THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF:
THE HONORABLE LOUISE E. GOLDSTON
JUDGE OF THE 13TH FAMILY COURT CIRCUIT

SUPREME COURT NO. 20-0742
JIC COMPLAINT NOS. 30-2020
33-2020

BRIEF OF THE HONORABLE LOUISE E. GOLDSTON, JUDGE OF THE 13TH FAMILY COURT CIRCUIT

Respectfully submitted,

Andrew S. Nason (WVSB No. 2707)
Pepper & Nason
8 Hale Street
Charleston, WV 25301
(304) 346-0361

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF THE CASE

On or about March 11, 2020, Mr. Gibson's attorney released a video of a confidential recording on his website, which resulted in the proceeding before this Court. The video quickly received many views and your Respondent contacted the Court as to her duty or obligation as it related to questions being asked by the press. Respondent was informed by the Court's press information employee that Judge Goldston (hereinafter "Respondent") should immediately call the Judicial Investigation Commission. Respondent did so and was informed by the office of Judicial Disciplinary Counsel (hereinafter "JDC") for the Judicial Investigation Commission (hereinafter "JIC"), that a complaint would be filed. (*See paragraph 3 of the Formal Statement of Charges*).

Respondent received an unsigned complaint from the JDC setting forth the bare facts shown in the video that was posted by Mr. Gibson's attorney. Attached to the complaint were the comments that had been posted on Mr. Gibson's attorney's site. Mr. Gibson filed a complaint March 18, 2020. (*See paragraph 3 of the Formal Statement of Charges*). Within ten (10) days, as required by the Rules of Judicial Disciplinary Procedure, Respondent filed her answer to the complaint. Respondent also listed any and all witnesses to the events surrounding the judicial complaint.

JDC then began their investigation. Respondent was informed that the investigation was confidential pursuant to Rule 2.4 of the Rules of Judicial Disciplinary Procedure, and she could not speak with anyone about the charge. Respondent was informed that she did not need a lawyer unless and until an agreement could not be reached between the JDC and Respondent.

On July 22, 2020, Respondent appeared at the offices of the JDC in response to a request for an interview. However, Respondent was sworn to give a sworn statement. (*See paragraph number 9, page 3 of the Formal Statement of Charges*). During that statement, JDC Brian Lanham showed Respondent a sentence highlighted on a page of a reported case, which indicated that there existed no statute which allowed for a judicial officer to conduct a view. As soon

as Respondent read the statement, the page was retrieved from her and she was asked if she was aware of that holding. Respondent indicated that she was not aware of that holding. During Respondent's practice of law, she litigated two different cases in which judicial views had been taken.

Respondent was handed one statute regarding the family court's contempt powers; she was asked to read it and point out any provision of that particular statute which permitted her to conduct a judicial view. Respondent could not find any provision in that particular statute allowing it. Respondent's statement taken that day was taken without counsel and without notice that the interview would be under oath. At the end of the statement, after the recording had been turn off, the JDC counsel reassured Respondent that both she and JDC Lanham thought Respondent was a good judge but had just "messed up" this time, and that Respondent had acted with good intent and with a good heart.

On or about September 15, 2020, after the JIC had its regular meeting, at which Respondent's matter was presented, Respondent received a phone call from the JDC stating that the JIC was asking that Respondent be suspended from the bench for a short time. The formal statement of charges was signed September 18, 2020 by Judge Alan D. Moats. Inasmuch as JDC had never explained with any detail how Respondent had violated the Canons, and Respondent's belief that she had acted judiciously and in good faith, Respondent was shocked. The formal charges were mailed to Respondent September 22, 2020 by JDC Lanham. Because Respondent has been a public servant for over 30 years, and has no substantial wealth, she informed the JDC that a suspension would force her immediate retirement as she could not financially survive a suspension.

Thereafter, JDC called once again and stated that the JIC would settle for a censure and a $5,000.00 fine. In order to save her job, which she has performed without incident or discipline for nearly 27 years, she tentatively agreed to that punishment. The formal statement of charges was filed on September 23, 2020. When Respondent received the proposed statement of charges, she inquired of the JDC when she would receive a document that would

detail how she had violated each specific rule and/or canon alleged. The JDC informed Respondent that "We don't do it that way." Respondent then expressed reluctance at admitting to the violations and asked if she could admit to the facts but not the violations, she was expressly told no.

Respondent then contacted her present counsel to discuss the charges and proposed agreement.

Before retaining current counsel, and shortly after Respondent's call from the JDC, Respondent received from the JDC what was characterized by the JDC as a "strong arm" call. Respondent was informed that it was in her best interest to enter into this agreement. Respondent informed the JDC that she had conferred with her present counsel and was considering retaining with him and would discuss that option with him. The JDC informed Respondent that if Respondent didn't enter into an agreement, the JDC would be "forced to do their job" and the JDC was very good at it.

Respondent then retained present counsel. Counsel and the JDC negotiated a removal of the Section 3 violations from the settlement and Respondent entered into the agreement.

Thereafter, Respondent submitted a prehearing statement served December 28, 2020. It contained as attachments a copy of the First Amended Corrected Final Order, the Second Amended Corrected Final Order, the Rule 22 Notice and the agreed upon personal property list. Mr. Gibson submitted a prehearing statement that contained allegations which were not part of the official statement of charges to which Respondent and the JDC objected. The objection was sustained.

On January 15, 2021, the Judicial Hearing Board (hereinafter the "JHB") met in this case and the agreement was presented, Respondent admitted the facts alleged and the violations set forth in the agreement. Respondent testified that she did so voluntarily and willingly, believing it to be, at the time, the only way to keep doing a job she loves. At said hearing, Family Court Judge Glen Stotler attempted to ask the JDC about her rationale for determining that Respondent had acted improperly. JDC Tarr defended the JDC's position.

Respondent had gone back on the record in the court room of the Raleigh County Family Court after the view and memorialized what had happened. Ms. Tarr disclosed that she was in possession of the hearing recording and provided a copy to the JHB.

After the January 15, 2021 hearing, on January 18, 2021 JDC Tarr filed a motion to disqualify Judge Stotler, alleging bias based on the fact that Judge Stotler disagreed with JDC Tarr on the law applicable to the actions of Respondent. Judge Stotler subsequently denied the motion to disqualify. On or about January 19, 2021, the JHB issued a Post Hearing Order that requested the JIC and Respondent answer twelve (12) questions to assist the JHB in deciding whether or not to accept the agreement. Both Respondent and the JDC timely filed their brief attempting to answer those questions as was their ethical duty. Respondent then timely filed a reply brief.

On or about March 15, 2021, the JHB issued its Recommended Decision, finding that the punishment agreed to was too harsh and should be reduced to an admonishment and a One Thousand Dollar ($1,000.00) fine. In its reasons for lowering the punishment, the JHB stated among its reasons that "Finally, while there is no statutory authority for the Respondent's actions, it is unclear whether or not her conduct was within her inherent authority and judges would benefit from guidance from the Supreme Court in the form of rule-making or otherwise on this issue."

Despite that the agreement entered into which states that the parties agree that they are bound by the decisions of the JHB and the Supreme Court of Appeals, within hours of receiving the Recommended Decision, JDC Tarr sent an email to all parties informing them of the JDC's intent to object to the Recommended Decision. Thereafter the JDC filed an objection and asked for costs when it previously stipulated there were no costs incurred. The objection also raised the issue of whether Respondent's briefing answering questions posed by the JHB signified a lack of remorse. Respondent's position that she will stand by the written agreement has never wavered. But JDC has argued the fact

that Respondent complied with the JHB's briefing order as evidence of a lack of cooperation by Respondent.

It is the JHB's and the Supreme Court of Appeal's duty under the Rules of Judicial Disciplinary Procedure to ascertain whether the agreement is fair and appropriate as well as whether Respondent violated the Canons of Ethics. Respondent thereafter filed an objection to preserve her ability to fully argue her position before this court and support the JHB ruling. Respondent stands ready to accept the terms of the agreement or the decision directed by the JHB and the Supreme Court of Appeals. She further believes that lack of clarity of the law concerning judicial views as recognized by the JHB should be taken fully into this court's consideration.

STATEMENT OF FACTS

This matter arises out of a view by Respondent of Matthew Gibson's home on March 4, 2020, in the post final order proceedings of *In Re the Marriage of Carrie Gibson and Matthew Gibson*, Civil Action Number 2017-D-655, Family Court of Raleigh County, West Virginia. The divorce litigation was resolved by agreement of the parties. (*See Orders attached the Respondent's December 28, 2020 Statement to the JHB*). Included in the parties' agreement was a list of personal property to be divided between the parties, which represented a negotiated resolution and was submitted to the court on the day of the final hearing. (*See attached list to the Respondent's December 28, 2020 Statement to the JHB*). The court marked the agreement as Joint Exhibit 1. That exhibit itemized the items that Husband (Mr. Gibson) was to receive, which were circled, and the items that Wife (Mrs. Gibson) was to receive, which were highlighted. A Final Order of Divorce was entered in that case on April 23, 2019, and an Amended Final Order was entered on June 11, 2019. The Orders incorporated the parties' agreements, including the personal property division and the provision that Mrs. Gibson could utilize third parties to come to the former marital home to aid her retrieval of those items. The Family Court accepted the agreement on the date of the final hearing, September 18, 2018 and it was made

a part of the record. The Court found that the agreement was fair and reasonable under the circumstances and that both parties had entered into the agreement knowingly, voluntarily and of their own free will. Mr. Gibson at that time was represented by counsel. The Order also included a provision that Mrs. Gibson could bring persons with her to the former marital home to aid her in the retrieval of her property.

On October 1, 2019, Mrs. Gibson filed a petition for contempt, alleging that Mr. Gibson failed to turn over several items of property she was awarded, and further that he had set out other items of personal property at the bottom of the driveway in the rain, causing them to either be damaged or destroyed. Mr. Gibson filed an answer on October 22, 2019, denying the allegations and he requested the court dismiss the petition for contempt.

On December 4, 2019, a hearing was scheduled on the petition for contempt. Mr. Kyle G. Lusk appeared on behalf of Mrs. Gibson and stated that he had video and pictures that had not been turned over to Mr. Gibson and that Mr. Gibson was entitled to see those exhibits prior to proceeding on the petition for contempt. (*Transcript of hearing of March 4, 2020 pp 8-9*). Mr. Lusk turned those exhibits over to Mr. Gibson in open court. Respondent Judge continued the hearing in order to allow both parties to turn over any other exhibits or discovery that they intended to introduce into evidence. The Court set a date for that disclosure to be made; at the March 4, 2020 hearing, Mr. Lusk admitted to filing the disclosure three (3) days late. (*Transcript of hearing of March 4, 2020 pp 9-10*).

Mr. Gibson moved the Court to dismiss the petition due to the late filing of the disclosure; the same was denied. (*Transcript of hearing of March 4, 2020 pp 5-10*). The Court determined the most judicious resolution of that attorney error was to grant Mr. Gibson an opportunity for a continuance so that he could thoroughly prepare for that hearing. Mr. Gibson declined a continuance and then asked for a court-appointed attorney to represent him on the contempt allegation. (*Transcript of hearing of March 4, 2020 pp 11-13*). The Court explained

that he was entitled to an attorney to be present only if the Court anticipated incarcerating Mr. Gibson, and that the Court did not anticipate doing so. Mr. Lusk then stated that he had requested that Mr. Gibson be incarcerated. The Court then informed Mr. Gibson that he was entitled to have an attorney present and that the Court would appoint him an attorney if he qualified for one financially, and that if he did not, he would have to hire his representation at his own expense. The Court offered him the opportunity to fill out a financial affidavit; he declined and stated he did not want to delay the proceeding.

As the moving party, Mrs. Gibson testified to the issues set forth in the petition for contempt and presented photographic and video evidence that some of the items she was awarded in Joint Exhibit 1 were left at the bottom of the driveway at a time prior to the agreed exchange and that it was raining and many of the items were damaged or destroyed. (*Transcript of hearing of March 4, 2020 pp 19-44*). She also listed several items that were not returned, including, but not limited to, a 16x20 canvas photo with a picture of it hanging in the former married home (*Transcript of hearing of March 4, 2020 p 44*), certain photographs, high school yearbooks, children's baby boxes (*Transcript of hearing of March 4, 2020 pp 44-45*), grandmother's recipes, DVDs, Blu-Rays, and an umbrella stand. Mr. Gibson then testified that he couldn't find the yearbooks and recipes, admitted that the DVDs and Blu-rays turned over did not amount to one-half (½) as set forth in the Joint Exhibit and (*See transcript of hearing of March 4, 2020 p. 56*) admitted that he had not turned over the umbrella stand. He further stated under oath that during the final hearing, he was told that he could make copies of the photographs. (*See transcript of hearing of March 4, 2020 p 56*). He admitted that the Order did not provide for making copies (*See transcript of hearing of March 4, 2020 p. 61*). He further testified that since he couldn't get any local store to make copies of the photographs that fact relieved him of his obligation to turn over the photographs.

Mrs. Gibson was also awarded a set of handprints of one of the parties' children which was framed in a popsicle stick frame. (*See transcript of hearing of*

March 4, 2020 p 45). Mr. Gibson admitted that he had removed the handprints and just given Mrs. Gibson the popsicle stick frame. When questioned by the Court as to why he admitted that he took the handprints out of the frame, he stated "I do have--yes, I have that, yes I do" and "it's at the house." (*Transcript of hearing of March 4, 2020 p 61*).

It became apparent to Respondent Judge that: 1) Mr. Gibson had admitted to contemptuous actions by knowingly deviating from the terms of the Final Order; 2) the Court's docket would not allow the parties to complete the presentation of the testimony in the cases; and 3) further delay of the remedy of Mrs. Gibson taking possession of property already awarded to her would result in further damage or destruction to the items she had been awarded at the final hearing eighteen (18) months before.

The Court then asked Mr. Gibson for his address and, after he informed the Court of where he lived, Respondent announced that the Court would recess and reconvene the hearing at Mr. Gibson's residence. (*Transcript of hearing of March 4, 2020 p. 63*). Respondent told Mrs. Gibson that she could bring a truck owned by her (Mrs. Gibson's) dad to the residence to be able to accommodate the removal of the items.

Upon arrival at Mr. Gibson's residence, the parties and several other persons were present at the home. When Respondent and her bailiff exited the police vehicle, they were immediately confronted by Mr. Gibson with several motions. Those motions included a motion to disqualify, as Mr. Gibson believed Respondent was making herself a witness to the proceedings (*Transcript of hearing of March 4, 2020 pp 65-66*), and Mr. Gibson vehemently objected to Respondent entering his home to retrieve the items of property previously awarded to Mrs. Gibson, which he had admitted, under oath, were in the house. Respondent denied Mr. Gibson's motion to disqualify as untimely filed and directed Mr. Gibson to allow her into his residence. At that point, counsel for Mrs. Gibson pointed out that Mr. Gibson was recording the proceedings as was his girlfriend. Respondent then ordered Mr. Gibson and his girlfriend to stop

recording. Mr. Gibson stated he had turned off his recording, which was untrue: when he handed the phone to Respondent's bailiff, it was still recording as evidenced by the recording itself. Respondent then told Mr. Gibson that he would be in direct contempt of the Court's order if he did not allow access to the premises, and that he could possibly be jailed for that contempt. At that time, Mr. Gibson relented and allowed Respondent, her bailiff, Mr. Lusk, and Mrs. Gibson access to the dwelling. Mr. Gibson asked the persons entering the home to take off their shoes; Respondent complied.

Upon entry into the house, Mr. Gibson pointed to the pictures that were at issue; Respondent instructed him to remove the pictures from the wall and hand Mrs. Gibson the property awarded to her, which he did. Mrs. Gibson then asked if she could look for the yearbooks. She was instructed she could look in the place where they were kept during the marriage. She looked in the living room closet and found the yearbooks. Mr. Gibson and Mrs. Gibson went through the items to be sure she got her books, not his; his were returned to the closet.

Mrs. Gibson then asked if she could look for pictures of the children at birth that were in an album that had been returned; however the pictures were removed. When told they were in a cabinet that she had already received, Respondent did not allow Mrs. Gibson to look other places.

Mrs. Gibson then informed the Court that the DVD/Blu-rays were in the family room downstairs. The parties, Mr. Lusk, Officer McPeake, and Respondent then proceeded directly to the family room. Since Mr. Gibson had turned over 12 DVDs to Mrs. Gibson in the initial exchange, Respondent asked Mr. Gibson to pick 12 DVDs to even out the distribution and then the parties would divide them one by one. Mr. Gibson refused, saying that Mrs. Gibson could have whatever DVDs/Blu-rays she wanted so long as she didn't take any that had been purchased after the date of separation. The Court was present while Mrs. Gibson went through the DVDs/Blu-rays. Mr. Gibson then asked that while she was doing that, could he show the bailiff the safe where Mrs. Gibson had alleged were certain items of baby memorabilia. There was no objection and Officer

McPeake followed Mr. Gibson to the safe. Respondent at no time asked him to open the safe and at no time actually viewed the safe.

After Mrs. Gibson finished gathering the DVD/Blu-rays, Respondent offered Mr. Gibson the opportunity to examine the ones Mrs. Gibson had picked. He refused, saying she could have whatever she wanted for the second time.

Mrs. Gibson asked if she could look in the cabinet over the stove for her mother's recipes. Mr. Gibson objected. The Court allowed her to look, and her recipes were found there and retrieved.

Mrs. Gibson then asked about the umbrella stand. In the parties' Joint Exhibit, Mrs. Gibson was awarded the patio set, including umbrella. Mr. Gibson had turned over the patio set and umbrella but did not turn over the umbrella stand. He took the position that the list did not include the stand. The Court questioned him as to whether the list awarded the stand to him, and he admitted it did not. Respondent then ruled Mrs. Gibson could retrieve the umbrella stand a part of what was awarded to her, which she did. (*Transcript of hearing of March 4, 2020 pp. 57 and 64*).

Respondent then informed the parties and counsel that the hearing would reconvene in the courtroom in approximately ten (10) minutes. The Court reconvened the hearing and set forth on the record what had occurred at the view, what issues Mr. Gibson had raised, the rulings on the same, and what items were returned to Mrs. Gibson. (*Transcript of hearing of March 4, 2020 pp 63-65*). Respondent then gave both Mr. Gibson and counsel for Mrs. Gibson an opportunity to correct or supplement the record with anything that had been left out. Respondent also informed Mr. Gibson how to file a motion to recuse, where it should be sent, and what procedurally would happen. Mr. Gibson then mentioned a complaint to the "JIC." Respondent explained to him the procedure for filing a complaint with JIC and that it should be sent to Charleston, West Virginia to their offices and not filed with the Court in Beckley, West Virginia. (*Transcript of hearing of March 4, 2020 pp 65-69*).

Mr. Gibson did file expeditiously a motion to recuse, which Respondent immediately forwarded to the Chief Justice of the Supreme Court of Appeals of West Virginia, along with her response as required by the Rules of Practice and Procedure. Shortly thereafter, Respondent received an Order from Chief Justice Armstead granting the motion to recuse and assigning the case to another Family Court Judge.

ARGUMENT/ISSUES PRESENTED

A. WHETHER THE JHB ERRED IN NOT RECUSING JUDGE STOTLER AND WHETHER JUDGE STOTLER ERRED IN NOT DISQUALIFYING HIMSELF FROM THE MATTER AND SHOULD BE UPON ANY REMAND TO THE JHB

The issue advanced by the Brief of the JIC, which was preserved by the motion of Judicial Investigation Commission Counsel in its motion to recuse Judge Stotler, is whether a judge is disqualified from hearing a matter for bias because they have an opinion on the law controlling the matter to be heard when that opinion is held prior to the completion of the proceeding. The JIC states that Rule 3.10 of the Rules of Judicial Disciplinary Procedure (hereinafter "RJDP") provides that board members shall disqualify themselves in any proceedings in which a judge similarly situated would be required to disqualify him or herself.

Family Court Judges are presented with issues dealing with families as set forth in their grant of jurisdiction, as set out in W. Va. Code §§ 51-2A-1 *et seq.* The pleading filed by the counsel for the Judicial Investigation Commission ("JIC") states that Judge Stotler has been a Family Court Judge since June of 2011. (*See Judge Stotler's biography on the website of this Court*). The pleading also states that Judge Stotler's experience as an attorney was primarily in the area of Family Law (*See Paragraph 1 of the motion filed by the JIC before the JHB*). Therefore, Judge Stotler has extensive experience and knowledge in family law, and brought to the JHB his observation and familiarity with domestic litigation, which provides valuable insight for the JHB's deliberations. It is apparent that membership of the JHB (RJDP Rule 3.1) as well as the JIC (RJDP Rule 1.1) is

designed to have a cross section of experience by including a Circuit Court Judge, Magistrate, Family Court Judge, Mental Hygiene Commissioner, Juvenile Referee Special Commissioner, or Special Master.

It would be "pollyannish" for anyone involved in the judiciary to think that individuals sitting as judicial officers do not have a firm opinion on the status of the law concerning legal issues that repeatedly are advanced in courts across the State of West Virginia. It would be "pollyannish" to believe that judicial officers have not made some evaluations of the law that exists and drawn conclusions to be applied to those issues which regularly are litigated in their court. It would be "pollyannish" to assume Judges have no preconceived notions about the body of law that touches on matters regularly addressed in litigation in the court in which they preside. In the Order denying the recusal request, Judge Stotler appropriately prepared for proceedings by reviewing the pleadings and was familiar with the law applicable thereto. It is submitted a prepared judge reviews the written pleadings and makes sure they are familiar with the applicable law on matters to be heard.

It was clear from the JDC's motion to recuse that when evaluating rule 2.11(A)1 as set forth in paragraph 16 on page 4 of their brief that Judge Stotler's impartiality is not being questioned with regard to (1) the judges personal bias or prejudice concerning the party or party's lawyer, or (2) the judge's personal knowledge of the facts that are in dispute before the tribunal. However, in their brief on page 24, it is asserted that "Judge Stotler's comment and actions are an extreme example of bias for the Respondent and against the JDC." Judge Stotler may have a personal opinion as to the law that is being applied here, but there are no facts advanced that his position is based on a personal bias concerning Judge Goldston or Judge Goldston's lawyer or the counsel for the JIC or the lawyer advising the JHB.

It is submitted there are no allegations requiring disqualification under Rule 3.10 of the Rules of Judicial Disciplinary Procedure. Judge Stotler is not related to Judge Goldston (Respondent). It is further submitted that Judge

Stotler would not be disqualified because he held an opinion on the law different from an opinion of a lawyer appearing before him.

It is submitted that the mere facts that Judge Stotler has an opinion on an issue of law is not a sufficient basis for his disqualification. *See In re African-American Slave Descendants Litigation*, 307 F. Supp. 2d 977 (N.D. Ill. 2004). There, the district court cited 28 U.S.C. § 455, which list various grounds for recusal of a judge. *In re African-American Slave Descendants Litigation*, 307 F. Supp. 2d at 982. The court observed that grounds for recusal under 28 U.S.C. § 455 are divided into two sections; one covering bias and prejudice grounds and one covering interest in relationship grounds. *Id.* The district court, citing 28 U.S.C. § 455(a), wrote that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and that the inquiry concerning such disqualification is based on an objective interpretation of bias. *Id.* at 983 (citing *Liteky v. United States*, 510 U.S. 540, 548 (1994)). Further, the district court wrote, "[a]s a preliminary matter, 'a judge's views on legal issues may not serve as the basis for motions to disqualify.'" *In re African-American Slave Descendants Litigation*, 307 F. Supp. 2d at 984 (citing *Recusal: Analysis of Case Law Under 29 U.S.C. §§ 455 & 144* 23 (Fed. Jud. Ctr. 2002) (quoting *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000)); *Rosquist v. Soo Line Railroad*, 692 F.2d 1107, 1112 (7th Cir. 1982) (stating that judges' views on general legal subjects are insufficient to warrant recusal)). This proposition "takes on added weight when those views arise outside of the judicial proceedings which a recusal motion concerns." *In re African-American Slave Descendants Litigation*, 307 F. Supp. 2d at 984. And, as the United States Supreme Court has stated, "some opinions acquired outside the context of judicial proceedings (for example, the judge's views of the law acquired in scholarly reading) will *not* suffice" to warrant recusal. *Liteky*, 510 U.S. at 554 (emphasis in original); *see also Judicial Inquiry Com'n of W. Va. v. McGraw*, 171 W.Va. 441 (1983) and Syllabus Point 2 where the Court announced the following "The Public

expression of a Judge as to a legal issue does not automatically require his later disqualification when the issue is presented to him in a specific case."

It is clear in this matter that the counsel for the JDC is suggesting that, because Judge Stotler believes that as a matter of law – given the facts as set forth in the statement of charges and the acknowledgement of Judge Goldston – her admitted conduct does not rise to the level of a violation of the judicial code of conduct, he should have been recused. This is but one member's legal opinion, which would have been debated by all the members of the JHB after the conclusion of the evidence. The debate is not of record. However, the recommended decision does record the following: "The Honorable Andrew Dimlich deemed himself disqualified and did not participate the Honorable Paul T. Farnell and the Honorable Russell M. Clawges, Jr. would recommend censure rather than admonishment but concur in the recommendation of a fine of $1,000.00 instead of $5,000.00 The Honorable Glen Stotler dissents because in his opinion there was no clear and convincing evidence that the Respondent violated any provision of the code of Judicial conduct." It is also clear from the decision that the recusal of Judge Stotler would not have changed the outcome of the case.

It is a requirement in West Virginia that all Family Court judges prior to taking the bench practice law for at least five (5) years. (*See* W. Va. Code § 51-2A-4(a)). It is submitted that every lawyer who practices law and appears in court will, on occasion, begin making a legal argument where it is obvious to the lawyer that the presiding judge does not agree with the attorney's analysis of the law or with the lawyer's advocacy of the law and facts in the case at bar. If the JDC is correct that Judge Stotler should have been recused because he disagreed with their legal position, then a judge's opinion of the status of the law on a particular issue before the court equals judicial bias and such a judge should be recused or recuse themselves. Every lawyer would then only argue a case to a judge who had never interpreted that question of law or had not yet addressed that issue and independently had no opinion on that issue. No judge could ever rule on an interpretation of a statute or legal issue more than once.

It further suggests that the JHB members who had the benefit of the pleadings, statements, and stipulated exhibits that were submitted prehearing should not have prepared themselves to ask questions of the lawyers and challenge their positions. The facts of this case would have been available to each Board member so they could question the application of those facts to the law. Judge Stotler's Order stated he had the information and prepared for the hearing (*See Judge Stotler's Order entered January 22, 2021*). The legal opinion of any member, including Judge Stotler, would therefore have been based on the law and facts presented in this case. The fact that, as a matter of law, Judge Stotler does not believe there is a *per se* prohibition against judicial views does not make him biased against the JDC.

Therefore, it is submitted that there are no grounds to disqualify Judge Stotler inasmuch as his stated objection to the recommendation of the JHB went to legal issues, as opposed to personal bias based on his having independent knowledge of the facts or a prejudice towards any party including, but not limited to, counsel appearing for the JIC. Judge Stotler's dissent was a minority opinion, and therefore did not affect the recommended decision.

Judge Stotler wrote an Order where he specifically addressed that he has no personal bias nor prejudice and had no personal knowledge of the facts (*See Judge Stotler's Order entered January 22, 2021*).

B. WHETHER THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE BINDING ON THE JDC AND RESPONDENT

The JDC and Respondent entered into a written agreement. That agreement was introduced as a joint exhibit at the hearing of January 15, 2021. The agreement is set forth on page 2 and page 3 of the Recommended Decision of the Judicial Hearing Board entered March 15, 2021. That agreement contained the following language:

> "Both parties understand, acknowledge, and agree that the decision to accept the recommendation concerning discipline rests solely within the purview of the Judicial Hearing Board and the State Supreme Court. The parties understand, acknowledge and agree that the Judicial Hearing Board and the State Supreme Court may

award more or less severe discipline than what is recommended by the parties and that the parties are bound by the decisions.

Both parties acknowledge and agree that neither the Judicial Investigation Commission nor Judicial Disciplinary Counsel incurred any costs as a result of the investigation into the disciplinary charges, and Respondent understands, acknowledges, and agrees that she is entering into this agreement because it is in her best interest and that no other inducements have been promised other than what is contained within the four corners of this document. All parties agree to do everything necessary to ensure that the foregoing terms of this agreement take effect."

Respondent does not deny the information provided in the interview with the JDC of July 22, 2020 or her letter to the JDC dated April 30, 2020. In the April 30, 2020 letter, she acknowledged her prior site visits with litigants and counsel. In her statement, Respondent stated that she could provide "no statute, rule or case that gave her authority to conduct home visits. Respondent also acknowledged there was nothing in the contempt powers that specifically gave her the authority to conduct a home visit." Respondent further "confessed that she never held anyone in contempt before going to their home."

The JDC is requesting this Court to find that Respondent is bound to the admitted facts. She is not now, nor has she ever sought to disavow the statements she made, then why is this issue included? It is submitted that both the JDC and Respondent agreed to be bound by the decision of the JHB and the West Virginia Supreme Court of Appeals (*See recommended decision page 3 item 1.viii*). Nonetheless, the JDC filed an objection to the JHB's recommended decision on March 23, 2021, even though they agreed to be bound by the JHB's decision. In their brief, JDC alleges in item D-3 that the JHB erred in not awarding costs to the JDC, in spite of stipulating in the paragraph cited above that there were no costs incurred. Therefore, the JHB's recommended decision that "Both parties acknowledge and agree that neither the Judicial Investigation Commission nor Judicial Disciplinary Counsel incurred any costs as a result of the investigation" is correct (*See Recommended Decision page 3 item 1.ix is supported by admitted facts*).

Further, the JDC's brief seems to suggest that Judge Stotler leaked a March 25, 2021 letter he wrote to the Justices of the West Virginia Supreme Court of Appeals; that assertion is outside of the record herein (*See footnote page 14 of the JDC brief*). In footnote 3 on page 14 of the same brief, the JDC argues the impact of the outcome of the voting of the JIC board from its probable cause deliberation in this matter (*See* RJDP Rule 2.7(b)) as well as the significance of an opinion of the Family Court Judge on its Board. That is not in the record.

Finally, Respondent agreed to the following formal charges: "Family Court Judge Goldston violated Rule 1.1 (compliance with the law), Rule 1.2 (confidence in the judiciary), Rule 1.3 (avoiding abuse of prestige of office), Rule 2.2 (impartiality and fairness), Rule 2.4(B) (external influences), Rule 2.5 (competence, diligence and cooperation)" (*See paragraph d.v page 2 of the Recommended Decision and page 1 of the formal statement of charges*). Her admission to violating those Rules was part of an agreement. It was always to be reviewed by the JHB and this Court. The JDC's interpretation of what constitutes a violation, and the effect of a violation, was always to be reviewed by the JHB and this Court.

The JDC agreed not to pursue any other possible violations which were alleged as follows: Rule 3.1(A),(B),(D) (extrajudicial activities in general) (*See paragraph d.vi of the Recommended Decision and page 1 of the formal statement of charges*).

The JDC has argued in its brief that Respondent denied Mr. Gibson due process and equal protection under the law, and violated Mr. Gibson's state and federal constitutional rights against unlawful search and seizure. The formal charges in paragraphs 1-14 did not allege violations of due process, equal protection violations, or a search and seizure violation. Rather the allegation focused on the judicial view at the home of a party, the contempt procedure, Respondent as a potential witness, the video recording and the authority for Respondent's procedural actions. It could be argued that due process issues could be involved in the charge, but Respondent did not agree to any violation of

due process or any denial of constitutional rights; there was no such assertion by the JDC in the formal charges and no such finding by the JHB. The JHB's decision to reduce sanctions centered around a prior treatment of another judge (*See page 4 paragraph 6 of the Recommended decision*); Respondent's record; the extensive record made after the incident; and its analysis that, although "there was no clear legal foundation for conducting the judicial view in question, the scope of a judicial officer's inherent authority relative to judicial views is uncertain." It is further submitted that the statement about inherent authority was made after an order entered January 22, 2021 requesting briefing on twelve questions concerning Family Court Judges' authority to conduct views. Respondent and the JDC both submitted initial briefs, and Respondent filed a reply brief.

Therefore, while the JDC argues that agreed upon facts are binding, it appears to be denying that other stipulated facts control. The JDC seeks to change the fact set forth in the agreement that Respondent "was completely cooperative during the investigation of the instant complaint and admitted her wrong doing" (*See page 3 paragraph 1d.vii of the recommended decision*). The JDC now wishes to argue that Respondent is not remorseful and now does not believe she has done anything wrong, when those facts are inconsistent with Respondent's position.

The JDC has asserted due process violations as grounds for challenging the decision of the Judicial Hearing Board. It is ironic that the JDC would assert violations of due process by Respondent, when now bringing this issue before the West Virginia Supreme Court of Appeals by the JDC could in and of itself be argued to be a violation of Respondent's due process. There is nowhere in the formal charges, which is the foundation document that brought Respondent into this process, indicating Respondent was charged with violating Mr. Gibson's due process rights. The charges cite specific sections of the Code of Judicial Conduct and merely cite the Code section. The charging document does not continue after citing the sections in the Code of Judicial Conduct to include a "to-wit statement" that the violation charge is based upon violating the due process rights of Mr.

Gibson. The factual allegations support the conclusion that Respondent violated the Code by having a judicial view at Mr. Gibson's house without there being any authority for her to do so; that she made herself a witness; that there is no statutory support to permit a judicial view; and that the contempt process does not permit a judicial view. Respondent filed an answer to those charges; an agreement was made; and a hearing was held based upon those specific allegations.

It is not the role of the JDC to litigate Mr. Gibson's rights, nor is it their role to in effect ask this Court to answer a question of law that is pending in Mr. Gibson's lawsuit filed in the United States District Court for the Southern District of West Virginia. The due process issues are not properly before this Court. In fact, when Mr. Gibson sought to argue those issues before the JHB, which were outside of the statement of charges, JDC and Respondent objected in writing. The JHB sustained those objections.

And what about Mrs. Gibson's right to have property that was awarded to her by the agreement of her and her ex-husband, which was reduced to a Court Order, to be returned to her? As a judicial officer, Respondent is tasked with ensuring that both parties' rights are protected, and that the Court order was enforced.

It is further submitted that, on June 4, 2021, in *Klein v. McCullough*, No. 19-0888 at *11-12, ___ S.E.2d___ (W. Va. June 4, 2021), this Court restated its long-standing position that it will not address a non-jurisdictional question that has not been decided at the trial court level, by citing the following:

> "See, e.g., Syl. Pt. 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958) ("This Court will not pass on a non-jurisdictional question which has not been decided by the trial court in the first instance."); Syl. pt. 2, *Cameron v. Cameron*, 105 W.Va. 621, 143 S.E. 349 (1928) ("This court will not review questions which have not been decided by the lower court."). The reasons behind this rule are many, including that "it is manifestly unfair for a party to raise new issues on appeal. *Whitlow v. Bd. Of Ed. Of Kanawha Cty.*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993)".

> In summary, but for the well-founded principle requiring parties to present arguments to the trial court in the instance, this Court might have been impelled to abolish the "stranger to the deed" rule. We must, however, decline the plaintiff's sudden invitation at oral argument to do so."

The Petitioner and Respondent should both be permitted to argue questions of law but should be bound by their statements of fact and their prior agreements.

C. WHETHER THE JHB CORRECTLY RECOGNIZED THAT "THERE WAS NO CLEAR LEGAL FOUNDATION FOR THE JUDICIAL VIEW IN QUESTION" AND CONCLUDED THAT GUIDANCE TO JUDICIAL OFFICERS FROM THE SUPREME COURT OF APPEAL...WOULD BE HELPFUL

1. Whether as a Court of limited subject matter jurisdiction the Family Court has authority to conduct hearings and regulate the fact finding process.

JDC argues that the Family Court system is a creation of statute, when it was created by an amendment to the West Virginia Constitution. *See* West Virginia Constitution Article VIII Section 8-16, which reads as follows:

> **"8-16. Family Courts.**
>
> There is hereby created under the general supervisory control of the supreme court of appeals a unified family court system in the state of West Virginia to rule on family law and related matters. Family courts shall have original jurisdiction in the areas of family law and related matters as may hereafter be established by law. Family courts may also have such further jurisdiction as established by law.
>
> Family court judges shall be elected by the voters for a term prescribed by law not to exceed eight years, unless sooner removed or retired as authorized in this article. Family court judges must be admitted to practice law in this state for at least five years prior to their election. Family court judges shall reside in the circuit for which he or she is a judge.
>
> The necessary number of family court judges, the number of family court circuits and the arrangement of circuits shall be established by law. Staggered terms of office for family court judges may also be established by law.
>
> The supreme court of appeals shall have general supervisory control over all family courts and may provide for the assignment of a family court judge to another court for temporary service. The provisions of section

seven and eight of this article applicable to circuit judges shall also apply to family court judges."

Even though Family Courts are courts of limited jurisdiction the jurisdiction limitation goes to substantive issue but not its judicial authority; family courts still regulate its process and enforcement of its orders.

See also W. Va. Code § 48-5-102 generally and specifically W. Va. Code § 48-5-102(b) "Generally a Family Court has the right and the authority to adjudicate actions for divorce and the power to carry its order into execution" and "jurisdiction of the subject matter of divorce embraces the power to determine every issue or controverted question in an action for divorce."

Family courts sit as courts of equity. When these cases delve outside the ordinary, sometimes the court sitting as a court of equity requires procedures to enforce its orders. A judicial view is within the inherent power of the family court to enforce its order to bring justice to the party harmed by the other party's contempt of the court order. It is acknowledged there is no statutory authority expressly permitting nor denying a family court's right to conduct a view away from the courthouse nor is there a statutory authority for a circuit court judge to do the same. However, case law indicates it lies within the inherent authority of courts of record.

Against this background, family court judges must make decisions which determine the future of families, not only their belongings. It causes family court judges to make every effort to ensure the court experience of the parties is safe, their rights preserved, with an efficient and judicious outcome, even if the parties may disagree with that outcome. It is the judge's responsibility to resolve all matters efficiently so the parties can move on with their lives.

JHB noted that any decision or guidance from the Supreme Court of Appeals in this case would be helpful as the issue impacts other courts. While this case presents a set of circumstances occasionally used in family court proceedings, they are often used in civil and criminal proceedings across the country.

Respondent agreed to the admission of the violation of the Canons. At that time, she was convinced by discussion with the JDC of such and that, if she disputed the matter, the JIC may seek her suspension from the bench. She agreed to the admission in order to end a protracted case and manage, to some extent, risks (as is done in the settlement of many civil cases).

Subsequent research regarding the questions posed by the Judicial Hearing Board revealed a body of law that supports the actions taken by Respondent. Respondent intends to comply with and respect the Orders made by the Judicial Hearing Board and Supreme Court of Appeals, as well as to honor her agreement with the JIC.

It is important to circuit judges and family court judges that this case does not establish a precedent limiting the inherent authority of courts to enforce their orders, view situations firsthand, and be able to act quickly when destruction or disappearance of property could be imminent. An order entered by a court sitting as a court of equity is not a suggestion to a party as to what is expected of them: it is a requirement, otherwise enforceable through civil contempt, to make the aggrieved party whole.

This matter before this Court arose out of litigation that is not atypical in domestic litigation; it was an emotionally charged case. Often, people feel intimidated by the court system, especially when they do not work within it. Respondent was surprised that, attached to the JIC's original complaint, were comments from social media, which should not have any bearing on the JIC finding that she violated ethics rules. It is questionable whether Mr. Gibson or others on his behalf should have posted matters dealing with a confidential family court proceeding, as the confidentiality of those proceedings protect both parties and was not solely Mr. Gibson's right to breach.

Rule 8 of the Rules of Practice and Procedure for Family Courts states:

"Unless prior permission is granted by the family court, no person shall be permitted to make photographs, video recordings, sound recordings or any other form of recording of proceedings, or any sound, video or other form of transmission of broadcast of proceedings;..."

The rule clearly prohibits the recording of proceedings by non-judicial "others" without permission. The rule also clearly authorizes the family court judge to authorize another person to record, such as a representative of the court – in this case the bailiff – to record the proceedings. The recording would be evidence of what took place, but not an official transcript.

It is important to remember the facts of the underlying case. Mr. Gibson came to the March 4, 2020 hearing with unclean hands after admitting that he had violated the court order by withholding property (*See transcript of hearing of March 4, 2020 pp. 56,57,58,59, and 61*). He refused to allow his former wife to come on his property (*Transcript of hearing of March 4, 2020 p. 23*). The evidence prior to the court view made clear Mr. Gibson was in willful and defiant civil contempt by not turning over property per the equitable distribution order, which was an agreement of the parties. This was further evidenced by a picture taken of the property in question prior to the separation of the parties.

There was also evidence that the items Mr. Gibson did turn over had suffered damage (*transcript March 4, 2020 pp 23-39*). There was clear testimony that the items had been left at the bottom of the driveway in the rain. Occurrences like these, though unfortunate, are common in family court proceedings. This testimony led to Respondent's decision to view the property to see what, if any, property had not been turned over in compliance with the prior order of the court, and whether any of this property had been damaged. As with some cases, this could only be accomplished by conducting a view of the property directly. It was also important to see and potentially seize the property that had already been awarded to Ms. Gibson by order, as to prevent further damage or loss to the property.

The least intrusive measure to enforce the Amended Final Order was to go to the property and allow the aggrieved party to recover the marital property that had clearly been awarded to her in the prior order. The Final Divorce Order allowed her to do that, and Mr. Gibson had prohibited his former wife from doing so. Other remedies would prolong the proceedings and may have resulted in the loss or destruction of the property. While Mr. Gibson could have been punished

for being in contempt, the Court made the decision to find a practical solution rather than jailing Mr. Gibson. He could have been ordered again to allow Mrs. Gibson onto the property to retrieve her property; he could have been ordered to compensate Mrs. Gibson and her helpers for the second trip to retrieve her property; he could have been fined and ordered to reimburse any damaged or lost property; however, these resolutions would not make Ms. Gibson whole because some of the property had great sentimental value. In addition, further proceedings would be necessary to ensure compliance with such orders. It would further protract and prolong the proceedings. These would not have been judicially economically remedies.

In this case, the more efficient and judicious remedy was to view the property and allow the court to sort out the allegations of the parties, and to see that the court's order was enforced through court supervision. This would prevent further loss or damage to the property, and hopefully de-escalate the feelings and attitudes of the parties. Jailing Mr. Gibson for contempt was unlikely to serve either purpose. The integrity of the process required the court-ordered division of the property be enforced and prevent further proceedings on these issues.

Respondent had the same inherent authority to conduct a view in order to enforce the previously entered order as a circuit court judge. Courts have inherent authority to enforce their orders and protect the parties. In family law matters, judges must sometimes act quickly to prevent an unjust and contemptible destruction or loss of property. Preserving the marital estate is a paramount part of court ordered property distribution. Family court cases are unique in this regard.

The statement of charges refers to a sudden stop of the proceedings, asking for Mr. Gibson's address and failing to inform Mr. Gibson the reason that the Court was proceeding to his home. *See* W. Va. Code § 48-1-304(e), which permits the Court upon a finding of flagrant contempt to issue a capias without prior service/notice. *See also Blanton v. Artrip,* 355 S.E.2d 640 (W. Va. 1987), where the court held "When an order of a court has been disobeyed and the case is

urgent or the contempt flagrant, the court may issue an attachment in the first instance without the usual antecedent rule." [a rule in contempt] (citing Syllabus Point 1, *Ex Parte Kirby*, 100 W. Va. 70 (1925) and Syllabus Point 3, *Hendershot v. Handlan*, 162 W. Va. 175 (1978). There, the court rejected an argument that a rule to show cause needed to be issued before taking remedial action because after avoiding payment for eighteen (18) years issuing such a rule would have provided an opportunity for flight. *See Blanton*, 355 S.E.2d at 662. Here, Respondent was attempting to avoid the same result. Mr. Gibson took the opportunity to object outside his home to the court's action. Respondent ruled on those objections both at the scene and in the courtroom when the Court reconvened the hearing immediately after the view. Mr. Gibson's rights were protected and preserved on the record.

It is submitted that due process was not violated in this case, as W. Va. Code § 48-1-304(e) provides guidance. In certain circumstances (it is part of the "general law") that a court may not provide the contemnor time to dispose of or damage the property and therefore limit advance notice. In this case, Mr. Gibson had admitted that at least two categories of property awarded to Ms. Gibson had not been provided and were still located within the home. Further, Mr. Gibson already was subject to an Order which contained the following language: "The Petitioner [Mrs. Gibson] may bring others to help her move these items (*See First Amended Corrected Final Order page 4 paragraph 14 and Second Amended Final Order Page 4 paragraph 14 attached to Respondent's statement accepted into evidence of January 15, 2021 hearing page 11*).

Magistrate courts, circuit courts and the State Supreme Court are constitutionally created courts; family courts have been established by the Constitution, statutes, and case law as a court of record with original jurisdiction in specific areas of domestic relations law, with the inherent and general powers which go with that designation. Since family court judges are both the triers of fact and asked to determine and apply the applicable law to those faces, their

decision-making process is no different from a circuit court of record in its duties to rule in a bench trial.

Family courts were created by the Unified Family Court Amendment, adopted in 2000, and added to the West Virginia Constitution in Article VIII Section 8-16 of the Constitution. As a constitutionally created court, family courts are "an independent judicial office and the exercise of the power of the office is subject only to the constitution and the law." *State ex rel. Skinner v. Dostert,* 166 W.Va. 743 (1981).

Thus, family courts have the inherent judicial authority of their offices, the same as circuit courts to enforce its orders. Both courts are West Virginia courts of record with original jurisdiction over proceedings for which they have subject matter jurisdiction. JDC confuses limited jurisdiction, a limit over subject matter, with a court's inherent authority. This is not a case involving limited jurisdiction. The family court has the inherent authority to conduct a view, the same as a circuit court in a bench trial. *State ex rel. Lambert v. Stephens,* 200 W.Va. 802, 490 S.E.2d 891 (1997) involved the enforcement of an administrative order of the circuit court related to parking, and the administrative business of the circuit court.

State ex rel. Farley v. Spaulding, 203 W.Va. 275, 507 S.E.2d 376 (1998) is also irrelevant. *Farley* is also a case involving the administrative authority of a circuit court, dealing with the issue of the assignment of bailiffs and the performance of courtroom services by bailiffs or other personnel.

Syllabus Point 3 of *Shields v. Romine,* 132 W. Va. 639, 13 S.E.2d 16 (1940) provides that "A court 'has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.' 14 Am. Juris., Courts, section 171."

The JDC focuses on the rights and remedies of Mr. Gibson, ignoring the rights and remedies of Mrs. Gibson, and her legal right to seek and receive property to which she was previously awarded ownership. It also ignores that Mr. Gibson's hands were unclean under equitable doctrines, and that he openly

admitted in court, under oath, and on the record that he had not turned over all of Mrs. Gibson's property, (*See transcript of hearing of March 4, 2020 p. 56 movie discs; p. 58-61 re picture, handprint*) had not even looked for much of it, and, importantly, that the property awarded to her was still at his house. It also ignored the inherent legal authority of a Family Court Judge to enforce its orders pursuant to West Virginia statutes, case law, and the general law of courts. *See* W. Va. Code §§ 51-2A-2(a)(10) & 51-2A-9 (Contempt Powers); *see also Aaron v. Montgomery,* No. 20-0126, __ S.E.2d __ (W. Va. Mar. 12, 2021).

The JDC has not cited a similar case in which a judge was sanctioned for ethics violations for performing a judicial function, including conducting a view and, in doing so, enforcing an order in a contempt proceeding. Even in cases where a view has been held to be improper, the remedy was a finding of error – not an admonishment or sanction of the presiding judge. An alleged error is an appealable issue, but a violation of a judicial canon is a separate matter.

JDC seems to take the position that, since Respondent Judge Goldston complied with the JHB's order and provided briefing to the JHB's questions, she is somehow reneging on her agreement with the JDC. This is not true. Respondent had the duty and obligation to comply with the directive of the JHB and research and answer the questions it propounded. Respondent's briefing to the JHB clearly stated she was not seeking to withdraw from her agreement.

While the research suggests Respondent Judge Goldston might not have agreed to the statement that there was no authority to perform a view at Mr. Gibson's house, she still accepts the agreement. The question presented is whether views are permitted and whether during the view's enforcement of a final court order are allowed. The weight of authority on that question is yes. The JDC cites no judicial opinions or decisions that a judge has been sanctioned for the type of conduct for which it seeks to sanction Respondent. The JDC's reliance on agreed admonishments is misplaced, as set forth *infra* Part D(1).

In *Westover Fire Dep't v. Barker,* 142 W.Va. 404, 410-11 (1956), the Supreme Court wrote,

This Court does not by the foregoing impugn the **integrity** or the ability of the Judge of the Circuit Court of Monongalia County in deciding the instant case on the basis of an *ex parte* view which he took of the premises.

It is unnecessary for us to decide whether, in a law action or proceeding tried by a trial judge, in lieu of a jury, the trial Judge may, after notifying the parties or their counsel be prohibited from viewing the premises. We simply say that in the instant case the trial Judge, having decided the case on the basis of his view alone, has not, so far as the record in this concerned, decided this case in a manner which would permit this Court to give a proper review of the case. See 2 Jones on Evidence, Civil Cases, Fourth Ed., Section 411, page 778, which revised by the publisher's editorial staff.

The judgment of the Circuit Court of Monongalia County should be reversed for this reason alone; however, because the case at bar was heard, tried and decided by the judge of the Circuit Court of Monongalia County, in lieu of a jury, it becomes the duty of this Court, for reasons hereinafter stated and under the case hereinafter cited, to review the record presented to this Court on the instant writ of error to determine what, if any, judgment should be entered here.

This Court has held that even where there is a view by a jury, (which is authorized in the exercise of the sound discretion of the court over which her presides (a question which we do not need to decide.) took a view of the premises, though it is to be considered by evidence, together with the other evidence in the case and insufficient by itself to justify the trial in entering judgment on the basis of what the jury saw on the view. A fortiori, the rules should be applied in this case where the judge without statutory authority, though he may have acted within the inherent power of the court over which he presides (a questions which we do not need to decide) took a view of the premises, and as this record discloses, without the consent or presence of the parties litigant or their attorney's with emphasis.'

It is unnecessary for us to decide whether, in a law action or proceedings tried by a trial judge, in lieu of a jury, the trial Judge may, after notifying parties or their counsel be prohibited from viewing the premises. We simply say that in the instant case, the trial Judge, having decided the case the basis of his view alone, has not, so far as the record in the Court is concerned decided this case in a manner which would permit this Court to give a proper review of the case. See 2 Jones on Evidence, Civil Cases, Fourth Ed, Section 411, page 778, which was revised by the publisher's editorial staff. (Emphasis added.)

In addition, as appears from the trial judge's opinion, the judge in the statutory proceeding, "which was on the 'law side' of the court, in which the balance equities has no application, undertook to balance the equities between the two contending parties," and noted the following: "The most helpful guide to the Court has been a view of the premises." *Id.* at 409. That opinion states the view of the property did not constitute judicial misconduct.

The Supreme Court was transparent in stating the judge was not reversed for viewing the property even without express statutory authority. The court was clear it was not going to call the trial court judge "on the carpet" for view of the property without the Judge having express authority to do so and even when it was done without notice/and without the parties.

Therefore, when JDC takes the position that there is no statute, rule or case that would have given Respondent the authority to conduct home visits, it is true that during the interview she could not identify any such authoritative source. Respondent has since had an opportunity to conduct research to adequately reform her answer to that question.

Respondent Judge Goldston fully and to the best of her ability answered the questions propounded by the JHB and provided legal authority for the answers to those questions. There is significant authority that permits courts to conduct views and impose appropriate remedies in contempt cases. This case and any agreement or penalty imposed on Respondent Judge Goldston, should not be precedent prohibiting the same conduct by circuit or family court judges.

2. Whether the Family Court has the inherent authority to conduct an onsite visit

Family court judges have the inherent authority to conduct a view to resolve enforcement of its orders, and that is contemplated in W. Va. Code § 51-2A-9(b). That statute states the court should use the least power adequate to the end proposed to purge the contempt and to obtain compliance with the order. As discussed above, Respondent told Mr. Gibson jail was not contemplated; see *Wyman v James, 400 U.S. 309 (1971)* where the lack of a criminal investigation or jail was a factor in holding that a home visit by a state welfare employee did

not violate the Fourth Amendment. The visit satisfied a limited remedy of no incarceration, preservation of property and the authority and dignity of the court.

Respondent believed that incarceration would not have provided Mr. Gibson the opportunity to purge the contempt except upon his promise that he would comply. A monetary fine and damages would not have provided a true remedy or replaced the awarded property which were sentimental and thus irreplaceable, given he had already admitted willfully violating the court's order.

The better remedy to assure compliance with the order was for the court to view the division of property (the video discs were to be equally divided) so that Mr. Gibson could and would purge his contempt. This would bring finality to the issue. Family court judges are triers of both fact and law. They are courts of equity. They should be able to conduct these views and proceedings to assure that the facts as alleged are true, and if necessary, take actions to ensure enforcement of its orders, when a party is in contempt.

This question of judicial views has been seen by other states as a proper way to evaluate evidence, and a permissible responsibility for a court, especially when the court is sitting as a trier of the facts, as are family courts. There are many cases where a view by a court of equity is not only proper, but also sometimes necessary. *Tiede v. Schneidt*, 105 Wis. 470 (1900) was a case alleging improper cleaning and rendering of animals. The Supreme Court of Wisconsin held that it was permissible for the trial court acting as a court of equity to view the premises "where the only purpose of such view was to enable the court to weigh and appreciate the evidence in the case better than it otherwise could." *Id.; see also* 89 C.J.S. Trial § 1204 Purpose of View or Inspection: "In a case tried to the court without a jury, a judge's personal inspections of property are permissible and proper as an aid to a better understanding of the evidence, the issues, what the witnesses have testified to, the weight of the evidence, the issues, what the witnesses have testified to, the weight of the evidence, and its proper application." (citing *Kirk v. Allemann*, 2 Wash. App. 183 (Div. 3 1970)). A viewing is justified if it enables the judge to better understand, correctly weigh and assess the respective credibility of the evidence and the availability of an

alternative to viewing the scene, as well as expense, delay or inconvenience to the parties. [citation omitted] A view should occur if it would aid the trier of fact in reaching its verdict and if it is impracticable and inefficient to present material elements by photographs, diagrams, maps or the like. *Hussain v. Cameron Const. & Roofing Co., Inc.* 2007 Mass. App. Div. 14, 2007 WL 84224 (Mass. Dist. Ct. App. 2007), *aff'd* 71 Mass. App. Ct. 1113, 882 N.E.2d 871 (2008) (unpublished). *See also When Mohammad Goes to The Mountain: The Evidentiary Value of a View*, 80 Ind.L.J.1091 (2005).

In the cases cited above, the court view was not only affirmed by the appellate court, but also recognized as being an important evidentiary tool. In this case, there was conflicting testimony and evidence concerning the nature, condition and extent of the property and whether Mr. Gibson had retained property that he should have delivered to his former spouse. As such it was necessary for Respondent, as the trier of fact, to view the items in Mr. Gibson's home as an aid in making her decision. It was a proper aid to permit a better understanding of the evidence, the weight of the testimonial evidence and its proper application and enforcement.

Courts in other jurisdictions have also held that a view by a judge is independent evidence upon which a finding may be made and sustained. *See, e.g., Hutcherson v. Alexander*, 264 Cal.App.2d 126 (Cal. Ct. App. 1968). In a property dispute case, the Supreme Court of Alabama stated it would not review a judge's ruling in a boundary line tried without a jury where the judge made a personal inspection before he ruled on the property line dispute, unless it is not supported by the evidence, or plainly or palpably wrong. *See Cameron v. Cain*, 295 Ala. 164 (1976). Interestingly in this case, one of the litigants was *pro se. Id.*

The importance of evidentiary views is the subject of an extensive analysis in *When Mohammed Goes to the Mountain: The Evidentiary Value of a View*, 80 Ind. L. J. 1091 (2005). This article is a review of court decisions on the value of court views, and the admissibility of the evidenced garnered from such views, as well as why they are important tools for courts. It expresses those judicial views

are a proper and often necessary means of courts, especially courts of equity, to view and assess evidence. *Mohammed, supra* 1118, concludes that "Views have been around for many years, and although technology has to some degree obviated them, views are likely to be an important part of trials for years to come. After all, '[i]f a picture is worth a thousand words, then the real thing is worth a thousand pictures."

Further, it is important to note that while, in a minority of cases the reported decisions find there to be in error in the manner the view was conducted, the cases do not discuss that such error rose to the level of a violation of a judicial code of ethics. *See supra Westover Fire Dep't v. Baker*, 142 W. Va. 404 (1956).

3. Whether Respondent violated Mr. Gibson's State and Federal Constitutional Rights against unlawful search and seizure is properly before this Court

The Gibson matter was not a modification of an order; it was an enforcement of an agreed order entered by the Court. Mr. Gibson had been served with a contempt petition: the hearing of March 4, 2020 was the second contempt hearing seeking enforcement of the last Final Order. Mr. Gibson was aware of the Final Order's contents and requirements. He admitted he was holding Mrs. Gibson's property and would not let her have access to it. As pointed out above, Mr. Gibson was given every opportunity to continue the hearing in order to obtain counsel. He chose to proceed and he agreed as part of the equitable distribution portion of the final decree for others to assist Ms. Gibson to obtain her property.

Henry v. Johnson, 192 W. Va. 182, 450 S.E.2d 779 (1994) involved the Family Law Master's entry of a temporary order of custody without allowing the parties to testify. Rule 16 of the Rules of Practice and Procedure for Family Courts generally provides for evidence at temporary hearings to be made by proffer. However, the Supreme Court of Appeals issued a writ requiring the Family Law Master to take testimony relevant to the issue of custody at a continued temporary hearing. The Supreme Court did not rule that the Family

Court procedure *per se* violated due process; the Supreme Court did note that both procedural and substantive due process applied in family courts.

Mr. and Mrs. Gibson both testified under oath prior to the visit to Mr. Gibson's home. Mrs. Gibson testified to the items of property that she did receive from Mr. Gibson and the condition of the items left in the rain. In the presence of both parties and Mrs. Gibson's counsel, Respondent went through the list of Mrs. Gibson's property on the record. Mrs. Gibson responded to whether she received the property. Mr. Gibson gave responses concerning where the property was and why he had not given it to her. This was not a contested action as to who was entitled to what property. There was no question Mr. Gibson kept Mrs. Gibson's property specifically awarded to her and the property was at the former marital home. The property division was agreed to and listed in the Final Order as was Mrs. Gibson's right to go to the house, retrieve the property and utilize third party help.

The Supreme Court wrote in *Henry v. Johnson*, 192 W.Va. 82, 450 SE2d 779 (1994):

> **"This is not a hearing on the disposition of an inanimate object such as a television, or a set of golf clubs. Under the circumstances of this cases, we conclude that a more elaborate evidentiary hearing is warranted."** *Id.* at 84 (emphasis added).

Here, this was a post find order proceedings concerning a party taking possession of inanimate objects already awarded to her.

JDC is incorrect in asserting that Mr. Gibson's due process rights were denied by not allowing him to testify at the hearing. He testified. He was under oath. His testimony regarding turnover of property is referenced previously herein. He testified to issues relevant to the contempt proceeding. He discussed where property was, its condition, whether it had been given to Mrs. Gibson as required, and the way he turned over some property, such as removing the handprint painting from its frame.

He was given service of the contempt petition and was aware of the nature and purpose of the proceeding. He filed responsive pleadings, although

unverified. He was given at least two opportunities to continue the hearing in order to obtain counsel. He testified and questioned the Court again on the record when the parties returned from the view. He was advised of his rights after the hearing, the procedure for filing for recusal, and even the procedure for filing a complaint against Respondent with the JIC.

W. Va. Code § 48-1-304(e) provides:

> (e) **At any time** during a contempt proceeding the court may enter an order to attach forthwith the body of, and take into custody, any person who refuses or fails to respond to the lawful process of the court or to comply with an order of the court. Such order of attachment shall require the person to be brought forthwith before the court or the judge thereof in any county in which the court is sitting. (emphasis added.)

The provisions of W. Va. Code § 51-2A-9(a)(1) (sanction) and (2) (regulate proceedings) were complied with. The provisions of subsection (3) involving direct contempt is not relevant to this proceeding since Respondent chose not to impose punishment.

The provisions of W. Va. Code § 51-2A-9(b), which allows a family court judge to enforce compliance, were complied with. The language cited above which specifically authorizes the court to seize or impound the property to secure compliance with the order.

The provisions of subsection W. Va. Code § 51-2A-9(c) do not apply to this proceeding, because Mr. Gibson was not jailed, put on home confinement nor put on work release.

The explicit provisions of W. Va. Code § 48-1-304(e) apply here. Nonetheless, Mr. Gibson had adequate notice of the contempt charges. Mrs. Gibson proved the allegations of the petition by her own testimony, which was not contested by Mr. Gibson, and were in fact confirmed by him. After establishing his noncompliance, the burden shifted to Mr. Gibson to establish any defense. He had none. He admitted he was still in possession of the property and failed or refused to allow Mrs. Gibson to retrieve it therefore confirming her allegation.

The JDC assertion that Respondent's actions amounted to an investigation of the facts is not correct. In a family law matter, the family court judge is the trier and finder of facts, just as in a bench trial in circuit court. As any judge in a case without a jury, the court finds those facts from the pleadings, evidence presented, and testimony of the parties. These points were sufficiently discussed in Respondent's brief and answer to questions propounded by the JHB and need not be repeated here. Moreover, as discussed above, Mr. Gibson admitted to the facts in the contempt petition, and testified concerning them.

Price Bros. Co. v. Philadelphia Gear Corp., 629 F.2d 444 (6th Cir. 1980) previously cited by the JDC, does not apply to this case. That case involved a judge sending a law clerk to conduct a view and then report back to the trial court. *Id.* That is not the case here. Evidence and testimony were taken directly by the court. There are no other triers of fact in a family court proceeding. A judicial view does not make the family court judge a witness or participant.

There should be no precedential value to several agreed admonishment cases. Those cases were submitted by the JDC in their initial recusal motion which was denied. First, judicial admonishments are not opinions of the Supreme Court who is the final arbitrator of judicial complaints. *See, e.g., In re Callaghan*, 796 S.E.2d 604 (W. Va. 2017). Therefore, a judicial admonishment does not establish precedent. There is no precedent in West Virginia or any other jurisdiction for the JDC's assertion that a judicial view is a *per se* violation of the canons. None of these cases were adjudicated on the merits.

Aboulhosn involved a circuit judge acting in an appellate capacity in a child support arrearages case. *Matter of Aboulhosn* (CCJ), Judicial Investigation Com'n Admonishments, Complaint No. 91-2013 (2014). The judge sent deputies to arrest the person in contempt. *Id.* Deputies did not find him at the house, but reported that they saw various assets in the house. *Id.* Then, the judge, without notice to either party, went to the house along with deputies, but without parties or counsel, and seized enough assets which in the judge's view would satisfy the judgment. *Id.* The judge was not seizing property awarded to the other party but

was having property seized to satisfy a judgment. *Id.* There were not writs of attachment directing the sheriff to seize property. *Id.* The judge was acting as an appellate judge. *Id.* Judge Aboulhosn agreed to the admonishment, and it was never presented to a tribunal. *Id.* It is further distinguished because, in this case, there was a very specific list of items belonging to Mrs. Gibson to be retrieved.

In *Shuck*, the parties reached an agreement, and the matter was not presented to a tribunal. In fact, *Shuck* was filed after this case. The JDC is attempting to make the circular argument that Judge Shuck committed error because of Respondent's actions which are also charged by the Commission, and then cites the *Shuck* case to support its position in this case. Again, this case has never been reviewed by a tribunal and was agreed to by Judge Shuck to avoid further proceedings.

In *Massie*, Magistrate Massie was charged by the JIC for going to the home of a respondent, (who happened to be his magistrate assistant) who was about to be served with a domestic violence proceeding. He interacted with both respondent and the officer serving the pleading. "Deputy Myers said the respondent was 'trying to stick up for Donnie [Mr. Plumley]." The respondent told Deputy Myers that could be considered harassment. Additionally, the respondent asked Deputy Myers to look into filing harassment charges against the DVP Complainant [sic]. Subsequently, Deputy Myers completed a police report on harassment against Ms. Shreve. According to Deputy Myers, he felt pressured to make the report because of the respondent telling him to do so." Before, this matter was submitted to the Supreme Court, Magistrate Massie resigned, and the Formal Statement of Charges was withdrawn.

At no time during the view in this case did Respondent attempt to interfere in the lawful process of a law enforcement officer performing his duties or pressure any officer to harass or interfere with either party.

This proceeding has focused on the rights of Mr. Gibson in the underlying case. Mrs. Gibson had rights too and was entitled to have them protected and enforced. It was, and is, the Family Court's responsibility to protect the rights

and property of all parties, and to enforce the order that the court entered in the underlying case, including the division of property and her right to go to the property and bring assistance, all of which was agreed to by Mr. Gibson in the final divorce hearing and memorialized by the Court in the First and Second Amended Corrected Final Order of Divorce.

The contempt proceeding was brought by Mrs. Gibson alleging Mr. Gibson had failed or refused to turn over certain property awarded to her. At the hearing, on the record, under oath, and before the view, Mr. Gibson admitted he had not turned over all of Mrs. Gibson's property, and that in fact, he was still in possession of the property. This is an admission of willful and contumacious civil contempt. The view confirmed his admissions. It is an unfortunate consequence in proceedings like this that withholding property or failing to comply with an order are further attempts of one former spouse to control the other.

The agreement of the parties and the division of property was incorporated into the Second Amended Corrected Final Divorce Order. Joint Exhibit 4. As is referred to by JDC in its own brief, the final court order provided.

> "(14) That the parties divided their household furnishings by agreement which is represented by a four-page exhibit entered before the Court and attached hereto. Each page is initialed and dated by the parties. The circled items are Respondents. The items not circled are the Petitioners. The parties shall cooperate to set a time and date for the Petitioner [Mrs. Gibson] to pick up said items. **The Petitioner may bring others to help her move these items.**" *Exhibit 4. (emphasis supplied)*

Nonetheless, when Mrs. Gibson arrived at Mr. Gibson's house with others to retrieve her property, she was specifically instructed by Mr. Gibson not to cross the property line or go into the house where much of her property was still located. *(See transcript of hearing of March 4, 2020 pp. 22-23).*

Mr. Gibson admitted to the violations of the agreement and order at the contempt hearing and made it clear to the court that he did not intend to comply with the Second Amended Final Order. *(See transcript of March 4, 2020 pp. 56-61)*

The following are examples of Mr. Gibson's contumacious refusal to comply with his own agreement and final order of the court: (a) leaving Mrs. Gibson's property in the house: (b) directing her not to go in there, and thus giving her no access to her own proper: (c) leaving her property in the rain to be damaged: (d) taking apart a child's handprint from its frame: and (e) failing to divide the movie DVD collection equally. Courts have held that once awarded, the title and ownership of the property becomes vested in the person to whom it was so awarded. Thus, Mr. Gibson was clearly in civil contempt of the final court order by retaining property that belonged to another.

4. Whether Respondent denied Mr. Gibson due process and equal protection under the law is properly before the Court

Mr. and Mrs. Gibson signed the list distributing the property on September 18, 2018. The Second Amended Final Order was entered June 7, 2019. This Second Amended Final Order did not change the distribution of the property. The Petition for Contempt was filed on September 26, 2019. Mr. Gibson was served with the Petition on September 30, 2019. Mr. Gibson filed an unverified Answer and Motion to Dismiss Contempt on October 17, 2019. The first hearing on the Petition for Contempt was on December 4, 2019. Mr. Gibson was granting a continuance of the December 4, 2019 hearing. Following this hearing, Mr. Gibson filed another unverified Answer and Motion to Dismiss Petition for Contempt on December 30, 2019. The contempt hearing, which was rescheduled and held on March 4, 2020, is the subject of this proceeding. Mr. Gibson thus had months of notice of the purpose and requirements of the hearing and the contempt petition. (All pleadings in Family Court must be verified; *see* W. Va. Code § 48-5-401).

Mr. Gibson asked about having an attorney appointed. Respondent correctly told Mr. Gibson that he may not be entitled to a court-appointed attorney but was invited to make an application for one. He was also told that the proceeding would be continued in order to allow Mr. Gibson to obtain an attorney, either through court appointment or by hiring one. (*See transcript of hearing of March 4, 2020 p. 5, pp. 10-13, and pp. 20-21*). In fact, Mr. Gibson was

reminded of this at least one other time during the hearing. (*See transcript of hearing of March 4, 2020 p. 24*). Each time he said he did not want to delay the hearing and agreed for the hearing to proceed without counsel. It was also clear from the record, as cited by the JDC in the footnote, that the Court was not contemplating jailing Mr. Gibson, which would not entitle him to court-appointed counsel, even though Mrs. Gibson's counsel stated he was going to request incarceration. Nonetheless, Mr. Gibson was offered opportunities to continue the hearing in order to obtain counsel and elected to represent himself.

As is part of the video record submitted in this case, and as is recited in the JDC brief, the parties went to the house to view and retrieve Mrs. Gibson's property, as granted to her in the property distribution which had been agreed to in 2018. Mr. Gibson made several motions at the house, which were denied there. To protect the record, these motions and rulings were repeated on the record when the parties returned to the courtroom. (*See transcript of hearing of March 4, 2020 pp. 63-69*).

What is correct is that while Respondent may have had other judicial remedies to impose on Mr. Gibson, including his incarceration, until he purged the contempt, there was general and valid concern that Mr. Gibson would destroy the rest of Mrs. Gibson's property, or would once again not allow her to retrieve her property. The list of remedies for contempt is alternative, where the Court can choose the remedy most suited to the individual circumstances. Judge Goldston used her discretion to avoid incarcerating Mr. Gibson until he purged the contempt, notwithstanding that Mrs. Gibson's Petition for Contempt requested incarceration. Respondent concedes she did not utter the obvious and state "Mr. Gibson you are in contempt," right before asking him for his address and stating the court would go there in ten minutes.

Scott v. Kelly, No. 12-0823, 2013 WL 6152082 (W. Va. Nov. 22, 2013) is an excellent recitation of the history of the family court system, and the contempt powers of family court judges. In that case, the ex-husband filed a writ of prohibition, asserting that the family court lacked jurisdiction to hear the

enforcement of his ex-wife's judgment in a contempt proceeding. *Id.* at *2. The Supreme Court of Appeals held that family court judges are vested with judicial power to entertain and resolve cases involving certain domestic relations matters. *Id.* at *5. The Court noted that, with the ratification of the Unified Family Court Amendment, family court judges have judicial officer status, and they may now conduct contempt hearings for which they may enter and enforce orders. *Id.*; *see also* W. Va. Code § 51-2A-9. We note that "[e]ffective January 1, 2002, all family court cases pending before the circuit court" were transferred to the jurisdiction of the family court pursuant to Rule 3(b) of the West Virginia Rules of Practice and Procedure for Family Court." *Id.* The Supreme Court discusses in *Dietz v. Deitz*, 222 W.Va. 46 (2008) that seven (7) days to pay $27,000.00 to purge himself of contempt was not an abuse of discretion and courts have wide latitude regarding the length of time that a person held in contempt had been given to comply with Court Orders. In the case *sub judice*, Ms. Gibson had been waiting well over a year to obtain her property. In *Donahoe v. Donahoe*, 219 W.Va. 102 (2006), the family court held in a contempt proceeding that the law is not to be lightly mocked, in the context of repeated demonstrations of contempt for the authority of the court.

The *Dietz* court cited with approval W. Va. Code § 51-2A-9(b), which provides that a Family Court Judge may enforce compliance with his or her lawful orders with remedial or coercive sanctions designed to compensate a complainant for losses sustained and to coerce obedience for the benefit of the complainant. *Dietz*, 222 W.Va. at 54-55. Under the Code, sanctions must give the contemnor an opportunity to purge himself or herself. *Id.* In selecting sanctions, the court must use the least possible power adequate to the end proposed. *Id.* A person who lacks the present ability to comply with the order of the court may not be confined for a civil contempt. *Id.* Finally, **"sanctions may include, but are not limited to, seizure or impoundment of property to secure compliance with a prior order**. Ancillary relief may provide for an award of attorney's fees." *Id.* (emphasis supplied)

Given Mr. Gibson's prior conduct, the least coercive remedy for Mr. Gibson to purge the contempt was to seize or impound the property to secure compliance with the court's order. That the property was in Mr. Gibson's house should be of no consequence for two reasons: First, the Final Order as agreed to by the parties authorized Mrs. Gibson "with the assistance of others to retrieve" the property from Mr. Gibson. Second, this was not a seizure of Mr. Gibson's property in the context of the Fourth Amendment, nor in any other context, because it was by then not Mr. Gibson's property. The title and ownership of the property was vested in Mrs. Gibson by virtue of the Final Order of Divorce. Respondent is not suggesting she was one of the "others to retrieve" the property but rather in spite of that remedy the prior order failed in its purpose to provide a transfer of the property and that Mr. Gibson refused to abide by that order.

In conducting the view and allowing Mrs. Gibson access to her personal property to which she had been denied, the Court was securing compliance with its prior order. Other remedies could have allowed Mr. Gibson to destroy or damage the property, as he had already demonstrated or caused Mr. Gibson to be incarcerated until Mrs. Gibson had physical possession of all her property.

The retrieval of Mrs. Gibson's property was reasonably necessary for the administration of justice in her case, and Respondent was empowered to seize the property to secure compliance with the family court's order pursuant to its authority in W. Va. Code §§ 51-2A-9(b), 51-2A-7(a) & 51-2A-7(a)(4).

This appeal is not a Fourth Amendment case. The property being sought did not belong to Mr. Gibson. There was no seizure of Mr. Gibson's property from him. The property belonged to Mrs. Gibson. Unlike the execution of a search warrant, the view was conducted with judicial oversight. Therefore, it was not *per se* unreasonable. All the cases cited by JDC on this issue involve government seizure of property or persons. That is not the case here. The case *sub judice* involves civil litigation between private litigants where the Judge is the constitutional officer to preside over the private parties' litigation. There is no authority for a bench warrant in a bench trial involving private litigants.

Family Court Judge's do not have the issuance of criminal warrants as part of the enumerated authority.

5. Whether Respondent followed the appropriate mechanism for contempt proceedings

This Court held in *Cottrill v. Cottrill*, 219 W.Va. 51, 55 (2006): "The court's approach should be one of balance. Thus, we have held trial courts possess a discretionary range of control over parties and proceedings which will allow reasonable accommodations to *pro se* litigants without resultant prejudice to adverse parties." *Cottrill* found that the court's approach should be one of balance. *Id. Cottrill* explained "we have held pro se parties, like other litigants, should be provided the opportunity to have their cases 'fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party.'" *Id.* (citing *Conservation Commission v. Price*, 193 Conn. 414 (1984)). Where the court ruled that the court's view of subject matter in dispute may be taken by the court, in exercise of sound discretion, whenever it is necessary or important to clearer understanding of the issues. In the case at bar is the Court viewing the personal property in dispute an appropriate discretionary action which cut down on protracted litigation within family court judges' latitude?

In this case, it was clear that Mr. Gibson was not at any disadvantage by being a *pro se* litigant versus a represented litigant. He made motions for dismissal, a motion for an appointed attorney, and requested a search warrant for the premises. He raised objections and issues at the house that an attorney could have raised. Mr. Gibson was afforded the courtesy of the court and as much explanation from the court as could be made without prejudicing the adverse party. Cases in which there is one represented litigant and one *pro se* litigant are especially difficult. Respondent attempts to balance the interests of the *pro se* litigants against becoming and advocate for her or him. There is no evidence Mr. Gibson was in any way prejudiced by representing himself by his own choice.

Pro se litigants are quite common in family court proceedings throughout West Virginia. *Pro se* litigants may not know the remedies they can request, such as a visit to the property, nor should the appearance of *pro se* litigants in a proceeding prevent the Court from finding that such a visit is appropriate and would clarify disputed facts and help resolve issues.

6. Whether any statute or rule applicable to Family Court authorizes the conduct of Respondent or the recording of such

Respondent believes that, although not expressly granted, it is not expressly prohibited, and therefore an affirmation answer is appropriate. *See, e.g.,* W. Va. Code § 48-1-304(e) (the contempt statute) and W. Va. Code § 51-2A-7(b), which allow the family court to promulgate local administrative rules; *see also* W. Va. Code § 51-2A-7(a)(1), which allows family courts to manage the business before them; W. Va. Code § 51-2A-7(a)(4) which allows family courts to compel and supervise the production of evidence; and W. Va. Code § 51-2A-9. When read together, these sections of the Code clearly anticipate that family court proceedings may well have to be conducted to allow family courts to enforce contempt and regulate how it receives evidence. Case law does not reflect that a judge has been sanctioned for conducting a view, although there are cases where the view was found to have created error, either in its application or the way in which it was conducted. Thus, it appears Mr. Gibson's proper judicial remedy may have been to appeal the view and any adverse consequences arising therefrom.

The West Virginia Supreme Court noted on the occurrence of a circuit judge view in *Hyre v. Waddy,* No. 19-0487, 20 WL 4355285 (W. Va. Jul. 30, 2020). The trial court wrote "(t)hat based upon the judicial view of the property, the gate posts are adequately constructed, and do not require further reinforcement." *Id.* at *2. On appeal the losing party argued the view by the court was not done correctly. It is unclear if there was a record of the view. The trial order was affirmed. *Id.* There is no mention of any separate complaint brought against him or her. The memorandum opinion does not cite statutory authority

for the court's view (no jury was involved). *Hyre* shows it is common opinion of judges that they have enhanced authority to conduct a judicial view in a bench proceeding.

W. Va. Code § 51-2A-7(a) states "The family court judge will exercise any power of authority provided in this article, in chapter forty-eight of this code or as otherwise provided by general law. Additionally, the family court judge has the authority to...Compel and supervise the production of evidence, including criminal background investigations where appropriate;" and gives authority to family court judges to conduct court proceedings outside their courtrooms and chambers, including but not limited to proceedings involving the judicial, non-jury view of real and personal property of which there is evidentiary or other dispute.

Does "general law" include the jury view for the trial court judge who acts as a trier of fact without a jury afforded to a circuit court judge? *See Westover Fire Dep't v. Barker*, 142 W.Va. 404, 409 (1956). This should be a part of the "general law" as cited in W. Va. Code § 51-2A-7(a).

Here, it was Respondent's determination that the only action that could be taken to preserve marital property was to go to the view and determine the relevant facts and allow Mr. Gibson to purge his contempt with finality and without incarceration, fine or both. *See* W. Va. Code § 48-1-304(e).

Family court judges are triers of both fact and law in family law matters. It is not only their inherently authority but also their duty to determine questions of fact. It is submitted that no notice is required to perform a function which belongs solely to the court. If the court is trying to enforce its order by seizure as allowed in W. Va. Code § 51-2A-9(b), giving additional notice only gives the contemnor the ability to destroy, remove or otherwise convert the property at issue. *See also* W. Va. Code § 48-1-304(e). But family court judges are directed by W. Va. Code § 51-2A-9(c) to provide remedial sanction to compensate for loss and to coerce obedience. It is without dispute that due process requires notice. However, W. Va. Code § 48-1-304(e) states that the court AT ANY TIME may

issue a capias without notice. Respondent argues that that statute allowed her to take the action she did.

7. Whether Respondent's action made her a fact witness because she observed an event or fact during a proceeding before the court with all parties or their representatives present.

The actions by a judge in making factual determinations and applying the law to the facts, receiving and reviewing exhibits, or judging the credibility of a witness, does not make the judge a witness to the proceeding. The judge is a trier of fact overseeing the proceeding. To find otherwise would imply that any conduct observed by any judge during a proceeding makes that judge a witness warranting a recusal. Courts as finders of fact observe a great many things to determine credibility of witnesses. Does that make a Judge sitting as a trier of fact a witness to a person testifying credibility or to their body language or demeanor? Courts are now conducting many proceedings by video conferencing. In these cases, Courts routinely see witnesses outside of courtrooms, virtually when parties and witnesses appear by video. The mere fact that a judge sees something not in the courtroom is not different than a jury view when the record of what a juror saw is dependent of what is spoken into a record. *See When Mohammed Goes to the Mountain: The Evidentiary Value of a View*, 80 Ind. L. J. 1091, 1108-1111 (2005); *Mauricio v. State*, 104 S.W.3d 919, 921 (Tex. Crim. App. 2003).

A finding that a judge becomes a fact witness in a proceeding that is before that judge ignores what judges do with regularity. A finding of a witness's credibility generally goes to the weight and admissibility of the evidence. Judges are required to assess the consistency of testimony, body language, hesitancy to answer, and evasiveness. These are not facts; they are trained assessments. In addition, to find that a court had no authority to deal with a contempt happening before it is impractical. As an example, a court has the authority to find someone in summary contempt for an act of contempt committed in the court's presence and incarcerate that person. If witnessing such an act makes the judge a fact

witness, would it require the appointment of a special judge to review the acts committed in the presences of his or her fellow judges?

What happened here is not like a judge seeing a married person commit adultery or a parent treat a child appropriately or inappropriately.

There is no found case which *per se* prohibits a judge viewing a scene which is germane to a factual dispute before the court. A view is a continuation of a court proceeding. All the authority and responsibilities of the court apply in those situations. In this case, proceeding to the property to view and retrieve the property that Mr. Gibson admitted he had not turned over was the "least possible power adequate to the end proposed." W. Va. Code § 51-2A-9. Other sanctions would have deprived Mr. Gibson of his liberty while still not assuring compliance with the court's previously issued order. *Donahoe v. Donahoe*, 219 W.Va. 102 (2006).

Judges are permitted to ask questions during trials. How different is a request by a court to actually see a real world location than asking questions of witnesses?

A view is a continuation of a proceeding. The statute clearly authorizes the court to seize or impound the subject property to secure compliance with a prior order. That is exactly what happened in this case.

Family court judges are the triers of fact, the same standard should apply to views conducted by family court judges. W. Va. Code § 51-2A-9(b) reads as follows: "A family court judge may enforce compliance with his or her lawful orders with remedial or coercive sanctions designed to compensate a complainant for losses sustained and to coerce obedience for the benefit of the complainant. Sanctions must give the contemnor an opportunity to purge himself or herself. In selecting sanctions, the court must use the least possible power adequate to the end proposed. A person who lacks the present ability to comply with the order of the court may not be confined for a civil contempt. Sanctions may include, but are not limited to, seizure or impoundment of property to secure compliance with the prior order. Ancillary relief may provide for an award of attorney's fees." Rule 4 of the Rules of Practice and Procedure

for Family Courts clearly contemplates that bailiffs can accompany judges to any proceeding or premises of the court. Rule 4 reads "including but not limited to," clearly suggests in the wording that there are premises beyond the courtroom or other listed premises. If a Court can issue a capias or use the "least possible power adequate to the end proposed" can that not be interpreted to going to a location away from the court room to examine physical evidence, give a party the opportunity to return property per a court order and bring a bailiff to insure order?

In the best of worlds, a bailiff to ensure decorum and respect to the proceedings, a court reporter or electronic device to record the proceedings and a clear understanding of the limitation of what is to be viewed and accomplished. The proceedings as conducted in this case should not construed as a per se violation of Mr. Gibson's due process rights. W. Va. Code § 48-1-304(e) provides "**At any time** during a contempt proceeding the court may enter an order to attach forthwith the body of, and take into custody, any person who refuses or fails to respond to the lawful process of the court or to comply with an order of the court. Such order of attachment shall require the person to be brought forthwith before the court or the judge thereof in any county in which the court may then be sitting." (Emphasis added). Mr. Gibson was already before the court when Respondent decided, after hearing evidence, to conduct a view and give him the opportunity to comply with a prior court order. Certainly, if the court has the power to incarcerate the respondent at any time, other less intrusive and restrictive measures may also be done at any time. He was allowed to make objections both at the home and again in the courtroom upon return. The objections made at his home were placed on the record back in the courtroom. The property seized from him was already awarded to the other party. The property was not his to hold. Ownership passed to his ex-wife. Respondent provided him the means to purge willful contempt without incarceration or other punishment.

D. WHETHER THE JHB ERRED IN RECOMMENDING AN ADMONISHMENT AND A $1,000.00 FINE AND IN FAILING TO AWARD COSTS TO JDC

1. Whether the JHB erred in its conclusions concerning aggravating and mitigating factors

There is evidence on the record in the transcript of the January 15, 2021 hearing concerning those factors. The agreement drafted by the counsel for the JDC stated Respondent had no prior disciplinary issues and was cooperative (*See transcript of hearing of January 15, 2021 pp. 8-9*). See also Mr. Gibson's lawyers' statement who accepts the agreement (*transcript of hearing of January 15, 2021 p. 15*) and his acceptance of mitigating factors, no prior disciplinary history, a long history of service and the difficulty of the cases she hears (*Transcript of hearing of January 15, 2021 pp 14-15*). Such is the evidence. It is clear, convincing and uncontroverted. This Court's independent evaluation of the record and recommendations of the Board and its right to make its own conclusion is uncontroverted. *See, e.g., Matter of Kaufman*, 187 W.Va. 166 (1992); *West Va. Judicial Inquiry Comm. v. Dostert*, 165 W.Va. 233 (1980). This Court's right to reject or accept the recommendations of the Board are absolute. *See Matter of Crislip*, 182 W.Va. 637 (1990).

In doing so this Court should not rule that Respondent's responding to questions propounded by the JHB is somehow wrongful, or an indication of lack of cooperation, candor, cooperation or lack of remorse. In fact, the failure of Respondent to respond truthfully to the Order briefing would show contempt for the process, filing briefs citing case law and statutory authority which suggests maybe her actions were not out of line is responsible and appropriate and should not be held against her.

2. Whether the JHB erred in not awarding costs to the JDC

Paragraph i page 2 of the Agreement states Respondent will be responsible for costs.

The parties went on in Paragraph k on Page 3 to "acknowledge and agree that neither the Judicial Investigation Commission nor Judicial Disciplinary counsel incurred any costs."

As the JDC stated in paragraph 10, page 4 of its Objections to the West Virginia's Family Court Association's Planned Motion for Leave to file an Amicus Brief:

> "Stipulations or agreements made in open court by the parties in the trial of a case and acted upon are binding and a judgment found thereon will not be reversed."...Where facts are stipulated, they are deemed established as full as if determined by the [trier of facts]. A stipulation is a judicial admission. As such, it is binding in every sense, preventing the party who makes if from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact...
>
> Having entered into stipulations of fact, the respondent [Starcher] is bound by them. Stipulations of fact are sufficient to prove facts not only in cases where the burden of proof is by preponderance of the evidence, but also where there is a heightened burden of proof.

Matter of Starcher, 202 W. Va. 55, 61 (1998). The Court also stated:

> [I]t is clear that a party who stipulates facts is bound by those stipulations, that the party with the burden of proof is relieved of the duty of producing evidence to prove the facts so stipulated and that the facts stipulated are considered to have been proven to the requisite standard of proof, whether the burden of proof be by a preponderance of the evidence, by clear and convincing evidence or beyond a reasonable doubt. These purposes seem to be at a minimum, the reasons for entering into stipulations of fact. There would be very little point in parties entering into and a tribunal accepting stipulations of fact if the party without the burden of proof could claim that the party with the burden of proof failed to meet the burden. The party with the burden of proof would be required to prove that which has already been stipulated, defeating the very purpose of the stipulations.
>
> The standard of proof... is by clear and convincing evidence. The parties were aware that the Judicial Investigation Commission bore the burden of proof in this action. The

> parties stipulated the relevant facts with knowledge of the standard of proof, either actual or construction. The Court is convinced that the stipulation entered into by the respondent and the Judicial Investigation Commission constitutes proof of the stipulated facts by clear and convincing evidence."

Id. at 62-63.

With both parties agreeing there were no costs how could the JHB have ordered costs in light of the stipulated evidence?

Therefore, the ruling awarding zero costs was correct since there was no evidence introduced to find otherwise.

CONCLUSION

Respondent is not seeking to abrogate her agreement. She signed an agreement, she acknowledged the agreement at the January 15, 2021 hearing on the recording and in both of her post hearing briefing filed with the JHB she stated she was sticking by her agreement. However, the question remains are whether views by a judge sitting without a jury are *per se* prohibited. The JHB's conclusion is that such a per se prohibition is unclear. Respondent now believes it is permitted. But even if it is not permitted and given the lack of clarity isn't it error as opposed to an intentional violation of judicial ethics? As such this Court should clarify the law and either affirm the ruling of the JHB or as the final arbiter conclude that there is no wrongdoing by Respondent. Respondent urges this court to permit judges to conduct views under such procedures as this court deems appropriate to preserve litigants' rights and courts' ability to make appropriate findings of fact. All of that being argued, Respondent made an agreement and will remain true to her word.

LOUISE E. GOLDSTON
FAMILY COURT JUDGE FOR THE
THIRTEENTH FAMILY COURT CIRCUIT
By Counsel

Andrew S. Nason (WV Bar No. 2707)
Pepper & Nason
8 Hale Street
Charleston, West Virginia 25301
304 340 0361

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

SUPREME COURT No. _____
JIC COMPLAINT NOS. 30 & 33-2020

CERTIFICATE OF SERVICE

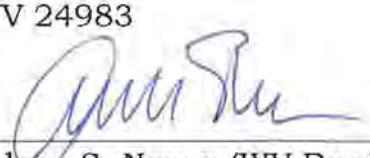
I, Andrew S. Nason, counsel for the Respondent, do hereby certify that I mailed a true and exact copy of the ***Brief of the Honorable Louise E. Goldston Judge of the 13th Family Court Circuit*** to the following via regular United States mail, postage prepaid, on this the 23 day of June, 2021.

Honorable Michael D. Lorensen, Judge
Judicial Hearing Board
380 W. South Street, Suite 4402
Martinsburg, WV 25401

Brian J. Lanham
Teresa Tarr
Deputy Counsel
Judicial Investigation Commission
City Center East, Suite 1200A
4700 MacCorkle Avenue, SE
Charleston, WV 25304

Ancil G. Ramey
Steptoe & Johnson
PO Box 2195
Huntington, WV 25722

John S. Bryan
Amicus Counsel
PO Box 366
Union, WV 24983



Andrew S. Nason (WV Bar No. 2707)
Pepper & Nason
8 Hale Street
Charleston, West Virginia 25301
Counsel for Respondent
304 340 0361