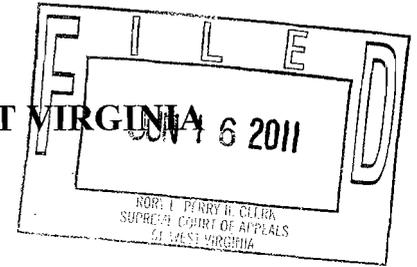


IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA



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 REPLY BRIEF

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TABLE OF CONTENTS

<u>SECTION</u>	<u>PAGE</u>
• STATEMENT OF THE CASE	1 - 5
• STATEMENT REGARDING ORAL ARGUMENT AND DECISION	5
• ARGUMENT	5 - 13
• CONCLUSION	13 - 14
• CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

STATUTES

West Virginia Code §48-6-301(b)

CASES

Allen v. Allen, 650 So. 2d 1019 (Fla. App. 2d Dist. 1991)

Billeck v. Billeck, 777 So. 2d 105 (Ala. 2000)

Holmes v. Holmes, 7 Va. App. 472, 375 S. E. 2d 387 (1999)

In the Matter of Morales, 214 P. 3d 81, 230 Or App. 132 (Or. App (2009)

In Re Marriage of Bahr, 29 Kan. App 2d 84b, 32 P. 3d 1212 (Kan App. 2001)

Murphy v. Murphy, 302 Ark. 157, 787 S. W. 2d 684 (1991)

Repash v. Repash, 148 Vt. 70, 528 A. 2d 744 (1987)

Robinson v. Coppala, 212 W. Va. 632, 575 S. E. 2d 242 (2002)

Steiner v. Steiner, 788 So. 2d 771, (Miss. 2001)

Womack v. Womack, 307 Ark. 269, 818 S. E. 2d 958 (1991)

OTHER AUTHORITIES

Rules of the Appellate Procedure

38 U.S.C. §1155

STATEMENT OF THE CASE CORRECTING INACCURACIES AND OMISSIONS

The Petitioner herein, the former wife, relies on the Statement of Fact set forth in her original brief, and desires to correct certain inaccuracies and omissions contained in the Respondent's brief.

The Petitioner, the former wife, does not dispute that the parties had a contentious marriage involving acts of cruelty by each party when they were drinking. The Respondent states on page 4 of his brief that the former wife had a drinking problem, consistently berated him, poured beer on him and his bed, kicked him out of the house multiple times, called his grandchildren "niglets" and physically attacked him. The truth of these acts are, however, disputed. The parties would go out drinking together, and sometimes acts of cruelty occurred. Supplemental Appendix at 91 and 92. The former husband admitted he would occasionally drink on his own. Supplemental Appendix at 79. The Family Court Judge asked during testimony why the former husband took the former wife drinking if she was mean to him when he did so. Supplemental Appendix at 92 and 93. The former wife testified the former husband had spit on her when drinking, and had stayed out late drinking alone. Supplemental Appendix at 99 and 100. The Family Court Judge found fault was equal by the parties. Supplemental Appendix at 142. Further, the grounds for the divorce were irreconcilable differences, and in this sense the former husband did not try to prove that cruelty caused the divorce. Supplemental Appendix at 139.

The Respondent's brief at page 4 and page 6 implies that the former wife became disabled in November 2009, months after the divorce action was filed. Actually, the favorable decision of the Social Security Administration found that the former wife's date of onset of disability was December 1, 2007. Supplemental Appendix at 254.

The Respondent's brief at page 9 states that the former wife was awarded social security benefits for a mental diagnosis of agoraphobia after the former husband was forced out of the marital home. The former wife did not force the former husband to leave the marital home; but he did so after using her income and home to live during the marriage until he had been granted his veteran's benefits and social security disability during the marriage. The former wife was not granted social security benefits merely because she suffers from agoraphobia. The former wife suffers from fibromyalgia, bipolar disorder, anxiety, depression, and psychotic episodes as well as agoraphobia. Supplemental Appendix at 253 and 254. The former wife has been hospitalized for mental or psychological problems three (3) times, and attempted suicide on at least two (2) occasions. Supplemental Appendix at 253. The physical malady of fibromyalgia, the numerous mental problems from bipolar disorder and the suicide attempts and hospitalizations were considered by the Social Security Administration in finding her disabled effective December 1st, 2007. Supplemental Appendix at 253. The former husband had the former wife involuntarily committed on one occasion. Supplemental Appendix at 74. The former husband was aware that the former wife suffered from far more than merely agoraphobia; but in testimony which is inconsistent with agoraphobia, he testified there were occasions she went drinking and he picked her up. Supplemental Appendix at 92 and 93. The Family Court found it more convincing that the parties went drinking together when the former husband took her out, and that fault for acts of cruelty while drinking was about equal. Supplemental Appendix at 142.

The former wife became disabled on December 1st, 2007, during the marriage due to fibromyalgia and severe mental problems which had resulted in hospitalizations and suicide attempts. Supplemental Appendix at 253. The former wife became disabled after she had provided the former husband a house to live in, used her income of about \$1,900.00 per

month to pay bills, and gave the former husband the opportunity to obtain his veteran's disability benefits, and social security benefits during the marriage.

The former wife paid most of the utility bills and costs of living during the marriage. The former husband testified at time of hearing that he had paid all marital debts, which debts were few, if any, except the cost of an automobile which the former husband received in the parties' property settlement. More precisely, the former husband wrecked a car purchased during the marriage which he took with him, and had replaced it with another vehicle he possessed and used by the time of the divorce hearing.

During the marriage the former husband testified that he made \$6.00 per hour, then made \$8.00 per hour. Supplemental Appendix at 75. There was also evidence that he made about minimum wage during the marriage. Supplemental Appendix at 140. The former wife earned a teacher's salary of about \$1,900.00 per month during the marriage until 2007. The former husband did not pay living expenses of \$3,300.00 per month during the marriage from money he earned. The former husband also ceased working during the marriage and was awarded his social security benefits, and veteran's disability benefits. Supplemental Appendix 140.

The former husband was awarded benefits based upon post traumatic stress syndrome. The PTSD symptoms were present during the marriage and became more manifest with counseling during the marriage. Supplemental Appendix at 225. The former husband's post traumatic stress syndrome was found by the veteran's administration to be service connected to his service in Vietnam but there was no detailed testimony in the divorce about actual events which caused it. The statements in the Respondent's brief about the former husband avoiding bombs in Vietnam seems a bit unrealistic given the common knowledge that the enemy did not have air superiority, and in the absence of detailed

testimony about the specific cause of the PTSD. During the marriage while the former husband underwent therapy and group therapy, he had episodes of rage, flashbacks, and nightmares. Supplemental Appendix at 60. The former husband never accepted responsibility for any role his PTSD played in the breakup of the marriage, but asserted that acts which are best viewed as manifestations of the former wife's psychological problems constituted fault in the marriage. Supplemental Appendix at 51 and 52. The Divorce Court found, however, that fault was about equal between the parties. Supplemental Appendix at 142.

The former husband did not contest that the house owned before marriage by the former wife, and upon which she has made the payments during the marriage, is her separate property. The former husband asserted the former wife would inherit from her mother, and would have access to a portion of the retirement fund from a former husband from a prior marriage. Supplemental Appendix at 104 and 105. At the divorce hearing, the former wife pointed out that what, if anything, she may inherit when her mother dies is uncertain, and that when she is allowed to access a portion of a former spouse's pension upon his retirement, the amount she will receive will be known at that time. See Supplemental Appendix at 104 -106. The former wife took the position at hearing that the death of her mother, and inheritance from her, and retirement of a former spouse, would constitute a change of circumstance which would permit the Respondent to modify permanent alimony. Supplemental Appendix at 108.

After receiving his veteran's benefits and social security disability while living with the former wife in the house she owned before marriage, the former husband receives \$4,366.66 monthly, of which \$1,451.00 is from social security disability, \$2,823.00 for veteran's disability benefits, and \$92.66 is from a retirement fund. Supplemental Appendix

at 140. He has monthly expenses of \$3,304.38. Supplemental Appendix at 140. The former wife receives income of \$780.00 per month in social security benefits. Supplemental Appendix at 139. Her monthly expenses are \$1,884.00 and exceed her income by \$1,104.00 per month. Supplemental Appendix at 140.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner, by counsel, Randall W. Galford, has received the Respondent's brief in which the Respondent requests oral argument; and the Petitioner has no objection to oral argument pursuant to Rule 19 or Rule 20 of the Rules of Appellate Procedure.

ARGUMENT

1. **Whether the Circuit Court was correct in reducing the former wife's spousal support award to \$500.00 a month for eighteen (18) months.**

The Circuit Court failed to apply the correct standard of review to the Family Court's finding that the former wife should be awarded \$1,000.00 per month in permanent alimony. 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 Respondent would have the Court make the length of the marriage the dispositive factor in determining alimony, with some attention paid to the things a party might forego during the marriage. It is our position that each of the factors for determining alimony set forth in West Virginia Code §48-6-301(b) may be considered. The Family Court's Order sets forth each of the factors contained in the statute, and states how each was considered by the Family Court. Supplemental Appendix at 138 - 145.

The Circuit Court did not apply the abuse of discretion standard to the Family Court's findings and conclusions. Instead, the Circuit Court substituted its opinion for that of the Family Court in deciding to award some spousal support, but less than the Family Court. The Circuit Court ignored that the former husband began the marriage while making around minimum wage, lived in the house owned by the former wife prior to marriage, and that the former wife used the \$1,900.00 per month she earned to pay the utilities and most of the living expenses. The former husband used the opportunity to apply for his veterans's disability benefits for PTSD resulting from military service thirty-six years previously, and to apply for social security benefits.

After the former husband obtained his veteran's benefits and social security benefits, he moved out and in a few months filed for divorce. During the marriage, in 2007, the former wife began suffering severe flare ups of her bipolar disorder, contracted fibromyalgia, and developed other psychological problems which resulted in suicide attempts and three (3) hospitalizations. Supplemental Appendix at 253. She was forced to cease working, and when the matter came to a hearing in 2009, social security determined she had become disabled on December 1, 2007.

During the marriage, and at the time of the divorce hearing the former wife's expenses were about \$1,884.00 per month. Her income decreased from \$1,900.00 per month during the marriage to \$780.00 per month at the time of the divorce. As a result of the benefits the former husband obtained during the marriage, his money increased from about minimum wage to \$4,366.66 per month. Supplemental Appendix at 140. The money he receives monthly exceeds his living expenses by \$1,062.28. Supplemental Appendix at 140.

The Circuit Court did not explain how it weighed each of the statutory factors in arriving at its determination of the proper amount of alimony, and the Circuit Court's

decision does not find which particularity that the Family Court abused its discretion in applying the statutory factors to the facts of the case. The Family Court considered the statutory factors and the equity of the case including his income and her need, and did not abuse its discretion in granting the former spouse \$1,000.00 per month in spousal support.

2. **Whether the Circuit Court was correct in finding that the Family Court Judge had not considered the totality of the circumstances.**

The Family Court considered and weighed each of the statutory factors set forth in West Virginia Code §48-6-301(b). The types of disability and the dates disabled are not directly addressed as being separate factors in the alimony determination, but were considered and stated by the Family Court. The former husband came into the marriage never having been granted veteran's benefits or found disabled due to his military service in Vietnam, and he was working making minimum wage. The former husband must have had a worsening of his PTSD during the marriage when he quit working and obtained both veteran's disability benefits and social security disability benefits. The former wife provided him the house she had owned before marriage, paid the house payment, and paid utility bills during this time.

In 2007, the former wife developed fibromyalgia and muscle and joint pain. The pain she experienced together with the stress caused by providing for the former husband exacerbated her bipolar condition. She was hospitalized once involuntarily by the former husband. There were suicide attempts. She was forced to quit working and developed agoraphobia.

During this time, the former husband was awarded veteran's disability benefits of \$2,823.00 per month and \$1,451.00 of social security benefits per month. He decided to use

his benefits for himself, and moved out. The former wife was left with no income and only such amounts as the former husband chose to give her until she was granted her social security disability benefits in 2009. In 2009, she was granted social security disability benefits effective back to December 1, 2007, the date social security determined she had become disabled. She receives \$780.00 per month in social security benefits while the former husband receives \$1,451.00 in social security benefits in addition to a pension of \$92.66 per month, and veteran's disability benefits of \$2,823.00 per month. Her living expenses have remained about \$1,884.00 per month, and his living expenses are \$3,304.38, or \$1,062.28 less than the total amount he receives monthly.

The Family Court heard the testimony about all the circumstances involved during the hearing, and the Family Court considered the totality of the circumstances in addressing each statutory factor and setting the amount of alimony.

3. Whether the Circuit Court was correct in finding that the Family Court Judge erred in not considering the underpinnings of the particular disabilities of the parties.

The Family Court considered the types of disability awards and the times they were received by the parties, even though there is no statutory guidance on how these are to be considered. The Circuit Court should have reviewed the Family Court's findings of fact under a clearly erroneous standard. Robinson v. Coppala, supra. There is no finding by the Circuit Court that the Family Court's findings about the parties disability awards are clearly erroneous.

The Circuit Court does not appear to mean that the facts underlying or underpinning the disability awards were not properly determined by the Family Court. Instead, the Circuit

Court appears to mean that the money received monthly for veteran's disability benefits should be considered differently from social security disability income, or that a service connected disability for a Vietnam veteran obtained during the marriage is a more severe disability than the former wife's disabilities.

The former wife suffered from depression and bipolar disorder prior to marriage, but managed to work as a teacher. The former husband had sustained psychological trauma in his military service in Vietnam prior to the marriage. The former husband's PTSD first prevented him from working during the marriage. He obtained both veteran's disability benefits and social security disability benefits during the marriage. The former wife developed fibromyalgia with attendant pain in 2007. For this and probably other reasons her depression and bipolar disorder became disabling. She was hospitalized three (3) times, but only applied for her social security disability benefits after separation, and was awarded them in 2009 effective back to December 1, 2007, a date prior to separation.

The former husband is not a vocational expert, but testified he thought the former wife could work without giving any examples of anything she had done that might equal working. Supplemental Appendix at 86. The former wife stated she was unable to work. There was no evidence that the former wife's fibromyalgia together with bipolar disorder, depression and resultant agoraphobia are less serious than the former husband's PTSD where he had worked for about thirty years after the events that precipitated the PTSD.

The issue becomes one of how the Courts should consider, or not consider, veteran's disability benefits in determining whether to award spousal support out of other income of a former husband. It is our position that veteran's disability benefits should be considered as a resource to a divorcing spouse who obtained these benefits during marriage in determining the amount of spousal support to award. Whether the IRS considers veteran's disability

benefits income should not be dispositive. The amount of income set forth on tax returns of divorcing parties who are self employed or partners in businesses involving depreciation is not dispositive of the amount that should be considered in setting spousal support.

Generally, alimony cannot be awarded out of veteran's disability benefits. See 38 U.S.C. § 1155. In the instant case, the award of alimony can be paid from the former husband's social security disability benefits and pension.

The minority rule appears to be that when a trial court considers the amount of veteran's disability benefits in determining alimony, it is essentially awarding the other spouse a portion of those veteran's disability benefits. See Billeck v. Billeck, 777 So. 2d 105 (Ala. 2000). The majority rule appears to be that it would not be equitable to fail to consider veteran's disability benefits in setting an award of alimony. 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).

The statute, West Virginia Code §48-6-301(b), permits and requires consideration of a party's resources in setting an amount of alimony. Both the Family Court, and the Circuit Court considered the former husband's veteran's disability benefits as a resource in determining alimony. Supplemental Appendix at 1-3. This is in accord with the majority of states.

The Family Court and the Circuit Court both considered the underpinnings of the parties' disability awards in setting an amount of alimony. The two courts, however,

awarded different weight to some of the factors. The Circuit Court erred in making an independent determination of the appropriate amount of alimony, instead of reviewing the Family Court's decision under the standard set forth in Robinson v. Coppala, 212 W. Va. 632, 575 S. E. 2d 242 (2002).

The Family Court considered the totality of the circumstances and addressed in its order each statutory factor. The Family Court considered the extent of disability of each party and found both permanently disabled. The Family Court considered the type of disability of the parties, and analyzed the former husband's veteran's disability benefits by considering them as a resource to him. The Family Court considered the totality of the circumstances and the underpinnings of the disability awards, and the Family Court's decision and award of alimony should be reinstated.

4. Whether the Circuit Court was correct in finding the decision of the Family Court's permanent spousal support award of One Thousand Dollars (\$1,000.00) per month was arbitrary and capricious based upon a four (4) year marriage.

It is the Petitioner's position that the Family Court considered and set forth in its order each statutory factor contained in West Virginia Code §48-6-301(b). The Family Court did not make the length of marriage an initial litmus test, or the dispositive factor in determining alimony. Where the former wife became disabled and suffered a drastic decrease in income during a short marriage while the former husband's monthly resources and income increased; it would not be equitable to make the length of marriage the dispositive factor in determining alimony, and the numerous factors set forth in the statute imply that in most cases one factor is not dispositive.

The Family Court was not arbitrary and capricious in considering all factors and not just the length of marriage in setting alimony. The Family Court properly considered that after meeting his living expenses of \$3,304.38 per month, the former husband had \$1,062.28 per month left over, and that the former wife had income of \$780.00 per month and expenses of \$1,884.00 per month. The \$1,000.00 in alimony awarded by the Family Court should be reinstated.

5. Whether the Circuit Court was correct in finding that 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.

The totality of the circumstances underpinning the particular disability awards in this case are adequately addressed in the Petitioner's original brief and in subsection 2 of this brief. The public policy considerations stem from the fact are that one of the former husband's disability awards is veteran's disability award.

The public policy about veteran's disability benefits is set forth in federal statutes, including 38 U.S.C. §1155. The majority of states have held that failure to consider veteran's disability benefits as a resource to the person receiving them would not be equitable. 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).

There are no special facts in the instant case which would suggest that the former husband's veteran's disability benefits should not be considered as a resource. The former husband worked prior to the marriage. He was awarded veteran's disability benefits based upon psychological trauma during service in Vietnam about thirty-five years prior to the marriage. He obtained his veteran's disability benefits during the marriage. During the marriage, the former husband lived in a house owned by the former wife prior to the marriage upon which she made the payments and paid the utility bills. After obtaining his social security benefits and veteran's disability benefits, the former husband moved out, separated and then filed divorce. These facts and circumstances do not support some special situation where the totality of the circumstances would require little alimony.

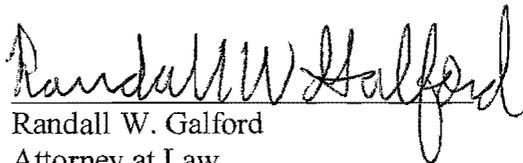
During the marriage the former wife had become disabled and her income decreased to \$780.00 per month while her expenses remained about \$1,884.00 per month. All of the \$1,000.00 per month in alimony granted by the Family Court can be paid out of the former husband's social security benefits and pension. The Family Court did not disregard the public policy underpinning veteran's disability benefits, and its ruling is not arbitrary or capricious where it is based upon the statutory factors of West Virginia Code §48-6-301(b) for determining alimony.

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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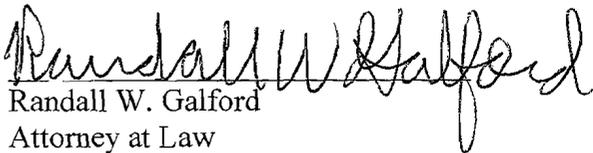
JOSEPH L. ZICKEFOOSE,

PETITIONER BELOW,
RESPONDENT.

CERTIFICATE OF SERVICE

I, Randall W. Galford, do hereby certify that I have served the foregoing Petitioner's Reply Brief upon counsel of record by United States Mail, postage prepaid, on this the 15th day of June, 2011, to:

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