contest that the former wife had been determined to be permanently disabled from working by social security. Supplemental Appendix at 82. The former husband did not offer any vocational expert evidence to show or suggest the former wife could work.

The Family Court found that the former wife was permanently disabled and her income of \$780.00 per month in social security benefits was not likely to change. Supplemental Appendix at 143. In reversing the Family Court's award of alimony, the

Circuit Court's Order states. "... it is against public policy for the Family Court Judge to disregard the totality of the circumstances underpinning the particular disability awards in this case and then to consider these awards in an equitable way in lifetime spousal support." Supplemental Appendix at 3.

The totality of circumstances underpinning the disability awards were considered by the Family Court. The Family Court found the former husband draws veteran's benefits and is retired. Supplemental Appendix at 140. The Family Court chose to find that the former wife is permanently disabled from working. Supplemental Appendix at 142. The Family Court found the former wife was granted social security disability benefits during the marriage. Supplemental Appendix at 139. The Family Court found that drinking was not significant factor in fault. Supplemental Appendix at 142. The Family Court chose to find the former wife disabled based upon the social security decision and her testimony, instead of finding her able to work based upon the former husband's testimony that he thought she was able to work.

It is the Petitioner's position that where social security administration or veteran's administration or similar agencies with expertise in determining disabilities have found a person disabled, then in the absence of medical evidence or other expert evidence to the contrary, it is not clearly erroneous for the Family Court to find a person is permanently disabled from working. Where a layperson, former spouse does not testify to any work the person has performed after social security found her disabled, and merely presents his opinion about her being able to work, it is not a misapplication of the law to the facts that would constitute an abuse of discretion for a Family Court to conclude the person is disabled based on the social security decision to that effect.

Application of the law to the facts by the Family Court should be reviewed by both

the Circuit Court and this Court under and abuse of discretion standard. Robinson v. Coppala, 212 W. Va. 632, 575 S. E. 2d 242 (2002). Questions of law are to be reviewed de novo. Carr v Hancock 216 W. Va. 474, 607 S. E. 2d 803 (2004).

It appears that the Circuit Court in finding the Family Court had disregarded the underpinning of the particular disability awards, meant that the Circuit Court found the Family Court has misapplied the law to the facts to an extent that constitutes an abuse of discretion. Presuming the law does require the Family Court to consider the underpinning of the particular disability awards in the instant case, there is no reason to believe the Family Court failed to properly do so where it considered the testimony about the former wife's disability, and made findings about her disabilities. The Family Law Court did not abuse its discretion in finding that the former wife is permanently disabled in view of the evidence that she was granted social security benefits, was involuntarily committed and testified she is unable to work.

Examining the underpinnings of disability awards could also be interpreted to mean considering the circumstances under which the disabilities and the grants occurred. The former husband's disabilities are service connected and have little to do with the former wife. The time the former husband's award was granted suggests the former wife may be "owed something" for his obtaining it. At the time the former husband's disability award was granted he was married and living with the former wife, in her house. Shortly after receiving his veteran's disability award the former husband moved out. The former wife became disabled during the marriage. She was involuntarily committed by the former husband during the marriage. Supplemental Appendix at 52. She ceased working, and she was granted disability benefits by social security effective back to December 1, 2007. The Family Court did not abuse its discretion nor ignore the underpinnings of the disability

awards where substantial evidence of disability supports the findings that the former wife is permanently disabled, and the Family Court's Order shows the timing and type of disability benefits awarded to the parties. This Court should review the standard of review appeal by the Circuit Court de novo, and find the Circuit Court erred in finding the Family Court's reasoning was an abuse of discretion, and the Order of the Family Court should be reinstated.

4. **Whether the Circuit Court erred in finding the decision of the Family Court was arbitrary and capricious where the Family Court Order addressed each of the factors in West Virginia Code §48-6-301(b), and the income of the Respondent herein (Petitioner below) was \$1,062.28 over and above his living expenses and the need and reasonable living expenses of the Petitioner herein (Respondent below) were \$1,104.00 more than her disability income.**

The Circuit Court reversed the Family Court's Order awarding \$1,000.00 per month permanent alimony to the former wife, and awarded her \$500.00 per month for eighteen (18) months instead. In reversing the Family Court, the Circuit Court stated, the Family Court Judge was "arbitrary and capricious" in considering veteran's benefits in an equitable way in lifetime support for a four (4) year marriage. The Family Court considered that the former husband's income exceeds his reasonable living expenses by \$1,062.28. The former wife has reasonable living expenses of \$1,884.00 per month. The Family Court found that the short term of the marriage was not dispositive, and the Family Court properly considered the former husband's veteran's benefits as a resource to him. Supplemental Appendix at 142. The reasoning of the Family Court does not constitute an abuse of discretion.

The statutory factors contained in West Virginia Code §48-6-301(b) were each addressed in the Family Court's Order. It has been held that the statute which specifies

factors to be considered in making an award of alimony does not require that specific weight be assigned to any one criteria and the trial judge, in his sound discretion may award such weight as he deems appropriate to any or all of the criteria. Corbin v Corbin, 157 W. Va. 967, 206 S. E. 2d 898 (1974). Also see Banker v Banker, 196 W. Va. 535, 474 S. E. 2d 465 (1996). It is the Petitioner's position that the Family Court had broad discretion in applying the statutory factors to the facts, and that the Circuit Court would have weighed these factors differently does not permit the Circuit Court to reverse and find an abuse by the Family Court.

It has been held that a Circuit Court should review findings of fact made by a Family Law Master only under a clearly erroneous standard, and it should review the application of law to the facts under an abuse of discretion standard. Robinson v. Coppala, 212 W. Va. 632, 575 S. E. 2d 242 (2002). In the instant case, the Circuit Court did not make a finding that the Family Court was clearly erroneous in making a finding of fact. The Circuit Court also does not make a finding that the Family Court abused its discretion in applying the law to the facts. The Circuit Court did not articulate the proper standard of review where it reversed the Family Court's decision as arbitrary and capricious in place of stating it was an abuse of discretion. Supplemental Appendix at 3.

In Porter v Porter, 212 W. Va. 682, 575 S. E. 2d 292 (2002), the Court remanded the case for an award of permanent alimony where there had been a short marriage. The Court stated, "Where the parties have been formally married, an award of alimony may be appropriate, and while the length of the marriage is one of the factors which may be considered in setting the amount of alimony, it is only one of many, and not the exclusive factor." Porter v Porter, 212 W. Va. 682, 575 S. E. 2d 292 (2002). In the instant case, the Family Court found there had been a short marriage.

The parties were married on May 1<sup>st</sup>, 2004. Supplemental Appendix at 17, 46, 138. The former husband stated they had separated in April, 2008, when he moved most of his possessions out of the former wife's house. The former wife contended that they had separated on May 22, 2009, because the former husband returned and they had sexual relations at that time. The former husband denied this. Supplemental Appendix at 80. The Family Court Order did not definitively resolve which date of separation was correct but found in any event it was a short term marriage. Supplemental Appendix at 142. The Family Court Order cites Porter v Porter, supra, and does not find the short term of four (4) years of marriage precluded granting alimony. That Family Court also considered the financial positions of the parties.

The Family Court found that during the marriage the former wife made about \$1,900.00 per month and the former husband earned minimum wage until each respectively became disabled or retired. Supplemental Appendix at 140. The testimony of the parties show the former husband sought his veteran's disability benefits during the marriage, and moved out soon after being granted these. Supplemental Appendix at 74. The Family Court found the former wife had been granted social security benefits effective December 1<sup>st</sup>, 2007. Supplemental Appendix at 139. The Family Court also found that the former wife was permanently disabled, and neither of the parties' income was likely to change. Supplemental Appendix at 142. It is the Petitioner's position that these findings of fact are not clearly erroneous, and are supported by the evidence.

The Family Court found that the former husband's income is \$4,366.66 per month, of which \$2,823.00 is from veteran's disability benefits, \$1,451.00 is from Social Security, and \$92.66 is from a retirement fund. The Family Court found the former husband claimed reasonable expenses of \$3,304.38 of which \$160.00 was for miscellaneous expenses and

\$600.00 was for recreation and entertainment. Supplemental Appendix at 140. The Family Court then used the total claimed living expenses of the former husband of \$3,304.58, and found that his income exceeds his reasonable living expenses by \$1,062.28. Supplemental Appendix at 143.

The Family Court found the former wife's income which had been about \$1,900.00 per month when she was working as a teacher is now \$780.00 per month from social security disability benefits. Supplemental Appendix at 139. The Family Court found the former wife's reasonable and necessary were \$1,884.00 per month. Supplemental Appendix at 140. The Family Court's finding of the financial facts is not clearly erroneous and is based on the evidence.

The former wife's reasonable and necessary living expenses exceed her social security disability income by \$1,104.00. The former husband testified to giving her some money between April, 2008, and May, 2009, to help with her expenses. Supplemental Appendix at 87. The former wife's income of \$1,900.00 per month was not available after she became disabled from teaching. None of the former husband's benefits or retirement were available to meet her living expenses after he moved out, except for the sums he gave her. The former husband was receiving much more month per month, than he did while working at minimum wage during the marriage. The former husband's income exceeds the arguably padded living expenses he claimed by \$1,062.38.

The former wife's living expenses exceed her income by \$1,104.00 per month. The former husband's income exceeds his claimed living expenses by \$1,1062.38. The statutory factors require the Court to consider the financial position of the parties. West Virginia Code §48-6-301(b). In addition a long line of cases have stressed the importance that a husband's ability to pay and a wife's need plays in setting alimony. The essential basis of alimony is

the ability of the husband to pay. Watson v Watson, 113 W. Va. 267, 168 S. E. 2d 373 (1933). The Statute providing for an award of alimony requires a trial Court to consider the financial needs of the parties, their income and income earning abilities, and their estate and income produced by their estate. Wood v Wood, 190 W. Va. 445, 438 S. E. 2d 788 (1993). Once it is determined that alimony is appropriate, calculation of the proper amount of alimony may include financial and other circumstances of the parties, utilizing fault as just one factor in such analysis. Uldrick v Uldrick, 196 W. Va. 663, 474 S. E. 2d 593 (1996). The Family Court did not abuse its discretion in giving weight to the facts that the former husband's income exceeded his claimed expenses by \$1,062.38; and the former wife's expenses exceed her income by \$1,104.00.

The Family Court considered the veteran's disability benefits received by the former husband as a resource to him in determining the amount of alimony. The Circuit Court correctly did not find that doing so was an abuse of discretion by the Family Court. The Circuit Court correctly stated the law with respect to veteran's disability benefits as follows:

"Alimony should not be awarded out of veteran's disability benefits absent certain limited circumstances not applicable in the instant case.

On the other hand, it would not be equitable to fail to consider veterans' disability benefits can be used to calculate alimony payments out of other money that is available. See Womack v Womack, 307 Ark. 269, 818 S. E. 2d 958 (1991); In Re Marriage of Bahr, 29 Kan, App. 2d 84b, 32 P. 3d 1212 (Kan App. 2001); Allen v Allen, 650 So. 2d 1019 (Fla. App. 2d Dist. 1991); Murphy v Murphy, 302 Ark. 157, 787 S. W. 2d 684 (1991); Repash v Repash, 148 VT. 70 528 A. 2d 744 (1987); In the Matter of Morales, 214 P. 3d 81, 230 Or App. 132 (Or. App 2009); Steiner v Steiner, 788 So. 2d 771, (Miss. 2001); and Holmes v.

Holmes, 7 Va. App. 472, 375 S. E. 2d 387 (1999).” Supplemental Appendix at 2.

This Honorable Court should review the decision of the Circuit Court de novo to determine whether the Circuit Court applied the correct standard of review because the standard of review is a question of law. See Robinson v. Coppala, 212 W. Va. 632, 575 S. E. 2d 242 (2002). The standard of review that should be applied to the Family Court’s order is whether it abused its discretion in applying the law to the facts. Robinson v. Coppala, 212 W. Va. 632, 575 S. E. 2d 242 (2002). The Circuit Court failed to apply an abuse of discretion standard of review to the decision of the Family Court. The Family Court addressed each statutory factor. The Family Court’s application of the law to the facts in calculating the amount of alimony based upon the former husband’s income over and above his expenses and the former wife’s need, did not constitute an abuse of discretion. The Order of the Family Court should be reinstated.

**5. Whether the Circuit Court erred in finding the Family Court’s decision was arbitrary and capricious because it is against public policy to disregard the totality of the circumstances underpinning the particular disability awards in this case.**

Courts of equity have jurisdiction in suits for divorce only by virtue of authority conferred upon them by statute. Cobb v Cobb, 145 W. Va. 107, 113 S. E. 2d 193 (1960). An award of spousal support is permitted by West Virginia Code §48-8-101, but that statute does not set forth public policy consideration in awarding spousal support. The effect of fault or misconduct on an award of spousal support is addressed in West Virginia Code §48-8-104. The factors to be considered in awarding spousal support are set forth in West Virginia Code

§84-6-301(b).

None of the factors contained in West Virginia Code §48-6-301(b) set forth a public policy that required a Family Court to examine the underpinning of a particular disability award made to one or both parties. It is the Petitioner herein's position that there is no statutory rule or public policy requiring a Family Court to explore the totality of the circumstances underpinning a disability award. A Family Court's equity jurisdiction granted to it by statute should not permit or require the Family Court to develop a policy of examining the totality of the circumstances underpinning a disability award.

A Circuit Court should review a finding of fact made by a Family Law Master only under a clearly erroneous standard, and it should review the application of law to the facts under an abuse of discretion standard. Robinson v. Coppala, 212 W. Va. 632, 575 S. E. 2d 242 (2002). Questions of law are reviewed de novo. Carr v Hancock, 216 W. Va. 474, 607 S. E. 2d 803 (2004). The Petitioner herein interprets the Circuit Court's decision as reversing the Family Court's decision for failure to properly apply the law to the facts.

The Circuit Court does not state the Family Court's findings of fact were incorrect or clearly erroneous. The Circuit Court does not state the Family Court is reversed on a question of law. Instead, the Circuit Court quotes an arbitrary and capricious standard and states the Family Court disregarded the totality of the circumstances underpinning the disability awards. The Circuit Court's decision mentions public policy as the law that was misapplied by failing to consider the totality of the circumstances underpinning the disability awards.

The former husband's attorney articulated a perceived public policy consideration in her argument for reconsideration before the Family Court. Supplemental Appendix at 120. The former husband's position was that awarding alimony in a short term marriage would

discourage marriage. It is our position that in the instant case failure to award alimony to a former wife who became disabled during a marriage, and who had provided the larger income during the marriage until the former husband obtained veteran's benefits and retired would discourage marriage. A woman might refrain from marriage where she knew that if the husband who was earning less than her at the time of the marriage came into money, he could leave the marriage and pay no alimony even if she became disabled and her income decreased substantially.

The trial Court should consider the totality of the circumstances in determining an award of alimony. Corbin v Corbin, 157 W. Va. 967, 206 S. E. 2d 898 (1974). Further, however, the Court will not disturb an award of alimony unless there has been an abuse of discretion. Polliccion v. Polliccion, 585 S. E. 2d 28, 214 W. Va. 28 (2003). As addressed more fully in other sections of the argument, it is the Petitioner's position that the Family Court considered the totality of the circumstances by addressing each statutory factor set forth in West Virginia Code §48-6-301(b). As set forth in Polliccion v. Polliccion, 585 S. E.2d 28, 214 W. Va. 28 (2003), the Family Court's award of alimony should be reviewed under an abuse of discretion standard.

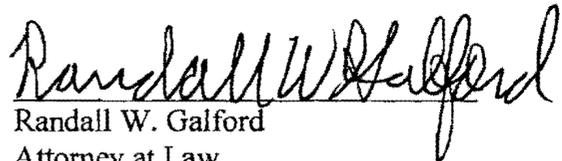
It is our position that the Circuit Court did not correctly apply an abuse of discretion standard of review. The Circuit Court relied on public policy considerations which its order does not explain to substitute the judgment of the Circuit Court for that of the Family Court. It is the Petitioner's position that the Family Court did not abuse its discretion in applying the statutory factors to the facts in the case at bar. This Court should find that the Family Court's decision granting \$1,000.00 per month alimony where the former husband's income exceeds his expenses by \$1,062.38 was not an abuse of discretion; that the Circuit Court failed to apply the proper standard of review; and that the Order of the Family Court should be

reinstated.

## CONCLUSION

The Petitioner herein, Margaret Paige Zickefoose (now Waldron), the Respondent in the original divorce and former wife, prays that this Honorable Court reverse, set aside and hold for naught, the Order of the Circuit Court of Kanawha County, West Virginia, which reversed the Order of the Family Court, and that the order of the Family Court granting the Petitioner herein the sum of \$1,000.00 per month in permanent alimony be reinstated and adopted by the Court; and that, alternatively, this Court remand this action to the Family Court of Kanawha County, West Virginia, for further evidence about the underpinnings of the parties disabilities awards; and that the Petitioner herein be granted such other and further relief as may be just and proper.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA

IN RE: THE MARRIAGE OF:

MARGARET P. ZICKEFOOSE,

RESPONDENT BELOW,  
PETITIONER,

vs.

Case No. 11-0073 (09-D-1501)

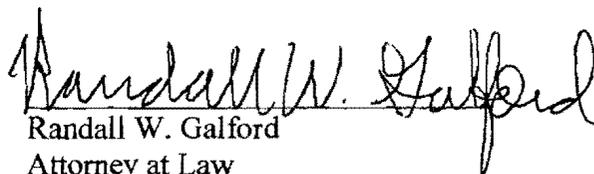
JOSEPH L. ZICKEFOOSE,

PETITIONER BELOW,  
RESPONDENT.

CERTIFICATE OF SERVICE

I, Randall W. Galford, do hereby certify that I have served the foregoing Petitioner's Brief upon counsel of record by United States Mail, postage prepaid, on this the 12<sup>th</sup> day of April, 2011, to:

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