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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HEATHER H.,

Respondent Below, Petitioner.

vs.

W. SHANE H.,

Petitioner Below, Respondent.

CASE NO. 19-0058
Appeal from final order of Circuit Court of Kanawha County (12-D-714)

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

The parties were married June 26, 1993 and separated March 19, 2012. AR #011. They have two minor children, namely, E.H, born on September 23, 2009 (9 years old), and K.H, born on February 27, 2012 (7 years old). Id. An action for divorce was ultimately heard in the Family Court of Kanawha County, West Virginia.

On July 3, 2012, the family court entered an *Agreed Temporary Orde*r requiring Husband to pay Wife $11,500 per month. (AR#007). The parties were divorced on the no-fault ground of irreconcilable differences by *Agreed Bifurcated Divorce Order* entered February 1, 2013. (AR #011). The order divorced the parties but bifurcated all divorce remaining issues (i.e. property distribution, parenting, support, etc.) to be resolved at a later date. AR #011. On July 18, 2013, a *Final Order of Divorce* was entered resolving outstanding issues pertaining to equitable distribution, child support and spousal support. (AR #017).

Father subsequently filed a *Motion Seeking Reconsideration of Final Order Regarding Equitable Distribution, Alimony and Child Support.* AR #290. By Order entered March 21, 2014, the family court entered an *Order Reconsidering and Correcting Order of 12/17/2013*, which vacated the *Final Divorce Order* entered July 18, 2013 in its entirety on all issues and temporarily reinstated the *Agreed Temporary Order* entered July 3, 2013, including the provision providing for the payment of $11,500 per month to Wife. (AR #007).

The parties thereafter appeared for several final hearings to present evidence regarding equitable distribution, alimony and child support. Both parties testified during these hearings as well as their respective expert witnesses. Wife testified, *and the family court found*, that Wife's reasonable monthly living expenses were $8,241 per month. (AR #270 #17).

At the conclusion of the evidence, each party submitted proposed final orders with memorandums in support (AR #173, 204). Importantly, **Wife's own proposed final order** awarded Wife child support in the amount of $14,648.92 and stated that "**neither party is awarded spousal support** at this time." (AR #188) (alimony) and (AR #187) (child support).

On November 13, 2017, the family court entered a *Final Order Regarding Equitable Distribution, Alimony, and Child Support.* (AR #247). The *Final Order* awarded Wife a total child/spousal support package of **$27,711.52 per month**, which consisted of **$15,000 per month** in **permanent alimony** plus **$12,711.52 per month in child support** ($5,000 per month of the child support was to be placed in an educational investment account which Wife had discretion and control of if not used by the children). (AR #265, 266).

On December 12, 2017 and February 26, 2018 Husband filed *Motions Seeking Reconsideration of the Final Order* entered on November 13, 2017. (AR #290), (AR #335). Specifically, Husband primarily sought reconsideration of Wife's total support package of $27,711.52 per month, which vastly exceeded her need and the evidence at trial. Husband also sought reconsideration of the Family Court's clerical error in classifying Husband's student loan debt incurred during the marriage as Husband's separate debt (and therefore, not included in equitable distribution), contrary to the agreement of the parties on the record at trial (AR #290) and inconsistent within the Court's order.

On July 30, 2018, the family court denied Husband's Motions for Reconsideration. (AR #348). On August 1, 2018, Husband Appealed the Order Denying Petitioner's Reconsideration to the Circuit Court, asserting that the family court erred as follows: (AR #350)

> ***The family court clearly erred and abused its discretion when it awarded permanent spousal support in substantial excess of wife's stated financial need when permanent spousal support was not even requested, and the court failed to consider Wife's misconduct.***

The family court clearly abused its discretion and erred when it disregarded the parties' agreement on the specific allocation and calculation of the marital portion of the 2011 tax refund and chose another method not supported by the evidence which resulted in a higher number attributed to Husband as an asset.

Family Court clearly erred and abused its discretion when it determined that Husband's student loan debt was his separate debt instead of marital debt even when Wife agreed and in violation of the Slone case.

Wife replied and filed a conditional cross-appeal. Circuit Court held oral arguments on October 23, 2018. Based on argument of counsel, review of the record on appeal, and utilizing the standard of review, the Circuit Court entered an Order on December 3, 2018 that REVERSED the Final Order on Petitioner's Petition for Appeal and Respondent's Cross Appeal finding that the family court abused its discretion in awarding permanent spousal support of $15,000 per month which substantially exceeded her monthly expenses of $8,241 per month. (AR #489) The circuit court found the child support (without inclusion of alimony) which was previously calculated in family court to be $14,748.92 the appropriate child support and awarded that amount. (AR # 489) In relevant part, the Circuit Court found the family court abused its discretion or erred as follows: (AR #487-489)

a. By awarding Wife alimony of $15,000 per month when in Paragraph J(17) of Final Order it found that wife testified her reasonable monthly living expenses were $8,241 and after receiving child support would have no need ***for alimony***. (AR #479, 480)

b. Wife never requested permanent spousal support; yet the family court awarded permanent support when Wife is healthy, has advanced education substantial work experience and testified she is able to work (AR #482, 483, 488)

c. The family court erred in its interpretation of *Mulugeta v. Misalidis* and requirement for alimony in this case in that wife seeking alimony who only awarded 10% of Husband's gross monthly income was patently unfair and this dictated the alimony award in this case. The facts in *Mulugeta v. Misalidis* were very different. (AR #483)

d. Paragraph J of the Final Order when it found that Wife had made an *alimony claim of $20,000* per month when at the most Wife requested $5,000 per month but acknowledged she could *not even substantiate* or document the need for $5,000 alimony per month. (AR #487)

e. Paragraph J(3) the family court found that Wife had a child of tender years in her custody. This is in direct contradiction with Paragraph J(13) stating the two children now attend public school.(AR #488)

f. Paragraph J(20) the family court found Husband's alleged infidelity and admitted contact to another woman during the marriage contributed to the dissolution of the marriage when this finding was contrary to Wife's testimony and the parties were divorced in 2013 on the ground of irreconcilable differences. (AR #484,485)

The Circuit Court's Order also reversed the family court's failure to classify Husband's student loan debt as marital property as agreed to by the parties on the record.

> The family court on Page 11 footnote 6 of the Final Order classified the student loan debt to be Husband's separate debt when Wife had agreed and testified at the Final hearing it was a marital debt. There was no explanation for this classification as separate property and the family court in paragraph 10 of the Final Order inconsistently listed the student loan debt in the marital model to be divided between the parties. (AR #257)

On January 18, 2019, Wife filed an Appeal of the Circuit Court Order.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The decisional process would not be significantly aided by oral argument as the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and/or the record on Appeal.

III. SUMMARY OF ARGUMENT

The family court clearly abused its discretion when it awarded permanent, excessive spousal support to Wife vastly exceeding her reasonable monthly expenses. Consequently, the circuit court correctly reversed the family court's *Final Order on Equitable Distribution, Spousal Support and Child Support* entered November 13, 2017 finding that the family court abused its discretion by awarding Wife permanent spousal support of $15,000 per month, in addition to $12,711 in child support,[1] for a total of $27,711, which is in substantial excess of Wife's monthly expenses of $8,241 per month. Considering Wife's child support award of at least $12,711[2] per month, Wife lacked any financial need for spousal support. Furthermore, recognizing the limitations of her own monthly need, **even Wife's proposed final order** submitted to the family court judge set child support at $14,648.92, and **denied** her request for spousal support (set at $0).

The circuit court also correctly reversed the family court's final order finding it was clearly erroneous to classify Husband's student loan debt as his separate debt when the parties agreed that it was a "marital" debt. Contrary to the parties' agreement, the family court erroneously listed the student loan as a separate debt allocated to Husband, which he did not receive credit for in equitable distribution. The circuit court did not err when it reviewed and reversed the family court's ruling

[1] (AR #265). Final Order Regarding Equitable Distribution, Alimony and Child Support, 2nd paragraph regarding $5,000 per month to be invested in an educational investment of Mother's choice

[2] Without the inclusion of spousal support as income to Wife, Wife's child support award would have been calculated to $14,656.30 (AR #286).

as an abuse of discretion and error.

IV. STANDARD OF REVIEW

In syllabus point one of *Trickett v. Laurita*, 223 W.Va. 357, 674 S.E.2d 218 (2009), this Court explained:

> In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to *de novo* review." Syllabus point 2, *Walker v. West Virginia Ethics Commission,* 201 W.Va. 108 (1997); *In re Name Change of Jenna A.J.,* 231 W. Va. 159 (W.Va. 2013)

> With regard to challenges regarding alimony, an Appellate court reviews the lower court's determinations under an abuse of discretion standard. Questions relating to alimony and to the maintenance and custody of the children are within the sound discretion of the court and its action with respect to such matters will not be disturbed on Appeal unless it clearly appears that such discretion has been abused. The three principal manners through which such an abuse of discretion might arise are: 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.

Drennen v. Drennen, 212 W. Va. 689, 575 S.E.2d 299, 2002 W. Va. LEXIS 221.

W. Va. Code § 51-2A-14(c)(2001), provides that "the circuit court shall review the 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."

In syllabus point three of *Estate of Bossio v. Bossio*, 237 W. Va. 130, 785 S.E.2d 836 (2016), the West Virginia Supreme Court explained what is meant by clearly erroneous finding as follows:

> A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety. *Syl. Pt. 1, in part, In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

V. RESPONSE TO ARGUMENT

1. THE CIRCUIT COURT DID NOT ERR WHEN IT REVERSED THE FAMILY COURT'S EXCESSIVE PERMANENT SUPPORT AWARD TO WIFE WHO DID NOT REQUEST PERMANENT SPOUSAL SUPPORT AND BECAUSE WIFE'S STATED FINANCIAL NEED WAS $8,241 PER MONTH WHICH WOULD HAVE BEEN SATISFIED BY THE CHILD SUPPORT ALONE.

The family court awarded Wife a total of **$27,711.52 per month in combined spousal support and child support,** with $15,000 designated permanent spousal support along with child support in the amount of $12,711.52 per month with $5,000 being placed in an educational investment account. In analyzing Wife's financial need, the family court found that Wife's reasonable monthly expenses were $8,241.57 per month, which was **nearly $20,000 less than** the support awarded to her by the family court judge. (AR #270). The family court's award of alimony to Wife was a windfall and an abuse of discretion.

In the case at bar, when Wife's financial needs were considered along with the child support she receives there is no need for alimony. The Circuit Court found that Wife did not even request a permanent spousal support award.

A. Amount and Duration of Spousal Support Award to Wife of $15,000 per month is excessive and not supported by the evidence.

1. Wife's Total *Financial Need* was $8,241 per Month

The family Court found that Wife's reasonable monthly living expenses for her *and the minor children* were $8,241.57 per month based on Wife's own testimony. (AR #266, See Par. J (17) 11/13/17 Final Order.) The circuit court did not err when it found the family court abused

its discretion by granting Wife an excessive alimony award in the amount of $15,000 per month, *which* ***was nearly double her total stated monthly expenses*** *(i.e. "need").* (AR #266 See Par. J, 11/13/17 Final Order) and ***three times her requested alimony***.

Wife testified as follows: *(*AR #042, *Transcript 9-29-17 page 90 (AR #131)*

BY MR. CARRICO:

Q. Okay. I've added up, Heather, if I got it right, I **total your monthly budget based on your testimony at $8,241.57.** Does that sound about right?

A. Well, I pretty much spend close to the $11,500 a month, period[3]. *(emphasis added)*

Later, in the testimony Wife agreed with her monthly budget of $8,241 per month. *(*AR #042, *Transcript 9-29-17 page 90 (AR #131)*

On Cross examination BY MR. CARRICO:

Q. It appears that your budget based on at least what it was in 2012 has gone down based on your testimony. Would you agree with that?

A. I agree with *what*[4] I just gave you.

Wife is referring to the revised Trial Exhibit 39 which showed her budget and financial need to be $8,241 per month and what the family court found her need to be in the Final Order.

[3] For over 5 ½ years from June 1, 2012 (pursuant to the Agreed Temporary Order AR #007) Wife had been receiving a total sum of $11,500 per month for the child support and spousal support.

[4] Wife is referencing her revised Trial Exhibit 39 which showed her budget and financial need to be $8,241 per month.

In addition to the $15,000 per month spousal support, Wife was awarded non-taxable child support for two minor children in the amount of $12,711.52 per month with $5,000 of said amount being placed in an educational account for the children. Therefore, the total non-taxable child support being paid directly to Wife for **two minor children is $7,711.52 per month.** This child support amount must be considered in determining Wife's financial need.

Wife testified that she had no specific need for the children above the $5,000 in spousal support she requested. (AR #135, AR #042, Transcript 9-29-17 at page 96)

Q. You did not produce any document today, any documentation or any sort of --

A. No budgeting today. Absolutely not.

Q. -- that would reflect that specifically you need $5000 a month to take care of both your children?

A. No.

Q. Or showing that you need more than $5000 or $2500 per month per child to take care of the day to day needs?

JUDGE: Same question. You can answer.

THE WITNESS: No.

Importantly, the Family Court found that the **minor children have no significant or extraordinary costs.** (AR #247, See Par. J(19)) and (AR #266 11/13/17 Final Order.) Yet, inexplicably, Wife was granted nearly $8,000 ($7,711.52) for their care.

Accordingly, Wife has at her disposal the excessive sum of **$22,711.52** to spend when her admitted and documented monthly expenses are only $8,241.57. The Court's combined support award was **three times** Wife's monthly need, which indicates that the family court's alimony award was clearly an abuse of discretion and a mistake.

2. Award of "Permanent" Spousal Support was not Requested nor Warranted

Wife ***never requested permanent*** spousal support at the final hearing. As noted above, she requested support "until both children have graduated from high school". (AR# 042, See Transcript 9-29-16) The children were then ages 8 and 6 and expected for both to graduate in 12 years at the latest.

Furthermore, it was clearly erroneous and a mistake for the Court to award Wife **permanent** spousal support where the court found Wife is able to work and is a healthy, 45-year-old woman, with advanced education and lengthy work history at Mylan Pharmaceutical and as an office administrator in the orthodontic practice. Wife also had prior employment for the U.S. Postal Service, and Mid Atlantic Capitol Group. (AR #247, See the court's findings in Par. J (4) of the Final Order.

Wife testified she *was able to work.* (AR #042, Transcript 9-29-17 page 117)

Q. Do you suffer from any ailments that prevent you from working?

A. No.

Wife testified that she wanted alimony to provide for college for her sons and for travel. (AR #042, Transcript 9-29-17 Page 119)

Q. I mean, are there some things like college and travel and those sorts of things that depending on what happens at the end of the day here, you would be able to do on your own nickel?

A. Yes. Allow me to, yes.

Q. And some things that depending on what happens at the end of the day you would not be able to do on your own nickel?

A. Yes.

Q. And is that essentially the basis for the alimony (inaudible)?

A. Yes.

3. Alimony Award of $15,000 Exceeded Wife's *Request* of $5,000 per Month

When Wife testified at trial, she requested alimony at the most of "$5,000 a month until the kids are both graduated". (AR # 042, Transcript 9-29-16 pages 68-69) Wife further acknowledged that she did not produce any documentation or budget to show she even needed an additional $5,000 per month over and above child support amount calculated. (AR # 042, Trial Transcript 9-29-16 page 96) Wife's specific testimony at trial:

BY MR. SWARTZ:

Q. Okay. In the event Mr. Selby's approach is used, are you making an alimony claim?

A. Yes.

Q. In what amount and what period of time?

A. Well, I feel like we agreed on $5000 a month back in June of 2013 and with the difference I would like a claim of $5000 a month *until the kids are both graduated.* (emphasis added)

Q. From high school?

A. From high school.

Under cross examination by MR. CARRICO, wife testified: (AR #042, Transcript 9-29-17 at pages 79-80)

Q.On top of that, in the event that the court were to adopt Mr. Selby's valuation as to the value of [redacted] you're asking for an additional $5,000 on top of the child support in spousal support?

A. Yes. That's correct.

Q. So, you're asking or a total of -- which would be almost $20,000 a month?

A. Correct.

Q. Okay. And today you didn't put in -- you agree with me you didn't put any evidence on

showing that you need that kind of money on a monthly basis, did you?

A. No.

Q. Okay. You didn't introduce any evidence that your needs are greater than the child support amount of $14,648.92, did you? [5]

A. No.

Q. And you're not testifying that your monthly needs are greater than $14,648.92 a month; is that correct?

A. Correct.

Q. Okay. And what I gave you attached as Exhibit No. 39, which is the attachment for the temporary order in this case and I'm looking at the temporary order which recognizes that, in fact, he's paying you $11,500 a month; is that right?

A. Correct.

Q. That's under the order of the Court. And at the time of the temporary hearing the court didn't classify the amount and noted that the month exceeds the amount that would be otherwise due under the child support formula. So, you don't disagree with that?

A. No.

Our Supreme Court of Appeals has held that the purpose of spousal support is not to equalize income. *Stone v. Stone*, 200 W.Va. 15 (1997)

4. ***Mulugeta Case is Distinguishable from the case at bar and does not mandate an excessive spousal support award of $15,000 per month when there is no financial need.***

[5] Child support calculation without alimony added to the child support formula would have been $14,648.92. The child support formula varies according to the spousal support inserted as income to Wife and paid by Husband.

The circuit court found that the family court judge incorrectly relied upon *Mulugeta* in making its determination of spousal support when there are several distinguishing factors in the case at bar. *Mulugeta v. Misailidis*, 801 S.E.2d 282, (W.Va. 2017). Specifically, Wife in *Mulugeta* had a monthly *need of $12,000* and the family court only awarded $4,000 per month in alimony and there was no child support payment to help with Wife's need. Therefore, Wife's financial need in *Mulugeta* ***was not met*** by the amount of alimony awarded and Supreme Court of Appeals correctly remanded.

However, in this case the amount of child support alone ($12,711) awarded ***exceeded Wife's financial need,*** making any alimony unnecessary. *Mulugeta* is further different because the Wife in that case was 62, (not 45 as here) and had never worked outside the home as the Wife here did. Most importantly, there was no child support payment in *Mulugeta* to consider in determining Wife's financial need.

5. Court Properly found the Family Court Erred and Abused its Discretion when it failed to Consider Wife's Misconduct in Spousal Support Award and Abused its Discretion regarding Husband.

The Circuit court found that the Family Court erred and abused its discretion when it incorrectly found the following which is not consistent with evidence or testimony presented:

> ... that the Petitioner's alleged infidelity as well as his admitted contact with another woman that was not his wife during the parties' marriage contributed to the dissolution of the parties' marriage.

During the parties' divorce proceedings, there was no evidence presented at trial by Wife that Husband committed adultery during the parties' marriage that contributed to the dissolution of their marriage. This finding is completely inconsistent with the evidence presented to the family Court.

In fact, Wife testified that there was no discussion of infidelity between the parties that entered into at the time of separation. (AR #95)

Q. And one other issue with regard to that. Did you and -- did you confront Shane at the time he was leaving about *possible infidelity*?

A. Well, that had been -- as you can see from the email that he had written to Dr. Mason, Dr. Mason was a therapist -- well, he was a Christian marital counselor.

Q. My question was did you and Shane when he was telling you "I'm done" have a discussion about possible infidelity at that point?

A. No. Because I felt like that we had addressed that issue back in November of 2011 when we had prepared a document for Tiffany Bader to leave. So, I thought things were better after that.

A bifurcated divorce order was granted in February 2013 on the ground of irreconcilable differences. Neither adultery. nor mental cruelty were alleged by Wife as grounds for divorce. Therefore, the Court's finding of infidelity or marital fault by Husband is erroneous and should not be considered in an award of alimony to Wife.

Wife's Misconduct Not Considered in Diverting Funds

To the contrary, the Court did not properly consider Wife's marital fault and misconduct. West Virginia Code section 48-6-301(b)(20) directs the court to consider such other factors in determining the amount of spousal support as the court deems necessary or Appropriate to consider in order to arrive at a fair and equitable grant of spousal support.

Evidence was presented that Wife diverted and dissipated marital funds to her mother in Approximately $80,000. The family court erred and abused its discretion in finding that husband was at fault for the dissolution of marriage and not considering wife's diversion funds to her mother in the amount of $80,000 during the marriage.

Wife testified as follows: (AR #106)

BY MR. CARRICO:

Q. And we have had quite a discussion about your mom being on the payroll. Do you remember?

A. Correct.

Q. And for that we have used the Plaintiff's exhibits, P8 and P15 and we have -- this was discussed in a hearing, but it should be on the record. But the net number that *you are accepting as a distribution to you is 79,841.30*?

Wife agreed that she had distributed to her Mother through her handling of payroll an amount of nearly $80,000 which she accepted on her side of the marital ledger.

Wife's Revisionist History not supported by Facts

In her Appeal Wife attempts to spin a story from wholecloth (Petition section number 2. "Statement of the Case") by trying to offer the Family Court an unsupported undocumented excuse for this excessive alimony award. Wife suggests that because the court didn't find the value of certain marital businesses to be the higher value proposed by Wife's expert, that the family court *made up for it* on the back end by giving Wife an exorbitant alimony award in excess of her financial needs. It is interesting to note that while Wife continues to dispute the value of the businesses, she has never filed an appeal challenging the businesses' values.

The problem with Wife's theory is-- this is <u>not</u> what the family court found in its alimony analysis which is set out on pages 21 and 22 of the Final Order (AR#267, 268). The

court does address the business and their values in terms of what income can be considered for alimony. The court specifically notes that because Wife will receive 50% of the value of the three holding companies that Husband's income from them should *not be considered* in alimony. The court also finds that it cannot consider 25% of Husband's income from [redacted] in determining Wife's alimony claim.

Contrary to what Wife states in her Petition (Statement of Case section 2.) top of page 4 that "If she did not receive the value she believed *May* allowed, she left it to the court to make an appropriate determination, which the Family Court did when it rejected her view of how the *May* case should be applied, and made a reasonable alimony award in that context. In fact, **Wife specifically sought $5,000 per month in alimony** as detailed herein. (AR #110, 356)

B. THE CIRCUIT COURT DID NOT ERR BY INCLUDING HUSBAND'S UNPAID STUDENT LOAN DEBT IN THE DISTRIBUTION OF THE PARTIES' ASSETS AND DEBTS SINCE WIFE AGREED AT TRIAL THIS WAS A MARITAL DEBT WITH THE LOAN FUNDS USED DURING THE MARRIAGE.

The Circuit court did not err when it found that the family court erred and abused its discretion when it disregarded the evidence and the law when it erroneously determined that Husband's student loan debt existing as of the date of separation was his separate debt. *It was not disputed* by Wife that *during the marriage* Husband incurred marital student loan debt that had a principal balance of ($133,985) as of the date of legal separation. (AR #247 See Final Order at p. 11) The Respondent *even agreed at trial that this was a marital debt* properly allocated to Husband for equitable distribution purposes. Wife during her direct testimony on September 29, 2016 (AR #366) testified as follows:

> Q. And the Sallie Mae was the loan balance on Shane's school loans, but the ones that were incurred while you were married?

A. Correct.

In addition, Wife in *her proposed final order* to the family court allocated this debt equally to the parties by including it as a debt in her marital model. Her proposed marital model specifically allocates it to Husband as a *marital* debt subject to equitable distribution resulting in it being equally allocated to both parties. See Wife's Proposed Final Order/Marital Model. (AR #173 and AR #191)

Moreover, it appears that this was a mistake in the Family Court Order since the family court had *two inconsistent findings* regarding the treatment of the Student Loan in the Final Order; specifically, the court found that the parties ***agreed*** that Husband's student loan debt was a *marital debt* allocated to Husband pursuant to equitable distribution. The family court specifically found as follows in its final order (AR #256):

> In addition, the parties at trial **agreed** to the following values and allocation of personal property and debts:
>
> | | | | |
> |---|---|---|---|
> | 1. | 2011 Cruiser Chap 310: | $138,000.00 | Petitioner |
> | 2. | Gibson houseboat proceeds: | $4,000.00 | Petitioner |
> | 3. | Gibson houseboat debt: | ($1,609.00) | Petitioner |
> | 4. | 2008 Denali: | $30,131.60 | Respondent |
> | 5. | **Navient/Sallie Mae:** | **($133,985.00)** | **Petitioner** |
> | 6. | Summit Line of Credit: | ($150,000.00) | Petitioner |
>
> That Court hereby ADOPTS the allocation set forth in paragraphs numbers 1-6 above and ORDERS that the items be allocated as set forth. (AR #257)

Importantly, the West Virginia Supreme Court of Appeals in Slone v. Slone, Memorandum Decision, 12-0620, (W. Va. 2013) upheld a family court's ruling that *equally allocated* the Wife's outstanding student loan debt incurred during the marriage to both Husband and Wife *as a marital debt.*

Notwithstanding foregoing the agreement of the parties as confirmed by the family court, it inserted footnote no. 6 at p. 11 of the final order stating that "[Husband's] Trial Exhibit no. 30 [student loan statement of balance]-Petitioner's separate debt not subject to equitable distribution." (AR #257) The Circuit court noted that the family court further erred by not providing to the parties any explanation for disregarding the agreement of the parties and assigning the student loan debt to Husband as his separate debt.

For these reasons, Husband requests this Court to affirm the Circuit court's order and properly allocate Husband's student loan debt to the parties equally pursuant to equitable distribution as the parties agreed at trial.

VI. CONCLUSION

For the foregoing reasons, Father requests that Mother's Petition for Appeal be DENIED and the Circuit Court's Order be affirmed; that he be awarded his reasonable attorney's fees and costs.

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