IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA

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

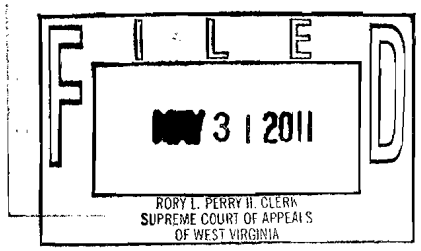
IN RE: THE MARRIAGE OF:

MARGARET ZICKEFOOSE, RESPONDENT BELOW, PETITIONER,

vs.

JOSEPH ZICKEFOOSE, PETITIONER BELOW, RESPONDENT.

RESPONDENT'S BRIEF



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10 U.S.C.§1408(e)(1);

BRIEF STATEMENT OF THE CASE

The parties were married on May 1, 2004 in Kanawha County, West Virginia and separated in April 2008. (Supplemental Appendix at 17, 48 and 178). The former wife admits that the former husband left the marital home in April 2008 but asserts that the parties' had relations once and the separation date should be considered May 22, 2009. (Supplemental Appendix at 17 and 138). The former husband alleged 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. (Supplemental Appendix at 49). The parties had no children and the former wife did not assist the former husband to improve his educational or employment status. (Supplemental Appendix at 48, 65, 66 and 139).

Both parties were deemed disabled from the Social Security Administration. (Supplemental Appendix at 140). The former wife was deemed disabled by the Social Security Administration in November 2009, four months after the former husband filed for divorce and a year and seven months after the parties separated. (Supplemental Appendix at 250 and 254). The former husband was also deemed disabled by the Veteran's Administration as a result of his service in Vietnam in 1967 and 1968. (Supplemental Appendix at 60, 224, 225 and 268). The former husband received $4,366.66 per month from his Veteran's Disability benefits, Social Security Disability benefits and pension that has been reduced to $4166.66 since the entry of the divorce order. (Supplemental Appendix at 9, 60, 268 and 269). The former wife receives $780.00 per month in Social Security Disability benefits for a mental disability. (Supplemental Appendix at 22 and 100).

The Family Court Judge ordered the divorce on the grounds of irreconcilable differences and ordered the former husband to pay the former wife $1,000.00 every month in permanent spousal support. (Supplemental Appendix at 51 and 144). Based upon this permanent spousal support award the former wife would have stood to have received Three Hundred Eighty Five Thousand Dollars $385,000.00 from the former husband by the time she turned eighty (80) years old. (Supplemental Appendix at 208 and 213). The former wife had separate and premarital assets while the former husband had no significant equity in his possessions. (Supplemental Appendix at 52, 53, and 104-106). There were no marital assets to divide. (Supplemental Appendix at 52 and 53).

A Motion to Reconsider was Heard before the Family Court Judge and denied and the award of spousal support was appealed to the Circuit Court. (Supplemental Appendix at 146-159, 169-172 and 175-192). The Circuit Court Judge set the Family Court's spousal support award aside and awarded the former wife Temporary Spousal Support of $500.00 a month for eighteen months. (Supplemental Appendix at 3).

PROCEDURAL HISTORY

The parties in this action were duly and legally married May 1, 2004 and separated in April 2008. (Supplemental Appendix at 17, 48 and 178). Joseph L. Zickefoose (previously the Petitioner, currently the Respondent, and herein referred to as the Respondent or the former husband) filed a Verified Petition for Divorce against Margaret P. Zickefoose (herein referred to as the former wife) on July 13, 2009. (Supplemental Appendix at 4). The former wife, Margaret P. Zickefoose filed a Response and Counterclaim for Divorce. (Supplemental Appendix at 16). The former husband filed a Response to the Counterclaim requesting that the former wife be denied alimony and that a Divorce be granted on the grounds of the Respondent's mental cruelty,

drunkenness and any such other and further relief as the Court deemed just and fair. (Supplemental Appendix at 35). In November 2009, the former wife was awarded her disability benefits from the Social Security Administration. (Supplemental Appendix at 255 and 256).

A Final Hearing was held on January 28, 2010 for which attorneys for both parties filed proposed Findings of Facts and Conclusions of Law and Final Order of the Court in a timely manner, three (3) weeks per the Court's Order, after the Final Hearing. (Supplemental Appendix Record II and Supplemental Appendix at 138). On June 3, 2010, five (5) months after the Final Hearing, the Court signed the former wife's Proposed Order with only several hand-written words altered. (Supplemental Appendix at 138-145).

In June 2010, the former husband filed a Motion for Reconsideration, within thirty (30) days of entry of the Final Order. (Supplemental Appendix at 146). On July 30, 2010, the Court heard the former husband's Motion to Reconsider. (Supplemental Appendix at 146-159). Counsel for the former wife prepared an Order Denying the Motion for Reconsideration and counsel for the former husband filed Objections and prepared a separate proposed Order Denying the Motion for Reconsideration. (Supplemental Appendix at 169 and 173). The Court again entered an unaltered copy of the former wife's Order Denying the Motion for Reconsideration on September 29, 2010. (Supplemental Appendix at 169-172). This Order was entered without consideration by the Court insofar as the order didn't reflect the court's findings. (Supplemental Appendix at 171).

The Order Denying the Motion for Reconsideration awarded the former husband, Joseph Zickefoose, one hundred dollars per month in spousal support and denied the former wife's Motion to Reconsider even though the former wife did not file a Motion to Reconsider.

(Supplemental Appendix at 171). The Order further granted the former wife forty-five days (45) from entry of this Order to appeal. (Supplemental Appendix at 171). The former husband filed a timely appeal on October 29, 2010 to the Circuit Court of Kanawha County West Virginia and the former wife filed her response on December 6, 2010. (Supplemental Appendix at 175-193). The case was heard by the Honorable Judge Kaufman and Final Order entered on December 13, 2010 setting the Family Court's Order aside and awarding the former wife $500.00 per month spousal support for eighteen (18) months. (Supplemental Appendix at 3 and 193-237).

STATEMENT OF THE FACTS

The former husband served his country in Vietnam, was a hard worker and worked consistently all his life. (Supplemental Appendix at 224 and 225). He served in Vietnam between 1967 and 1968 in a place called Donghua in the Marine Corps. (Supplemental Appendix at 224 and 225). Sometime after serving his country, the former husband spent time in counseling and group as a result of his service in Vietnam and was diagnosed with post-traumatic stress disorder and went to a compensation and pension hearing and won his disability benefits. (Supplemental Appendix at 60 and 225). The former husband was disabled as a result of his service in the military that occurred thirty six (36) years prior to the parties' marriage. (Supplemental Appendix at 224 and 225). The former husband also received Social Security Disability Benefits for the same reason. (Supplemental Appendix 140 and 269). These Social Security Disability benefits are awarded based upon the amount that the claimant has paid into the fund throughout his lifetime. (Supplemental Appendix at 260). The former husband worked constantly and paid into Social Security for over thirty six years (36) years and as a result, he was entitled to the Social Security Disability benefits that he was awarded as a result of his

previous employment when he was found disabled by Social Security. (Supplemental Appendix at 269).

Both parties were previously married and the parties had no children from this marriage. (Supplemental Appendix at 48 and 139). The former husband is sixty-four (64) years old. The former husband contributed to the marital expenses and worked full-time during the marriage at DACCO Transmission earning eight dollars ($8.00) per hour until December 2007, when he was deemed disabled by the Veteran's Administration. (Supplemental Appendix at 54 and 288). After December 2007, the Petitioner continued to contribute to the parties' household expenses with his Veteran's Disability check. (Supplemental Appendix at 61). The Petitioner moved out of the marital home in April 2008 and presented evidence to the court that he got a loan to purchase another home with a mortgage in July 2008, where he resided. (Supplemental Appendix at 47, 56, 57 and 95). The former wife admits that the former husband moved out of the marital home in April 2008. (Supplemental Appendix at 47 and 95). Even after the former husband left the marital home, he continued to assist the former wife financially in an attempt to rehabilitate her so that she would be self sufficient. (Supplemental Appendix at 57-59 and 272-284).

The former wife is forty-eight (48) years old and has had a drinking problem during the parties' marriage. (Supplemental Appendix at 52, 92 and 93). The former wife didn't work enough during her lifetime to accumulate significant social security benefits even though she has skills and a college education, as she always had someone to help support her including her mother. (Supplemental Appendix at 27 and 53). The former wife only worked twenty-six months during their forty-seven month marriage, for which she made a maximum of $1,900.00 per month. (Supplemental Appendix at 84, 107, 209 and 210). The former wife did not

contribute in any way to the former husband's education or support the former husband during the length of their marriage. (Supplemental Appendix at 143). The former wife applied for and was awarded Social Security Disability benefits for a mental diagnosis of agoraphobia after the former husband was forced out of the marital home. (Supplemental Appendix 209). Due to the former wife's employment history and because she didn't make a significant contribution to social security, she draws a mere $780.00 per month in Social Security Disability benefits although she has the option to work part time while on disability and earn an additional $1,000.00 per month without losing her Social Security Disability benefits. (Supplemental Appendix at 22 and 27).

The former wife was at fault for the parties' divorce. During the Hearings, the Petitioner's counsel argued and the former husband testified that the domestic violence endured at the hands of the Respondent was the reason that he was forced from the marital home and subsequently filed for divorce. (Supplemental Appendix at 49, 51 and 52). According to the former husband, the former wife was always on his back about something and that she intimidated him, made him feel inferior as if he was just some dumb guy. She was physically and verbally abusive to the former husband. The former wife poured beer on the former husband and in the place he was going to sleep. (Supplemental Appendix at 49). She physically hit and attacked him and called his biracial grandchildren "niglets." (Supplemental Appendix at 49 and 52). The former wife would just about every day do something crazy to make the former husband feel dumb. The former wife threw the former husband out of the house numerous times and he tried to reconcile the marriage but it only got worse so the former husband decided to leave and when he did the former wife got drunk on whiskey and physically attacked the former husband. (Supplemental Appendix at 51 and 52). The former wife would get drunk at the bar

therefore the former husband would have to pick her up and drive her home. The former husband was unable to tolerate the domestic violence perpetrated against him. (Supplemental Appendix at 49-52).

The former husband provided support to the former wife in the amount of $7,500.00 to $10,000.00 from the time of his departure from the marital home until he filed for divorce in November 2009. (Supplemental Appendix at 58 and 59). At the time of the divorce hearing, the former husband's assets and bank account was approximately $2,000.00 for which he had bills to pay out of that account. (Supplemental Appendix at 60). The former husband purchased a home and vehicle since his former vehicle was wrecked and owned on both of them with no or little equity. (Supplemental Appendix at 285-287). The former husband had no pension plan except a pension that was inherited from his father for which he currently receives $92.66 per month and has had to help his daughter with her rent as she was having financial difficulty. Furthermore, the former husband testified that he paid off the parties' debts. (Supplemental Appendix at 53). The former wife did nothing to increase the parties' standard of living during the marriage and the former wife did not contribute to the former husband's education. The former wife had a Bachelors degree but the former husband had no college education. (Supplemental Appendix at 27).

The former wife had problems with her finances even prior to the parties' marriage. When the parties met, the former wife was not employed and relied upon her mother to support her; she continued to receive assistance from her mother after the marriage. (Supplemental Appendix at 53). The former wife was going to receive a back award from social security disability and owned a vehicle outright, owned a home that she had been living in for six years that she did not know and did not disclose the equity that she had in the three bedroom home, she

had a CD, stood to inherit from her mother, owned Rite Aid stocks and had a pension or retirement plan from her previous husband that she was not sure if she could collect on at the time of the hearing. (Supplemental Appendix at 104-106). During the hearing, the former wife testified that she only wanted temporary support. (Supplemental Appendix at 108).

SUMMARY OF ARGUMENT

The Circuit Court properly reversed the Family Court's award of permanent alimony to the former wife of $1,000.00 per month and awarded $500.00 per month for eighteen (18) months instead. The Circuit Court found that alimony should not be awarded out of the Veterans Benefits absent certain limited circumstances not applicable to the instant case. (Supplemental Appendix at 2). The Circuit Court stated in its opinion "Questions relating to alimony are within the discretion of the court unless it appears 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." (Supplemental Appendix at 3). The Circuit Court ruled that "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 a four year marriage." (Supplemental Appendix at 3).

The Circuit Court appropriately addressed the length of marriage, the parties disability, the financial needs of the parties, the present employment of the parties, monthly disability awards, fault, and factors contained within West Virginia Code §48-6-301 (b)(20). These factors addressed in the Circuit Court's Order were the most relevant factors to the instant case and

sufficient to justify the Circuit Court's determination that the spousal support award ordered by the Family Law Judge was arbitrary and capricious and other factors were not mentioned as they were unnecessary in determining the award of spousal support, insignificant or did not apply.

In reversing the Family Court's decision, the Circuit Court indicated that it was not an abuse of discretion to consider the former husband's Veterans Disability Benefits unless the Family Court's decision was arbitrary and capricious and the Circuit Court found that the Family Court's decision was arbitrary and capricious.

"The decision to grant or deny alimony is reviewed by this Court for an abuse of discretion. Although discretion gives the family law master a range of choices, it is not without limit. An abuse of discretion occurs in three principal ways: (1) when a relevant factor that should have been given significant weight is not considered; (2) when all proper factors, and no improper ones, are considered, but the family law master in weighing those factors commits a clear error of judgment; and (3) when the family law master fails to exercise any discretion at all in issuing the order." Banker v. Banker, 196 W.Va. 535, 474 S.E.2d 465 (W.Va. 1996).

1) A relevant factor that should have been given significant weight by the Family Law Judge was not considered. The Family Court ordered a permanent spousal support award of $1000.00 per month. The Circuit Court appropriately considered the factor and set the Family Law Judge's order aside.

In the instant case the Family Law Judge's permanent alimony award to the former wife was arbitrary and capricious and constituted an abuse of discretion as she failed to consider the relevant factor that should have been given significant weight: the underpinnings of the particular disability awards in this case and that the former husband should be entitled to his Veterans Disability benefits because his disability stemmed from his service in Vietnam and his Social Security disability benefits were awarded for that same reason, Post Traumatic Stress

Syndrome. The Family Court Judge also failed to consider any future needs of the former husband as a result of his disability. (Supplemental Appendix at 205-237).

2) Even if the Family Law Judge considered all proper factors, and no improper ones are considered, the Family Law Judge weighed those factors incorrectly and committed a clear error of judgment in ordering a $1,000.00 monthly spousal support award that the Circuit Court appropriately set aside.

Even if this Court finds that the Family Law Judge considered all proper factors, and no improper ones, the judgment made by the Family Law Judge in weighing those factors was in clear error. In the instant case, the only factor to support an award of alimony is the difference in the parties' monthly receipts. The Family Court improperly considered the difference in the parties' income and the Circuit Court appropriately weighed the spousal support factors. Spousal support is not to be awarded solely for the purpose of equalizing the income between spouses. Stone v. Stone, 200 W.Va. 15, 488 S.E.2d 15 (1997).

3) The Family Law Judge failed to exercise any discretion at all in issuing the spousal support order for $1000.00 per month and the Circuit Court correctly exercised its discretion in setting the Family Court's Order aside.

Furthermore, it could be argued that the Family Law Judge failed to exercise any discretion at all in issuing the spousal support order. Even if the Court determines that the former wife was not at fault for her actions leading up to the divorce, she did nothing and made no sacrifices to justify such an enormous award of spousal support. "As a general rule, a significant alimony award is more appropriate after a long marriage than after a short one." Bridgeman v. Bridgeman, 182 W.Va. 677, 680, 391 S.E.2d 367, 370. In long marriages, it often happens that one party foregoes education and employment, in effect permanently, in order to support the other's career and the couple's children. In short marriages that produce no children, conversely, each party's sacrifices tend to be short-lived and easily remedied. ID.

Finally, the Family Court's enormous permanent spousal support award for a brief marriage is shocking, punitive, is not consistent with other spousal support awards, not supported by the code, against public policy, and will merely act to discourage the future union of man and wife and institute excessive litigation. Considering the facts of the marriage as indicated above, no individual would enter into a marriage knowing that they would be subject to such an excessive spousal support award. Further, such an award for this short marriage violates the former husband's due process rights, is a windfall to the former wife and serves as a reward and unjust enrichment of the former wife for her drinking and physical and verbal abuse of the former husband.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent, by counsel, Michelle Johnson, believes that oral argument is appropriate pursuant to Rule (19) or Rule (20) of the Rules of Appellate Procedure.

Oral argument is appropriate pursuant to Rule 19 of the Rules of Appellate Procedure as the Family Court's Order was against the weight of the evidence; Oral argument is appropriate pursuant to Rule 20 of the Rules of Appellate Procedure as the Family Court's Order involves a case of first impression, Veterans Disability Benefits; involves an issue of fundamental public importance; arbitrary awards of spousal support and involves inconsistencies and conflicts among the decisions of lower tribunals in awarding spousal support.

STANDARD OF REVIEW

Pursuant to West Virginia Code §51-2A-14, the Circuit Court shall review findings of fact made by the Family Court Judge under the clearly erroneous standard and shall review the application of law to the facts under an abuse of discretion standard. The Supreme Court's

standard of review from an appeal from a Circuit Court that reviewed a Family Court's Final Order, or refused to consider a Petition for Appeal to review a Family Court's Final Order, is the same. "In reviewing a Final Order entered by a Circuit Court Judge upon a review of, or upon a refusal to review, a final order of a Family Court Judge, we review the findings of fact made by the Family Court Judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo.*" *Carr v. Hancock*, 216 W.Va. 474, 476, 607 S.E.2d 803, 805 (2004) Findings of fact not supported by competent evidence are to be reversed, conclusions of law are reviewed de novo, and the lower Court's discretion is evaluated for potential abuse. Mitchell v. Mitchell, 205 W.Va. 203, 517 S.E.2d 300 (1999): see also Burnside v. Burnside, 194 W.Va. 263, 460 S.E.2d 264. Questions of law and fact that require the consideration of legal concept and involve the exercise of judgment about the values underlying legal principles are reviewed de novo. Burnside v. Burnside, 194 W.Va. 263, 460 S.E.2d 264. Further, when conclusions of law rendered by the lower court are not accorded specific weight, and should be reversed when incorrect. Foster v. Foster, 196 W.Va. 341, 472 S.E.2d 678 (1996).

ARGUMENT

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

"As a general rule, a significant alimony award is more appropriate after a long marriage than after a short one." Bridgeman v. Bridgeman, 182 W.Va. 677, 680, 391 S.E.2d 367, 370. In long marriages, it often happens that one party foregoes education and employment, in effect permanently, in order to support the other's career and the couple's children. In short marriages that produce no children, conversely, each party's sacrifices tend to be short-lived and easily

remedied. ID. Furthermore, an award of spousal support is not to be awarded solely for the purpose of equalizing the income between spouses. Stone v. Stone, 200 W.Va. 15, 488 S.E.2d 15 (1997). "The decision to grant or deny alimony is reviewed by this Court for an abuse of discretion. Although discretion gives the family law master a range of choices, it is not without limit. An abuse of discretion occurs in three principal ways: (1) when a relevant factor that should have been given significant weight is not considered; (2) when all proper factors, and no improper ones, are considered, but the family law master in weighing those factors commits a clear error of judgment; and (3) when the family law master fails to exercise any discretion at all in issuing the order." Banker v. Banker, 196 W.Va. 535, 474 S.E.2d 465 (1996).

Here, there was no testimony that the former wife gave up anything to enter into the marriage or during the marriage; the former wife sacrificed nothing. There was no testimony that the former wife received spousal support from a husband prior to Mr. Zickafoose, nor that she moved or gave up a career in order to marry and remain married to the former husband and there were no children born of the marriage. In the case at hand, the former wife's maximum earnings while working were $1,900.00 per month. She is currently receiving Social security benefits of $780.00 per month. The Order signed by the family Law Judge awarding the former wife one thousand dollars $1,000.00 every month in spousal support, would provide the former wife with only one hundred and twenty dollars $120.00 less per month than her top income as a music teacher. (Supplemental Appendix at 144). This spousal support award is so large that it is unlikely that the former wife would ever even attempt to return to work. Should the former wife live to the age of eighty (80) years, **the former husband would have paid the former wife a total of Three Hundred Eighty-Five Thousand Dollars ($385,000.00)** as the result of a

marriage where the parties were only together **forty seven (47) months** and for which her contribution was minimal, if anything at all.

The Circuit Court Judge appropriately set aside the Family Law Judge's Order as the Family Law Judge abused her discretion in ordering the enormous spousal support award based upon a marriage that lasted for less than four years.

The former wife argues that the Circuit Court did not correctly apply an abuse of discretion standard in reviewing the Family Court's Order and cites Robinson v. Coppola, 212 W.Va. 632, 575 S.E. 2d 242 (2002) in support of her argument.

In Robinson, the husband appealed both the award of spousal support in the amount of $1,000.00 per month for thirty-six (36) months and the Family Law Master's requirement for him to maintain life insurance for the benefit of the four (4) year old minor child. The wife, Ms. Coppola, had an annual average income of $34,080.00 and the husband, Mr. Robinson, had an annual average income of $177,230.00. The Circuit Court reversed the Family Law Master's decision and determined that there should be no award of spousal support and that Mr. Robinson didn't have to provide any life insurance for the minor child. The Circuit reasoned that he thought Mrs. Coppola could get a better paying job because she had an advanced degree and was healthy even though she maintained her job as a clerk to allow her adequate time to care for the minor child. Clearly, the Circuit Court's review of the Robinson case is much different than the case at bar. In the Robinson case, the Circuit Court interjected facts and his own opinion that resulted in an unjust resolution of the issues. In the instant case, the Circuit Court considered factors available to the Family Law Judge but were decided incorrectly and therefore deemed it necessary to set the Family Law Judge's Order aside and issue an award of spousal support that was fair and just to both parties.

2. **The Circuit Court was correct in finding that the Family Court Judge had not considered the totality of the circumstances insofar as the Order drafted by the former wife's attorney and signed by the Family Court Judge was erroneous.**

In the case at bar, the Family Court Judge only considered the difference in the parties' monthly income and that the former wife was deemed disabled by the Social Security Administration. The Family Court Judge did not consider the fact that the former wife was awarded her disability four months after the former husband filed for divorce nor did she consider that the parties had been separated for approximately seventeen months prior to social security deeming that she had a mental disorder. (Supplemental Appendix at 102 and 103). Furthermore, the Family Court Judge did not consider the factors pursuant to West Virginia Code §48-6-301(b) or the fault of the former wife in making the spousal support award. The Family Law Judge failed to consider that the former husband had a vested entitlement to his disability benefits. (Supplemental Appendix at 229 -234).

Here, the Circuit Court found that the Family Court Judge disregarded the totality of the circumstances underpinning the particular disability awards in this case and then considered these awards in an equitable way in a lifetime spousal support award for a four (4) year marriage. (Supplemental Appendix at 3). The former wife argues that the Circuit Court did not make sufficient findings to the statutory factors that are applicable and appropriate to the case. However, Banker v. Banker 196 W.Va. 535, 474 S.E. 2d 465 (1996) does not require that each statutory factor be considered and the Circuit Court did address the length of marriage, the parties disability, the financial needs of the parties, the present employment of the parties, monthly disability awards, fault, and factors contained within West Virginia Code §48-6-301 (b)(20). These factors addressed were sufficient to determine that the decision of the Family Law Judge was arbitrary and capricious and other factors were insignificant or did not apply.

The Circuit Court stated that the former husband was obviously disabled as a veteran when he came into the marriage and the former wife wasn't and if there is any vested or entitlement interest that goes with the disability, he would have that before, during and after. The Court indicated that if there is an entitlement interest in the former wife's disability benefits, she definitely has that. (Supplemental Appendix at 219). The Circuit Court decided that you only have $1,543.66 that he would circumvent as being legitimate to have discretion applied to it and that the Family Court Judge's award was based entirely in equity so somewhere along the line she must have felt One Thousand Dollars ($1,000.00) a month was fair. (Supplemental Appendix at 220 and 221).

The Circuit Court Judge reasoned that coming out of the marriage both parties were disabled and going into it the former husband was disabled and that it was not fair to take one disability benefit to pay for somebody else's disability benefits when they were independently decided as being needed for the welfare of the individuals involved. (Supplemental Appendix at 221 and 226). He further articulated that from a humanitarian standpoint, if you took from him to give to her, she would have more money for her own mental disorder and he would have less for his out of the $1,543.00 social security benefits that he receives. (Supplemental Appendix at 224).

Moreover, he further asserted that you start with a mental disability that both of them have in a very short marriage, which no one including doctors have the cure for and nor can tell you beyond a reasonable degree of medical certainty when it is going to end. (Supplemental Appendix at 230). The Court further reasoned that you have a Family Law Judge applying one thousand dollars a month for the rest of their life in this marriage to suggest that it meets all of the tests on both equitable and legal grounds. (Supplemental Appendix at 231 and 232).

When the discretion is used in an area that's totally discretionary to begin with, and when these figures are sitting in front of you, that they should be reviewed. (Supplemental Appendix at 233). The Court further indicated that the guy went over there with bombs all around him in Vietnam; therefore, he deserves some consideration the rest of his life when forty years later he is diagnosed with post-traumatic stress syndrome. The Circuit Court Judge was giving equitable consideration to his benefits. (Supplemental Appendix at 234). The Circuit Court said that public policy would not be sympathetic to taking the former husband's disability benefits away from him and giving them to the former wife leaving the former husband with a marginal income based on a four year marriage and someone that becomes mentally disabled during that marriage. (Supplemental Appendix at 234).

Pursuant to West Virginia Code §48-6-301 (b) the Court shall consider the following factors in determining the amount of spousal support…., if any.

> (a) In cases where the parties to an action commenced under the provisions of this article have not executed a separation agreement, or have executed an agreement which is incomplete or insufficient to resolve the outstanding issues between the parties, or where the court finds the separation agreement of the parties not to be fair and reasonable or clear and unambiguous, the court shall proceed to resolve the issues outstanding between the parties.
>
> (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;
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> (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 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.

A review of the factors the Court should consider in determining an award of spousal support pursuant to West Virginia Code §48-6- 301(b), as indicated infra, in light of the fact and circumstances of the parties' marriage, does not justify the Family Court's permanent spousal support award as further explained below:

A. The spousal support factors support a spousal support award of $500.00 per month for 18 months, not $1,000.00 per month permanent alimony. The parties' marriage was short.

The parties were married on May 1, 2004 and separated in April, 2008, after the former wife physically attacked the former husband. (Supplemental Appendix at 17, 48 and 138). A Petition for Divorce was filed on July 13, 2009, and although the former wife alleges that the parties last live together and had sexual relations on May 22, 2009, the former husband denied these relations and provided proof to the court that he moved out of the marital residence in April 2008 and purchased a separate home in July 2008. (Supplemental Appendix at 4).

B. The spousal support factors support a spousal support award of $500.00 per month for 18 months, not $1,000.00 per month permanent alimony. The parties' actually lived together as husband and wife for only a short time.

The parties actually lived together as husband and wife for almost four (4) years or forty-seven months from May, 2004 until April, 2008. (Supplemental Appendix at 47).

C. The spousal support factors support a spousal support award of $500.00 per month for 18 months, not $1000.00 per month permanent alimony considering the parties present monthly and recurring disability award, the income earning abilities of each of the parties based upon their education, training, employment skills, work experience, length of absence from the job market and custodial responsibilities for children.

The former husband received $4,366.66 every month of which $1,451.00 is from Social Security benefits, $2,823.00 is from Veteran's benefits and $92.66 is inherited from his father's retirement fund. (Supplemental Appendix at 9). The former husband testified during the Circuit Court hearing that his Veterans benefits have been reduced by $200.00 leaving him with a current monthly benefit and retirement amount of $4,166.66. The Respondent receives $780.00 per month in Social Security Disability benefits. (Supplemental Appendix at 22 and 100).

Here, the former wife has significant income earning abilities insofar as she has a Bachelor's Degree, was employed as a teacher and has other skills in which she could rely upon. Although her employment history has been spotty, according to the former husband's testimony and the former wife's minimal disability benefits, she is educated and capable of making additional earnings at least on a part-time basis. (Supplemental Appendix at 27). The former wife had no custodial responsibilities for children and her absence from the job market during the parties' marriage was merely by her choice. The former husband had no significant educational training or job skills; however, the former husband maintained steady employment until he was deemed disabled in December 2007 at the age of sixty-one.

D. The spousal support factors support a spousal support award of $500.00 per month for 18 months, not $1,000.00 per month permanent alimony considering the ages and the physical, mental and emotional condition of each party.

The former wife is fifteen (15) years younger than the former husband and under no apparent physical disability. The former husband has mental and emotional disabilities including Post-Traumatic Stress Syndrome. The former husband testified to the former wife's excessive drinking which led to her attack upon him and other bizarre behaviors for which the former wife was committed to a psychiatric Hospital in April 2008, the day that the former wife physically attacked the former husband, but she only remained hospitalized for four days. (Supplemental Appendix at 52).

E. The spousal support factors support a spousal support award of $500.00 per month for 18 months, not $1,000.00 per month permanent alimony considering the educational qualifications of each party.

The former wife has a Bachelor's Degree and marketable skills including computer skills whereas the former husband has no college education, technical training or other formal training.

F. The spousal support factors support a spousal support award of $500.00 per month for 18 months, not $1,000.00 per month permanent alimony considering that the Respondent did not forgo or postpone economic education or employment opportunities during the course of the marriage.

During the course of the marriage, the former husband worked consistently and full-time making approximately eight dollars ($8.00) an hour to provide for the parties' living expenses. (Supplemental Appendix at 288). However, the former wife only worked twenty-six (26) months during their marriage. The parties had no children and the former wife did not care for any children or make any sacrifices for the former husband during the course of the marriage.

G. The spousal support factors support a spousal support award of $500.00 per month for 18 months, not $1,000.00 per month permanent alimony considering that the standard of living established during the marriage was very modest.

The parties lived on their modest income of $1,386.00 of the former husband and $1,900.00 of the former wife until the former wife quit working around 2006 at which time the parties lived on the former husband's income and Veterans Disability Benefits that he received beginning in 2007. (Supplemental Appendix at 84, 140, 142 and 288). The former wife testified that she received financial assistance from her mother before and after the parties' marriage.

H. The spousal support factors support a spousal support award of $500.00 per month for 18 months, not $1,000.00 per month permanent alimony considering that neither party contributed financially to the education, training and vocational skills, career or earning capacity of the other party.

Neither party obtained a degree or training during the marriage. (Supplemental Appendix at 142). From April 2008 until the former husband filed for divorce, the former husband assisted the former wife and provided receipts to the Court in excess of $7,500.00 to assist the former wife financially to get back on her feet or otherwise to assist in education, training and employment. (Supplemental Appendix at 255-267).

I. The spousal support factors support a spousal support award of $500.00 per month for 18 months, not $1,000.00 per month permanent alimony considering the cost of educating minor children, the cost for providing health care for the parties and the minor children.

The parties had no children and had no expense in educating the children. The parties' children from prior marriages had since grown and both parties had and currently have Medicare. Further, since there were no children born of the marriage, there were no restrictions precluding the parties from obtaining employment outside of the home and both parties have been awarded social security benefits and are therefore insured through Medicare. (Supplemental Appendix at 142, 250 and 269).

J. The spousal support factors support a spousal support award of $500.00 per month for 18 months, not $1,000.00 per month permanent alimony considering the financial status of each party.

Although the Family Court considered the current monthly receipts by both the former husband and the former wife, the Family Court failed to consider that the former husband only has a small retirement fund inherited from his father, no assets and no significant equity. Whereas, the former wife has retirement funds, a vehicle that has been paid off, a CD, stocks, a home that she has been on for six years and the ability to make $1,000.00 per month while obtaining Social Security Disability benefits. Neither party had any legal obligations to support any other person or minor children or adult children with mental or physical disabilities. (Supplemental Appendix at 52 and 103-106).

K. The spousal support factors support a spousal support award of $500.00 per month for 18 months, not $1,000.00 per month permanent alimony considering the misconduct of the former wife that led to the deterioration of the marital relationship.

According to West Virginia Code §48-8-104, 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 affect of the fault or misconduct as a contributing factor to the deterioration of the marital relationship.

Here, the former husband left the marital home as a result of domestic violence. The former husband was physically and mentally abused by the former wife. Furthermore, the former wife threw beer over the former husband, the couch and his bed and it could be argued that these actions stem directly from the former wife's alcohol abuse. (Supplemental Appendix at 49-53).

3. 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 Circuit Court found that alimony should not be awarded out of the Veterans Benefits absent certain limited circumstances not applicable to the instant case. (Supplemental Appendix at 2).

The former husband was obviously disabled as a veteran when he came into the marriage and the former wife wasn't and if there is any vested or entitlement interest that goes with the disability, he would have that before, during and after and each party has an entitlement interest in their own disability benefits. (Supplemental Appendix at 219). The Circuit Court asserted that you only have $1,543.66 that he would circumvent as being legitimate to have discretion applied to it. (Supplemental Appendix at 220).

Moreover, the Circuit Court Judge determined that the Family Court Judge's award was based entirely in equity and that somewhere along the line she must have felt one thousand dollars a month was fair but it was not fair to take one disability benefit to pay for somebody else's disability benefits when they were independently decided as being needed for the welfare of the individuals involved. (Supplemental Appendix at 221and 226). In addition, the Circuit Court reasoned that from a humanitarian standpoint if you took from him to give to her, she would have more money for her own mental disorder and he would have less for his out of the $1,543.00 social security disability benefits that he receives. (Supplemental Appendix at 226).

The Judge articulated that these parties started with a mental disability that both of them have in a very short marriage, which no one, not even doctors, have the cure for nor can they tell you beyond a reasonable degree of medical certainty when it is going to end and then you have a Family law Judge applying a thousand dollars a month for the rest of their life in this marriage to suggest that it meets all of the tests on both equitable and legal grounds. (Supplemental Appendix at 233).

Furthermore, the Circuit Court explained that he was giving equitable consideration to his benefits considering the former husband went over there with bombs all around him in Vietnam,

therefore he deserves some consideration for the rest of his life when forty years later he is diagnosed with post-traumatic stress syndrome. (Supplemental Appendix at 234).

Finally, the Circuit Court explained that public policy would not be sympathetic to taking the former husband's disability benefits away from him and giving them to the former wife leaving the former husband with a marginal income based on a four (4) year marriage and someone that becomes mentally disabled during that marriage. (Supplemental Appendix at 234).

Several states and the Federal Government agree that Veteran's Disability Compensation should not be used for spousal support. Title 38, §5301 A of the United States Code, states:

> Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity.

Furthermore, the Internal Revenue Service does not consider disabled veterans' benefits as income; it should be payable only to the veteran and should not be considered in determining spousal support. Disability compensation awarded by the VA is excluded from Petitioner's gross income for income tax purposes and is not subject to allocation to a former spouse. IRS Publication 52, (2009), 10 USC § 408 and 38 USC §1155 .

The West Virginia Supreme Court of Appeals has not considered whether Veteran's disability benefits for the award of spousal support should be considered, however, it is clear that the Federal Government intended for the Veteran's disability benefits to remain with the veteran.

"When the Trial Court makes an alimony award based upon its consideration of the amount of Veteran's disability benefits, the Trial Court essentially is awarding the wife a portion of those Veteran's disability benefits; in doing so, the Trial Court is violating Federal Law." Billick v. Billick, 777 S0.2d 105,109 (2000); see also Mansell v. Mansell, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989). Even if the Trial Court does not order the husband directly to pay his Veteran's disability benefits to the wife, and just considers these disability benefits in awarding the spousal support obligation, the Trial Court still violates 10 U.S.C. §1408.

Texas legislatures have recognized that Veterans Disability Benefits and Social Security benefits should be excluded from monthly gross income in calculating spousal support. Texas Family Code Annotated § 8.055(c). Texas has also placed a cap of 20% for spousal support for the spouse's average monthly gross income. Texas Family Code Annotated § 8.055(a.).

4. **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.**

Questions relating to alimony are within the discretion of the court unless it appears 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." (Supplemental Appendix at 3). The Circuit Court ruled that "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 a four year marriage." (Supplemental Appendix at 3).

"The decision to grant or deny alimony is reviewed by this Court for an abuse of discretion. Although discretion gives the family law master a range of choices, it is not without limit. An abuse of discretion occurs in three principal ways: (1) when a relevant factor that should have been given significant weight is not considered; (2) when all proper factors, and no improper ones, are considered, but the family law master in weighing those factors commits a clear error of judgment; and (3) when the family law master fails to exercise any discretion at all in issuing the order." Banker v. Banker, 196 W.Va. 535 at 478, 474 S.E.2d 465 (W.Va. 1996).

A). A relevant factor that should have been given significant weight by the Family Law Judge was not considered.

In the instant case, the Family Law Judge's permanent alimony award to the former wife was arbitrary and capricious and constituted an abuse of discretion as she failed to consider the relevant factor that should have been given significant weight, the underpinnings of the particular disability awards in this case and that the former husband should be entitled to his Veterans Disability benefits because his disability stemmed from his service in Vietnam and his Social Security disability benefits were awarded for that same reason, Post Traumatic Stress Syndrome. (Supplemental Appendix at 60). The Family Court Judge also failed to consider any future needs of the former husband as a result of his disability.

B). When all proper factors and no improper ones are considered but incorrectly weighed clear error of judgment is committed.

Even if this Court finds that all proper factors, and no improper ones, are considered, the Family Law Judge's judgment in weighing those factors was in clear error.

The parties were married on May 1, 2004 in Kanawha County, West Virginia and separated in April 2008. (Supplemental Appendix at 17 and 138). The former wife admits that the former husband left the marital home in April 2008 but asserts that the parties' had relations once and the separation date should be considered May 22, 2009. (Supplemental Appendix at 17

and 138). The former husband alleged 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. (Supplemental Appendix at 49). The parties had no children and the former wife did not assist the former husband to improve his educational or employment status. (Supplemental Appendix at 48, 65, 66 and 139). Both parties were deemed disabled from the Social Security Administration. (Supplemental Appendix at 140). The former wife was deemed disabled by the Social Security Administration in November 2009, four months after the former husband filed for divorce and a year and seven months after the parties separated. (Supplemental Appendix at 250 and 254). The former husband was also deemed disabled by the Veteran's Administration as a result of his service in Vietnam in 1967 and 1968. (Supplemental Appendix at 60 and 268). The former husband received $4,366.66 per month from his Veteran's Disability benefits, Social Security Disability benefits and pension that has been reduced to $4,166.66 since the entry of the divorce order. (Supplemental Appendix at 9, 60, 140, 268 and 269). The former wife receives $780.00 per month in Social Security Disability benefits for a mental disability. (Supplemental Appendix 22 and 100).

The Family Court Judge ordered the divorce on the grounds of irreconcilable differences and ordered the former husband to pay the former wife $1,000.00 every month in permanent spousal support. (Supplemental Appendix at 51 and 144). Based upon this permanent spousal support award the former wife would have stood to have received three hundred and eighty five thousand dollars $385,000.00 from the former husband by the time she turns eighty (80) years old. (Supplemental Appendix at 208 and 213). In addition, the former wife had separate and premarital assets while the former husband had little to no equity in his possessions. (Supplemental Appendix at 52, 53 and 104-106). A Motion to Reconsider was Heard before the

Family Court Judge and denied and the award of spousal support was appealed to Circuit Court. (Supplemental Appendix at 171 and 175). The Circuit Court Judge set the Family Court's spousal support award aside and awarded the former wife Temporary Spousal Support of $500.00 a month for eighteen months. (Supplemental Appendix at 3).

In the instant case the only factor to support an award of alimony is the discrepancy of income and spousal support is not to be awarded solely for the purpose of equalizing the income between spouses. Stone v. Stone, 200 W.Va. 15, 488 S.E.2d 15 (1997).

C) The Family Law Judge failed to exercise any discretion at all in issuing the spousal support order for $1,000.00 per month.

Furthermore, it could be argued that the Family Law Judge failed to exercise any discretion at all in issuing the spousal support order. Even if the Court determines that the former wife was not at fault for her actions leading up to the divorce, she did nothing and made no sacrifices to justify such an enormous award of spousal support. "As a general rule, a significant alimony award is more appropriate after a long marriage than after a short one." Bridgeman v. Bridgeman, 182 W.Va. 677, 680, 391 S.E.2d 367, 370. In long marriages, it often happens that one party foregoes education and employment, in effect permanently, in order to support the other's career and the couple's children. In short marriages that produce no children, conversely, each party's sacrifices tend to be short-lived and easily remedied. ID.

That the cases cited and relied upon by the former husband and included within the Family Court's order prepared by counsel for the former wife are irrelevant and easily distinguished from the case at hand. The former wife relied upon Sloan v. Sloan, 632 S.E.2d 45 (W. Va. 2006), Porter v. Porter 212 W.Va. 682, 575 S.E.2d 292 (2002), and Banker v. Banker, 196 W. Va. 535, 474 S.E. 2d 465 (1996) in support of her request for permanent alimony.

In Sloan, this case involved a twenty-three year marriage where the wife raised the parties' children and was awarded temporary and permanent alimony. In Porter, this case involved parties who had been married several times to each other, the first marriage lasting over ten years. In Porter, the spouse raised the parties children, they were married for over ten years the first marriage and cohabitated almost all their adult lives. In Banker, this case involved a long marriage where the party awarded spousal support had raised the parties' five children, was a stay at-home wife who's wealthy, successful husband had an affair with his secretary.

Although the West Virginia Supreme Court of Appeal hasn't yet considered weather Veteran's Benefits are available for an award of spousal support, comparing the facts to that of the Smith case, this Court should uphold the Circuit Court's decision and deny the remedy requested by the former wife. In Smith v. Smith, 609 S.E.2d 844, 216 W.Va. 583 (2004), the Court found that the former wife was only entitled to $632.00 spousal support for five years when the parties were married for twenty four years, had three children, and there was a substantial difference in the parties' income.

5. 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.

In the case at bar, the former husband was deemed disabled as a result of the Vietnam War where he was in combat in 1967 and 1968. (Supplemental Appendix at 268). The parties didn't marry until 2004, and therefore, the former wife should have no entitlement to his disability benefits because she didn't suffer emotionally or physically as a result of the war. The former husband's entitlement to Veteran's disability benefits and Social Security Disability benefits is analogous to a personal injury settlement which is considered separate property. The former husband's Veteran's Disability benefits and Social Security Disability benefits should be

considered separate property pursuant to West Virginia Code § 48-1-237, the former husband's entitlement to Veterans Benefits were acquired before the marriage when he was in combat and he was considered disabled prior to the marriage by the Circuit Court. (Supplemental Appendix at 2 and 213).

In Gainer, the Court found that because the husband served in the military prior to the parties' marriage, his military service credits were his separate property within the meaning of W.Va. Code § 48-1-237. Gainer v. Gainer, 219 W. Va. 654; 639 S.E.2d 746 (2006).

West Virginia Code § 48-6-301 provides that the court is to consider present employment income and other recurring earnings of each party from any source in awarding spousal support. However, the former husband argues that these are entitlement benefits paid on a monthly basis these benefits should not be considered as income for the purposes of spousal support. The former husband's only other recurring source of money except Veteran's Benefits and Social Security, is a small pension he inherited from his father in the amount of $92.66 per month. The Internal Revenue Service does not consider Veteran's Disability Benefits as income, and according, they are not treated as taxable income. (Supplemental Appendix at 268 and 269).

CONCLUSION

The Circuit Court was correct in setting aside the Family Court Judge's permanent spousal support in the amount of $1,000.00 per month when the parties separated prior to their four (4) year anniversary, there were no children as a result of the marriage, the former wife did nothing to promote the interest of the formed husband and the former wife was at fault for the divorce.

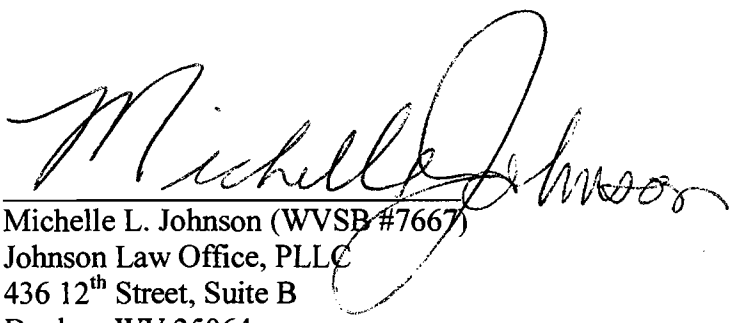
Moreover, the Circuit Court appropriately applied the law when it found that the decision of the Family Court Judge was arbitrary and capricious because it is against public policy for the

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 a lifetime spousal support for a four (4) year marriage. This enormous permanent spousal support award for a brief marriage is not supported by the code, is against public policy, and will merely act to discourage the future union of man and wife. Anyone would hesitate before entering into a marriage knowing that they would be forced to pay an ex-spouse twenty-five percent (25%) of their income for life considering the facts of the marriage as indicated above. Such an award for this short marriage violates the former husband's constitutional rights, is a windfall to the former wife's and serves as a reward for bad behavior and unjust enrichment of the former wife.

Many disabled individuals live on an income less than the $780.00 that the former wife receives for social security. The former wife should access the government recourses available to her and learn to live within her means or obtain part-time employment.

WHEREFORE, we request that this Honorable Court deny the former wife's Appeal and uphold the Circuit Court's spousal support award of $500.00 per month for eighteen (18) months.

Joseph L. Zickefoose
By Counsel



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IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA

IN RE: THE MARRIAGE OF:

MARGARET ZICKEFOOSE,	RESPONDENT BELOW, PETITIONER,
vs.	Case No. **11-0073 (09-D-1501)**
JOSEPH ZICKEFOOSE,	PETITIONER BELOW, RESPONDENT.

CERTIFICATE OF SERVICE

I, Michelle Johnson, do hereby certify that I have served the foregoing **"Respondent's Brief"** upon the Petitioner's counsel of record by facsimile transmission and first class mail, postage prepaid, on this the 31st day of May, 2011 as follows:

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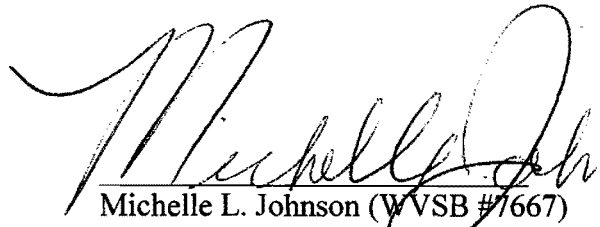

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