IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF:

THE HONORABLE LOUISE E. GOLDSTON,

JUDGE OF THE 13TH FAMILY COURT CIRCUIT

33-2020

SUPREME COURT NO. 20-0742

JIC COMPLAINT NOS. 30-2020

AMICUS CURIAE BRIEF OF THE FAMILY JUDICIAL ASSOCIATION

Respectfully submitted,

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STATEMENT OF THE CASE

In the case before the Court today, the Court is asked to determine whether the actions of a Family Court Judge were appropriate or if the judicial officer deserves sanctions as being outside the bounds of her ethical responsibilities

Because this brief is being presented on very limited issues, the Family Judicial Association will not restate the facts of the case here, as both the Judicial Disciplinary Counsel and the judicial officer in question have already provided the Court with ample recitations on that point.

SUMMARY OF ARGUMENTS

The Family Court Association wishes to emphasize at the outset that it is not taking a position on the issue of the correctness of accused judicial officer's actions in the underlying case. The Family Court Association, a voluntary association made up entirely of judicial officers serving in Family Court, wishes to be heard on issues that would affect all judicial officers of this state. As such, this brief will deal with issues related to the appropriateness of the Family Court Association in filing this brief and the concept of the inherent powers of courts, including Family Courts.

Regarding those specified issues, the Family Judicial Association believes that it is entitled to request to be granted the status of an amicus curiae, that the Court consider this brief in that light because its

members have knowledge of the Family Court system that may be helpful to the Court. The members also believe that holdings made in this case will have a profound effect on the way that Family, Circuit and Magistrate Courts operate in the future. The Association believes that it is important that this Court consider how any rulings made in this case will affect all its judicial officers, not just the judicial officer in question.

Secondly, in Judicial Disciplinary Counsel's brief, she implies that the Family Court is not a constitutionally-created court. The Family Court was created by an amendment to the West Virginia Constitution, is a court of limited jurisdiction, but even courts of limited jurisdiction possess those inherent powers that are necessary for that court to fulfill the duties and functions assigned to it.

Third, the Family Judicial Association believes in the system that has been set up to investigate and sanction judicial officers whose actions are contrary to statute, rules or procedures. But an error of judgment, absent a malicious intent or evidence of continued action after being advised of the error of the position or procedure, should not always result in an ethical charge. Like the people who work in and litigate within the court system, courts are not perfect. Errors of judgment and law, as well as in following procedures are to be expected. Correction and even disciplinary action is to be expected, but it is not necessary in each and every case where an error is detected.

STATEMENT REGARDING ORAL ARGUMENT

The Family Judicial Association is aware of the provisions of Rule 30 of the West Virginia Rules of Appellate Procedure and does not request to be a part of any oral arguments in this case but will participate if requested by this Court.

ARGUMENTS

1. THE FAMILY COURT ASSOCIATION HAS THE RIGHT TO REQUEST THAT THIS COURT GRANT TO IT THE STATUS OF AN AMICUS CURIAE AND CONSIDER ITS BRIEF ON LIMITED ISSUES THAT ARE BEFORE THE COURT

Pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure, the Family Judicial Association (hereinafter referred to as the FJA) gave formal notice to all counsel in this case of its intent to seek leave to file as an amicus curiae.[1] In her response, Judicial Disciplinary Counsel Tarr questioned the right of the FJA to be heard and threatened the individual members of the FJA with ethics charges for their vote to seek counsel to file the motion and accompanying brief. See paragraph 4, *JDC Objections To The West Virginia Family Court Association's Planned Motion For Leave To File An Amicus Brief*.

As has been stated earlier, the Family Judicial Association does not wish to opine on the specifics relating to the judicial officer whose actions are in question. The FJA supports and understands the role of this Court in disciplinary action against a judicial officer and the FJA does not wish to interfere with

[1] Counsel for the Family Judicial Association does state, pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure, that her services are being provided to the Family Judicial Association without cost. No party or counsel to this litigation has paid any sum of money nor has promised any money or payment to counsel for the Association. The undersigned counsel is the sole author of this brief.

this solemn duty. However, the FJA wishes to make the Court aware that there are general issues involved in this case that present themselves in a variety of ways within various levels of the court system. The purpose of the brief of the FJA is to highlight the ways that rulings in this case may impact other judicial officers across the entire court system in West Virginia. It is for the Court to decide the case and to issue whatever sanctions it deems appropriate or to dismiss the action. The FJA strongly agrees that this Court is the sole determiner of the sanctions, if any, that should be imposed in the instant case, but the FJA believes that it has a duty to speak up to make the Court aware of the implications of this decision on the work of the judicial officers that make up the court system in West Virginia.

In *In Re Judicial Qualifications Commission Formal Advisory Opinion No. 241, 301 Ga. 54, 799 S.E.2d 781 (Georgia, 2017),* the Georgia Council of State Court Judges filed an amicus brief in a matter pending before the Supreme Court of Georgia. The Judicial Qualifications Commission rendered a Formal Advisory Opinion that the filing of such an amicus brief would be "improper and prohibited by the Georgia Code of Judicial Conduct." The Council of State Court Judges challenged that opinion. In 2017 the Georgia Supreme Court found that "the Code of Judicial Conduct permits judges' associations to submit amicus briefs in pending litigation." in its reasoning, the Georgia Supreme Court differe ntiated the filing of an amicus brief by an association from a brief filed by an individual judicial officer. "Here, the Council is not an individual judge. It did not perform a judicial function by submitting an amicus brief ... and the Council is not facing a potential disciplinary action based upon these

activities; instead the Council is a constitutionally-created body which was established in order to effectuate the constitutional and statutory responsibilities conferred upon it by law and to further the improvement of the state courts, the quality and expertise of the judges thereof, and the administration of justice. (Citation omitted.) The filing of amicus briefs by the Council may fulfill these purposes and is part of the long tradition of judicial organizations, including the Conference of Chief Justices, filing amicus briefs in State and Federal courts around the country. Therefore, the Commission does not have the authority to regulate the Council's conduct as an institution." *In Re Judicial Qualifications*, supra.

While the FJA in West Virginia is not a constitutionally-created organization, it fulfills many of those same purposes set forth in the opinion of the Supreme Court of Georgia. As the Court may note, the Code of Judicial Conduct being interpreted by the Georgia Court is substantially the same as its West Virginia counterpart. Ga. Rule 2.10 reads as follows: "Judges shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair trial or hearing ...". West Virginia's Rule 2.10 of the Rules of Judicial Conduct states, "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court or make any nonpublic statement that might substantially interfere with a fair trial or hearing."

In West Virginia, the FJA is aware of at least three instances in recent years when the Judicial Association, the comparable organization consisting of Circuit Judges and retired Circuit Judges, has filed amicus curiae briefs with this Court. In fact, in the most recent case, *Jay Lawrence Smith v Teresa Tarr*

and the WV Judicial Investigation Commission, (Case No 13-1230, West Virginia 2015), the Judicial Association filed an amicus brief that was accepted and considered by the Court. That case involved a response to a Freedom of Information Act request. See also *State ex rel. Frazier v. Meadows, 454 S.E.2d 65, 193 W. Va. 20 (W. Va. 1994)* (WV Judicial Association files an amicus brief in a dispute between a circuit judge and a sheriff related to court security) and *DePond v. Gainer, 351 S.E.2d 358, 177 W. Va. 173 (W. Va. 1986)*, (WV Judicial Association files as an amicus curiae in a case involving the widow of a deceased Circuit Judge who was filing for a survivor's pension). It seems clear from a reading of those cases that there are circumstances when the members of a voluntary association of judges may feel compelled to share insight with the appellate court on issues that affect the judicial system. Further, it appears that there was no challenge made to the Judicial Association's briefs in those cases. It is up to this Court to decide whether to grant the Family Court Association leave to file their brief and to convey on them the status of amicus curiae. If such status is granted, it is, of course, within the purview of this Court to accept or reject the points set forward by the Family Judicial Association, but it seems premature and, frankly, disingenuous for the Judicial Disciplinary Counsel to threaten disciplinary action against every member of the association before the brief is even written, when it is obvious that she is aware that such briefs have been filed on other occasions.

2. THE FAMILY COURT IS A COURT OF LIMITED JURISDICTION BUT IT IS A CONSTITUTIONALLY CREATED PART OF THE COURT SYSTEM AND HAS ITS OWN UNIQUE INHERENT POWERS AS ARE NEEDED TO FULFILL THE DUTIES AND OBLIGATIONS ASSIGNED TO IT

In her brief at page 29, Judicial Disciplinary Counsel opines, "(M)agistrate Courts, Circuit Courts and the State Supreme Court are constitutionally created courts. " To that statement, the Family Judicial Association strongly shouts, "Me too." West Virginia's Family Court system was created through an amendment to the West Virginia State Constitution in 2000. Legislation to flesh out the new addition to the court system was passed in 2001 and became effective in 2002. Chapter 51, Article 2A of the West Virginia Code contains the description of the jurisdictional parameters of the new court, and it includes the statement that the Family Court is a court of limited jurisdiction. [2]

In the section of her brief entitled "As A Limited Jurisdiction Court, the Family Court Has No Authority to Conduct Home Views," the Judicial Disciplinary Counsel reminds us that Family Court was created as a court of limited jurisdiction. See W. Va. §51-2A-2(e). However, the term "limited jurisdiction" does not

[2]In fact, this Court has found uses for Family Court Judges outside those specific statutory parameters when necessary. For several years, this Court has employed Family Court Judges to run adult drug courts, juvenile drug courts, domestic violence courts and family treatment courts. While the Judicial Disciplinary Counsel opines that there can be no action taken by Family Court Judges that is not contained in Chapter 51, Article 2A of the West Virginia Code, this Court has permitted them to undertake administration of those types of courts, and the Family Court Judges who have fulfilled those responsibilities have done so in admirable fashion.

equate with "limited power." In fact, every court has the power needed to fulfill the duties assigned to it, whether or not those powers are specifically enumerated. In the book entitled, *"Inherent Powers of the Courts, Sword and Shield of the Judiciary,"* by Felix Stumpf, published by the National Judicial College and the State Justice Institute, on page 13 it states that "The argument that denies the existence of inherent powers in non-constitutional courts has been generally rejected. While inherent powers have been more often exercised by general jurisdiction trial courts, courts of many jurisdictional levels have successfully invoked inherent powers ...". In *Anderson County Quarterly Court v. Judges of the 28th Judicial Circuit, 579 S.W. 2d 875 (Tenn. App. 1978)* the term "inherent powers" is used to describe those powers not specifically enumerated. "Inherent powers consist of all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective." *Anderson County,* supra.

In a recent case, *Aaron W. v. Montgomery, Case No. 20-0126, W. Va. 2021,* this Court took up the issue of whether a Family Court Judge had the inherent authority to rule on a motion to disqualify an attorney in a case pending before that court. The Court stated that "part of a court's inherent authority to manage judicial proceedings includes making decisions regarding whether an attorney should be disqualified from representing a client in matters before that court. Insofar as a family court has the authority to "[m]anage the business before [it]," W. Va. Code § 51-2A-7(a)(1), a family court, also, has the authority to rule upon attorney disqualification motions as part of the management of its business, which would include the administration of justice in matters over which the family courts have been granted jurisdiction, such as the underlying divorce proceeding." *Aaron W.*, supra, at page 9.

There is no question that the Family Court is a court of limited jurisdiction, but that limited jurisdiction includes proceedings for property distribution and proceedings in contempt for failure to follow a valid order of the Family Court. See West Virginia Code § 51-2A-9 (Contempt powers of family court judge) and West Virginia Code § 51-2A-2(a)(15) (jurisdiction over all proceedings for property distribution).

In a case involving a different aspect of the doctrine of inherent powers, the budget of a statutory court had been severely limited, causing the presiding judge to believe that the lack of funding would interfere with his ability to perform the necessary judicial functions. In *Carlson v. State ex rel. Stodola, 220 N.E.2d 532, 247 Ind. 631 (Ind. 1966)* the Court stated, "The appellants herein do not appear to us to question seriously what has been said with reference to higher courts of general jurisdiction, whether created by the Constitution or by statute. Appellants urge that the cases referred to above, upon which is reliance is made by the appellee, concern courts of general jurisdiction, while the City Court of the City of Hammond is a statutory court and one of inferior and limited jurisdiction. To the contention that a difference in principle applies as a result of such distinction, we cannot agree. The functions of the City Court of the City of Hammond are as truly judicial in character (although limited in scope) as that of any other court in the State of Indiana."

As has already been discussed in *Aaron W.*, supra, the Family Court is possessed of the necessary inherent powers that would allow it to complete the tasks assigned to it or, in the words of West Virginia Code §51-2A-7(a)(1), to "manage the business before it." While we often think of courts as dealing

with complex litigation and novel issues of law, more often there are frequently repeated scenes in courts of all levels across West Virginia, and in all likelihood, across the country. Many of these fact patterns involve situations that are legally simple but intensely personal, fraught with emotional conflict. In *Bartles v. Hinkle, 196 W. Va. 381, 472 S.E.2d 827 (W. Va. 1996)* this Court stated in a case dealing with compliance with discovery orders, "It is hard to find an area of the law in which the governing rules are, and probably have to be, so vague. Admittedly, a trial court has broad authority to enforce its orders and to sanction any party who fails to comply with its discovery rulings. *Doulamis v. Alpine Lake Property Owners Ass'n, 184 W. Va. 107, 399 S.E.2d 689 (W. Va. 1990); W. Va. R. Civ. P 16 (f) and 37(b)(2).* The difficulty is that the range of circumstances is so vast, and the problems so much matters of degree, as to defy mechanical rules." The Family Judicial Association believes that this statement certainly applies to many of those fact patterns that present themselves to judicial officers and would encourage this Court to give lower courts as much leeway as is Constitutionally permissible so that they can effectively and efficiently carry out their assigned duties and roles. This Court has already recognized that different types of cases, many with that highly charged emotional content, have better and more long-term outcomes when a different type of approach is used. Problem-solving courts, such as our drug courts, veterans court, domestic violence courts, and family treatment courts, observe less of the formality that is normally seen in a courtroom, but have been shown to reduce recidivism and increase the likelihood that both the offender and the community will experience positive outcomes. The Family Judicial Association believes that there are some aspects of the hallmarks of processes that are employed in problem-solving courts that can be helpful in the right situation within the Family Court system.

In fact, there are several reasons that might compel a lower court to leave its courtroom to view a place or situation. Circuit Court Judges, either sitting in a bench trial or in the presence of a jury, often view the scenes of accidents, boundary disputes, or crime scenes. Family Courts are called upon to take a bench view to determine if a piece of marital real estate is capable of being divided equitably between the parties. Before technology became readily available to many litigants, courts were convened at hospital bedsides or even in homes if a litigant or essential witness was unable to physically be present in the courtroom. While some of these situations may involve authority granted under a specific statute, others are not mentioned in rule or statutory authority. Are they necessary to a court trying to manage "the business before it"? The Family Judicial Association hopes that this Court will answer that question in the affirmative and will be mindful that a strict defining of boundaries or rules without input from judicial officers of lower courts may unnecessarily impede the expeditious movement of cases through the system.

3. COURTS ARE NOT REQUIRED TO BE PERFECT. AN ERROR IN A PROCESS, PROCEDURE OR RULING OF LAW DOES NOT ALWAYS MEAN THAT AN ETHICAL VIOLATION OCCURRED.

The judicial branch of government plays a vital and indispensable role in our society. Because of its unique powers and duties and because of the many ways that it can potentially reach into the homes and purses of the average citizen, it is vitally important that the integrity of those working within the judicial system be constantly scrutinized. The Family Judicial Association respects the duty of Judicial Disciplinary Counsel to investigate and bring charges against judicial officers who are believed to have violated the Code of Judicial Conduct. In 2019 and 2020 our Judicial Disciplinary Counsel reported that the office has been ranked in the top five states in the country in the raw number of disciplinary actions taken against WV judicial officers.[3] Considering that West Virginia is a state with a small population and a relatively small judicial system, one might interpret this fact in different ways. Are West Virginia judicial officers less ethical than those in other states? The Family Judicial Association does not believe this to be true but would offer another possibility: we are using the wrong standard to determine when an error by a judicial officer requires a disciplinary action. To be clear, we are not proposing a lesser standard; we are proposing a different standard.

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[3] See West Virginia Judicial Investigation Commission Annual Report – 2019, filed January 30, 2020, footnote page 25. "... West Virginia ranked third along with Arizona for the number of judicial officers/candidates publicly sanctioned ..." See also West Virginia Judicial Investigation Commission Annual Report – 2020, footnote on page 22. "...West Virginia ranked fourth along with Florida for the number of judicial officers/candidates publicly sanctioned ...".

Every error in a case or deviation from procedure does not equate with an ethical violation. The Association would encourage this Court to adopt a more stringent standard as a threshold for determining that a violation occurred. In *In Re Judicial Qualifications Commission Formal Advisory Opinion No. 239, 300 Ga. 291, 794 S.E.2d 631 (Ga. 2016)*, the Georgia Supreme Court is called upon to interpret Canon 2 A of the Georgia Code of Judicial Conduct, which is the equivalent to West Virginia's Canon 1.1 of the Code of Judicial Conduct. In speaking about that Canon the Georgia Court states, "Canon 2 (A) provides that 'judges shall respect and comply with the law,' but it does not demand perfection in the judicial discernment and application of the law." "All judges make mistakes. (Even us.)" *In Re Judicial Qualifications Commission*, supra. "Rather, Canon 2 (A) requires a judge to endeavor in good faith and with her best efforts to discern the law, and it demands that she then attempt to apply the law as she honestly understands it to the cases that come before her. A knowing and willful misapplication of the law, of course, would amount to bad faith and thereby implicate the Code of Judicial Conduct. See *In re Inquiry Concerning a Judge, 265 Ga. 326, 454 S.E.2d 780 (1995)*. A mistake of law produced by deliberate indifference or willful ignorance likewise would amount to bad faith. See *In re Inquiry Concerning a Judge, 265 Ga. At 849, 454 S.E.2d 780.* "But the law is not always easily discernable, and when the law is unclear or unsettled, an honest misunderstanding or misapplication of the law ordinarily does not implicate the Code. Absent bad faith, errors in the judicial discernment and application of the law implicate Canon 2A only to the extent that the pertinent law is clear and settled.

In *Matter of Benoit, 487 A.2d 1158 (Me. 1985)*, the Supreme Judicial Court of Maine articulated this reasoning: "Every trial judge will from time to time commit legal errors in decisions later reversed on appeal, but judicial discipline would be in order in almost none of those cases. Something more than a mere error of law is required to constitute misconduct under Canon 3 A (1). ... (w)hen reviewing the conduct of a judge, a court must be as certain as possible of dispensing a consistent and rational brand

of justice. The internal integrity of the disciplinary process is strengthened to the extent that it applies a definite standard.

Third, the case-by-case approach fails to indicate to judges the particular level of scrutiny that will be applied to their behavior, should it ever be challenged by the Committee on Judicial Responsibility and Disability. Of course, a judge will always be expected to try, as best as he can, never to make an error of law. But should he make one, and should it be challenged as misconduct by the Committee, it is only fair that he know the standard by which he will be judged." *Benoit,* supra.

The *Benoit* court goes on to formulate a test to apply to whether judicial disciplinary actions should be taken against a judicial officer. "Instead of a case-by-case approach, the Code requires a rule that can have general application to the wide variety of situations that a judge faces in court from day to day. The objective standard of what a reasonable judge would have done in the same circumstances meets the requirement of general applicability. The reasonable judge of our standard must be reasonable both in prudently exercising his judicial powers and in maintaining his professional competence. But the standard must be further restricted to recognize that every error of law, even one that such a reasonable judge might avoid making, is not necessarily deserving of disciplinary sanction. A judge ought not be sanctioned under Canon 3 A (1) for an error of law that a reasonable judge would not have considered obviously wrong in the circumstances or for an error of law that is de minimis. Putting all of these factors together, we conclude that, by an appropriate objective test, judicial conduct constitutes a violation of Canon 3 A (1) if a reasonably prudent and competent judge would consider that conduct

obviously and seriously wrong in all the circumstances." *Benoit,* supra. [4] The Family Judicial Association believes that such a standard is prudent and will ensure that judicial officers have a better understanding of what is expected from them. We would encourage this Court to adopt this standard in dealing with this and other disciplinary matters that come before it. We also concur with the recommendation of the Judicial Hearing Board in paragraph 7 of their Recommended Order of March 15, 2021, suggesting that "guidance to judicial officers from the Supreme Court of Appeals through rule-making or otherwise regarding the proper scope of conducting judicial views would be beneficial."

An additional potential flaw in West Virginia's system of judicial discipline involves the use of stipulations. When an ethical violation is investigated, the Judicial Disciplinary Counsel may offer the accused judicial officer an opportunity to stipulate that the specific actions are violative of the Code of Judicial Conduct. Judicial officers may have many reasons for entering into a stipulation: they simply may not wish to contest the validity of the charge, or they may agree that the actions complained of were inappropriate. They may have far greater concerns facing them or they may not be aware that there is case law that might support their actions. Whatever their thought process might be, that stipulation then appears to become similar to a precedent when those disciplinary actions are published. Clearly, an agreed-to stipulation entered into by one judicial officer should not be treated as the equal of an opinion by a court of competent jurisdiction. The Family Judicial Association believes that this approach permits an action taken for the sake of expediency by one judicial officer to become a guiding principle that other judicial officers are expected to follow. The FJA understands that stipulations are an important part of the process of resolving judicial disciplinary cases in an expeditious

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[4] Canon 3 A (1) of the Judicial Code of Conduct of Maine reads as follows "A judge should be faithful to the law and maintain professional competence in it ...

manner, but we believe that their precedential value is currently over-stated and we encourage this Court to explore ways to decrease the weight given to the stipulation of one judicial officer as to the error of their actions, particularly in circumstances where the alleged violation is based upon unsettled or unclear laws or procedures.

SUMMARY

In summary, the Family Judicial Association believes that it is both permissible and appropriate for this brief to be filed and that it is appropriate for the Court to grant it the status of an amicus curiae. The FJA does not wish to take a position to either support or oppose the ultimate decision relating to the specific underlying case, but it believes that there are critical issues that this Court must explore in arriving at that decision that will have an effect on all judicial officers serving in West Virginia. The FJA urges this Court to find that all courts have the inherent powers necessary to carry out the duties that are assigned to them. The Association believes that if this Court creates boundaries that are artificially or inappropriately tight the important work of the court system could be impeded. Finally, the Family Judicial Association believes that a better articulation of the threshold for an action to file a judicial disciplinary action would well-serve the officers of the courts, so that they can better attempt to conform their actions to the appropriate standard.

Respectfully submitted for consideration,
The Family Judicial Association by

Susan Shelton Perry

Susan Shelton Perry, Esquire

CERTIFICATE OF SERVICE

I, Susan Shelton Perry, counsel for the Family Judicial Association, hereby certify that I have mailed a true and accurate copy of the attached **MOTION OF THE FAMILY JUDICIAL ASSOCIATION TO BE GRANTED THE STATUS OF AN AMICUS CURIAE AND TO BE PERMITTED TO SUBMIT A BRIEF IN THIS MATTER** and **AMICUS CURIAE BRIEF OF THE FAMILY JUDICIAL ASSOCIATION** by placing the same in the United Staes Mail, first class postage pre-paid, on this the 24th day of June, 2021, to the following individuals:

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Dated this the 24th day of June, 2021.

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