

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**SANDRA KAY CREA, Petitioner Below,  
Appellee,**

**Vs.**

**Case No. 33656**

**RICHARD CREA, Respondent Below,  
Appellant.**

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**BRIEF IN SUPPORT OF PETITION FOR APPEAL  
FROM THE CIRCUIT COURT OF JEFFERSON COUNTY  
HONORABLE THOMAS W. STEPTOE JR.  
CASE NO. 06-D-123**

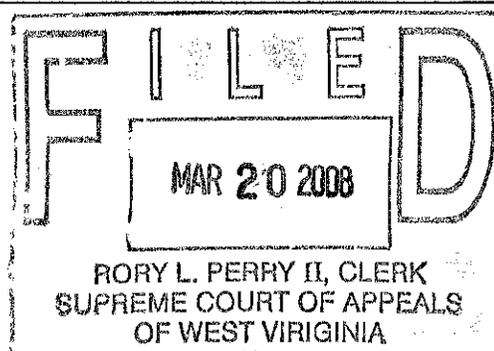
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**BRIEF ON BEHALF OF APPELLANT  
RICHARD CREA**

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## TABLE OF CONTENTS

|             |   |           |
|-------------|---|-----------|
| <b>I.</b>   | <b>Statement of the Case</b> .....              | <b>2</b>  |
| <b>II.</b>  | <b>Statement of the Facts</b> .....             | <b>3</b>  |
| <b>III.</b> | <b>Statement of the Issues</b> .....            | <b>6</b>  |
| <b>IV.</b>  | <b>Points and Authorities Relied Upon</b> ..... | <b>7</b>  |
| <b>V.</b>   | <b>Standard of Review</b> .....                 | <b>8</b>  |
| <b>VI.</b>  | <b>Assignments of Error Relied</b> .....        | <b>9</b>  |
| <b>VII.</b> | <b>Conclusion and Relief Requested</b> .....    | <b>17</b> |

I.

**STATEMENT OF THE CASE**

This is a Brief in support of Appellant's Petition for Appeal from a Final Order entered on March 29, 2007 by the Circuit Court of Jefferson County, West Virginia which refused Appellant's Petition for appeal of a Family Court Final Order. That said Brief is filed in accordance with the previously Ordered briefing schedule entered on October 11, 2007.

The parties to this action did attend a final contested divorce hearing on December 21, 2006. The Final Divorce Order addressed all issues of spousal support and equitable distribution of the parties' marital estate.<sup>1</sup> Appellant did timely file a Petition for Appeal with the Circuit Court of Jefferson County, West Virginia on February 23, 2007. By Final Order entered on March 29, 2007, the Circuit Court of Jefferson County did refuse said Appeal.

That the Appellant did timely file a Petition for Appeal with the Supreme Court of Appeals of West Virginia on July 26, 2007.

## II.

### STATEMENT OF FACTS

1. That the parties were married on July 7, 1979 in Jefferson County, West Virginia.
2. That the parties last lived and cohabited together as husband and wife on January 20, 2004.
3. That Appellee Sandra Crea did file a Petition for Divorce on April 4, 2006 in the Family Court of Jefferson County, West Virginia.
4. That a Final Divorce Hearing was held on December 21, 2006.
5. That the parties acquired marital real estate located at 67 Kimberwicke Drive North, Charles Town, West Virginia.
6. That the parties acquired the real estate located at 67 Kimberwicke Drive North, Charles Town, West Virginia during the parties' marriage.
7. That the appraised value of said property and the amount used for equitable distribution of the marital estate was \$312,000.00.
8. That the amount owed on the parties' marital home as of July 3, 2006 was \$156,486.06.
9. That each party's share of the equity in said property without making any other adjustments for equitable distribution of the marital estate would have been \$78,776.69 based on the appraisal of the home and the amount owed on said home.

10. That, at the time of the Final Divorce Hearing, Appellant Richard Crea had acquired credit card debt of \$44,730.89 and Appellant Richard Crea produced documentation that said amount of credit card debt still existed.
11. That Appellant Richard Crea did testify at the Final Divorce Hearing that the Appellant Richard Crea believed that the portion amount of said credit card debt that was acquired during the parties' marriage was about \$21,000.00.
12. That, at the time of the Final Divorce Hearing, Appellant Richard Crea did testify that he was obligated to make minimum monthly payments on said \$44,730.89 credit card debt in the amount of \$1,435.00 per month.
13. That the Family Court of Jefferson County erroneously found that Appellant Richard Crea should receive no credit for the reduction in principal of the parties' marital home although Appellant made all mortgage payments during the three years the parties were separated prior to the final hearing.
14. That, at the time of the Final Divorce Hearing, Appellee Sandra Crea had a net income of \$1,716.46 per month before expenses.
15. That, at the time of the Final Divorce Hearing, Appellant Richard Crea had a net income of \$3,952.54 per month before expenses.
16. That, at the time of the Final Divorce Hearing, Appellee Sandra Crea had expenses of \$1,930.00.

17. That, at the time of the Final Divorce Hearing, Appellant Richard Crea had expenses of \$5,030.00; which included his monthly payments for the \$44,730.89 credit card debt.
18. That the Family Court of Jefferson County Ordered that the marital residence should be sold and the parties be awarded one-half of the equity in the home, subject to the credits of each.
19. That the Family Court of Jefferson County Ordered that Appellee Sandra Crea be assessed no liability for the \$44,730.89 credit card debt that existed in Appellant's name. Further, Appellee Sandra Crea was not held liable for the \$21,000.00 marital portion of said debt.
20. That the Family Court of Jefferson County Ordered that Appellee Sandra Crea be awarded spousal support in the amount of \$325.00 per month until the death of either party or the remarriage of the Appellee, payable beginning May 1, 2007, subject to judicial modification.
21. That Appellant Richard Crea disagreed with many of the findings of the Family Court of Jefferson County and did appeal said rulings to the Circuit Court of Jefferson County, West Virginia.
22. That the Circuit Court of Jefferson County, West Virginia did refuse Appellant Richard Crea's Petition for Appeal and Appellant Richard Crea now appeals said ruling.

### III. STATEMENT OF THE ISSUES

1. Was the equitable distribution of the parties' marital estate improper?
2. Should Appellee Sandra Crea be able to avoid being assessed any portion of the parties' \$21,000.00 marital credit card debt through equitable distribution of the parties' marital estate?
3. Should Appellant Richard Crea be given credit for the reduction in principle of the mortgage indebtedness on the marital home based on Appellant's consistent payment of said indebtedness during the parties' separation?
4. Should Appellee Sandra Crea to be awarded permanent spousal support in the amount of \$325.00 per month?

#### IV. POINTS AND AUTHORITIES

*Kapfer v. Kapfer*, 187 W.Va. 396, 419 S.E.2d 464 (1992).

*Mayhew v. Mayhew*, 205 W.Va. 490, 519 S.E.2d 188 (1999).

*Stuck v. Stuck*, 625 S.E.2d 367, 218 W.Va. 605, (2005).

*West Virginia Code § 48-8-103*

V.

**STANDARD OF REVIEW**

In reviewing a Circuit Court Final Order refusing to review a Final Order entered by a Family Court Judge, the Supreme Court of Appeals reviews the findings of fact made by the Family Court Judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion.

*Stuck v. Stuck*, 625 S.E.2d 367, 369-370, 218 W.Va. 605, 607-608 (2005).

## VI.

### ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY NOT GRANTING APPELLANT RICHARD CREA'S APPEAL WHEN IT DID REFUSE TO REVIEW THE FAMILY COURT'S RULING REGARDING EQUITABLE DISTRIBUTION OF THE PARTIES' MARITAL ESTATE

The Family Court of Jefferson County West Virginia abused its discretion when it made its ruling regarding the equitable distribution of the parties' marital estate. The errors made by the Family Court of Jefferson County, West Virginia concerned the equitable distribution of the parties' marital debt and the credit to be given for interest payments on the parties' home.

- a. **The Family Court abused its discretion when it determined that Appellee Sandra Crea should not be assessed any marital debt for the \$21,000.00 worth of credit card debt that Appellant Richard Crea acquired in his name during the parties' marriage.**

The Family Court of Jefferson County committed reversible error when it determined that Appellee Sandra Crea should not be assessed any marital debt for the \$21,000.00 worth of credit card debt that Appellant acquired in his name during the parties' marriage. As noted above, the parties were married on July 7, 1979 in Jefferson County, West Virginia. The parties separated on January 20, 2004 and lived separate and apart since that date. At the time of the final hearing, it was undisputed that Appellant Richard Crea currently had \$44,730.89 of credit card debt in his separate name. Further, it is undisputed that Appellant Richard Crea testified

at the final hearing that he believed that \$21,000.00 of said debt was acquired during the parties' marriage.

Statute governing equitable distribution expresses a marked preference for characterizing the property of the parties to a divorce action as marital property.

*Mayhew v. Mayhew*, 205 W.Va. 490, 519 S.E.2d 188 (1999)

Equitable distribution...is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets. The third step is to divide the marital estate between the parties in accordance with the principles contained in W. Va. Code § 48-7-103.

*Syl. Pt. 1. Stuck v. Stuck*, 218 W. Va. 605, 625 S.E.2d 367 (2005)

Appellant Richard Crea testified that he provided all of the information that he could to prove that a portion of the \$44,730.89 credit card debt that he acquired during the parties' marriage was in fact marital debt. As previously provided to counsel through discovery, Appellant Richard Crea provided all of the current credit card statements that he could obtain and provided detailed credit report histories in an attempt to prove that a portion of the \$44,730.89 of credit card debt acquired in his name was marital debt. At the final hearing, he testified that he believed the portion of said credit card debt that was incurred during the parties' marriage was \$21,000.00.

The Family Court of Jefferson County committed reversible error when it failed to attribute half of the \$21,000.00 marital debt from said credit cards to Appellee Sandra Crea. Again, the parties were separated for close to three years before the final hearing and Appellant Richard Crea testified that the information provided regarding said debt was all of the information that could be obtained beyond

his testimony. The Family Court wrongfully assumed that Appellant Richard Crea had acquired \$44,730.89 of credit card debt within three years of separation and assessed none of said debt against Appellee Sandra Crea.

Accordingly, the Family Court should have assessed one half of the \$21,000.00 credit card debt against Appellee Sandra Crea based on the fact that said debt was acquired during the parties' marriage.

**b. The Family Court abused its discretion when it determined that Appellant Richard Crea should not receive any credit for the reduction in principle of the parties' marital home.**

The Family Court of Jefferson County committed abused its discretion when it determined that Appellant Richard Crea should not receive any credit for the reduction in principle caused by Appellant making the mortgage payments on the parties' marital home while the Appellant lived in the marital residence during the parties' three-year separation.

It is well established, that the West Virginia Supreme Court of appeals has shown a preference for awarding a party to a divorce credit for reduction in principle of mortgage payments made on the marital home while the parties are separated before divorce. *See Kapfer v. Kapfer*, 187 W.Va. 396, 419 S.E.2d 464 (1992).

It is undisputed that Appellant Richard Crea resided in the marital home and paid all of the mortgage payments from January 20, 2004 until the final hearing held on December 21, 2006. It is also undisputed that the Court calculated the estimated reduction in principle as \$214.92 per monthly payment based on Appellant's current mortgage payments. Therefore, during the parties' separation, Appellant should receive credit for \$7,737.12 for the reduction of principle during the three years the

parties were separated until the final hearing. However, the Family Court of Jefferson County did not give the Appellant any reduction in principle for any of the payments made on the parties' marital home during the parties' separation. This is unfair. Based on the Court's ruling, Appellee Sandra Crea is not held liable for one-half of the marital debt *and* Appellant is also not given credit for the reduction in principle that was made during the parties' marriage.

It is clear that Appellee Sandra Crea has received a benefit from having the principle on the parties' marital home reduced by \$7,737.12 based on Appellant Richard Crea's payment of mortgage payments during the time the parties were separated.

**2. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY NOT GRANTING APPELLANT RICHARD CREA'S APPEAL WHEN IT DID REFUSE TO REVIEW THE FAMILY COURT'S RULING REGARDING THE FAMILY COURT'S AWARD OF PERMANENT SPOUSAL SUPPORT TO APPELLEE SANDRA KAY CREA**

The Family Court of Jefferson County abused its discretion when it awarded Appellee Sandra Crea permanent spousal support in the amount of \$325.00 per month beginning May 1, 2007, subject to judicial modification.

*West Virginia Code § 48-8-103* requires that an award of spousal support shall not be "disproportionate to a party's ability to pay as disclosed by the evidence before the court." In this case, it is irrefutable that Appellant Richard Crea simply does not have the ability to pay spousal support. The Family Court found that Appellant Richard Crea had a net income as of December 26, 2006 in the amount of \$3,952.54. The Family Court further found that Appellant Richard Crea had expenses of \$5,030.00. Simply looking at the net income of Appellant and his expenses clearly

indicates that Appellant does not have the ability to pay spousal support. It should also be noted that Appellant Richard Crea did testify that he was currently only making ends meet by shifting debt.

The Family Court ordered that the parties' marital home be sold. The reasoning behind said forced sale was to allow the "Appellant to both pay the Appellee her share of the equity in the home and to pay off most if not all of the credit card debt which prevents the Court from entering an award of alimony." There are several reasons why said ruling is in error. The Court ruled that Appellee Sandra Crea would not be assessed any of the \$21,000.00 of marital credit card debt that Appellant Richard Crea acquired during the parties' marriage.<sup>2</sup> It is uncontested that Appellant Richard Crea has a current total of \$44,730.89 of credit card debt with a *minimum* monthly payment of \$1,435.00 on said credit card debt. Said *minimum* credit card debt is close to half of Appellant's net monthly income of \$3,952.54. The mortgage payment on the home is now \$1,259.41; which is a low payment by all accounts on a home valued at \$312,000.00. Therefore, with just the minimum monthly credit card payment and the current low mortgage payment, these two payments total \$2,694.41 of Appellant's expenses.

The Appellee should not be allowed to have it both ways. Simply, the Family Court refused to find that any of the Appellant's credit card debt was marital debt; therefore, the Family Court should have taken into account the Appellant's inability to pay because of the payments that are required for the undisputed *minimum* monthly payments on said \$44,730.89 credit card debt. Under the Family Court's ruling, Appellee is simply allowed to avoid any liability for the parties' marital credit

card debt, but Appellant is forced to pay spousal support when his ability to pay spousal support is shattered by the payments due and owing on said \$44,730.89 of credit card debt.

The Family Court's solution to this inability to pay is to force the sale of the marital home in order to allow the Appellant to pay his debt from the proceeds and create an ability to pay spousal support. Again, no liability for said \$44,730.89 was assessed against Appellee Sandra Crea. Under the Family Court's current ruling, Appellee avoids liability for the \$44,730.89 of credit card debt; Appellant is given no credit for reduction in principle made for all mortgage payments made during the parties' separation; and Appellant is ordered to pay \$325.00 of permanent spousal support that he does not have. This is inequitable and creates a great hardship on the Appellant.

The Family Court's reasoning for the forced sale of the marital home is based on the theory that once the marital home sells Appellant will pay off all of his debt and an ability to pay spousal support will be created. The Family Court found that the parties' marital home was appraised at \$312,000.00, and each parties' equity in said marital home would be \$78,776.69. Therefore, Appellant would receive \$78,776.69 without any deductions. Under the Family Court's theory, right off the top, said \$78,776.69 in Appellant's equity would be reduced by the payment of the \$44,730.89 of credit card debt, leaving Appellant with \$34,045.08. Pursuant to the Court's Order, Appellant will receive an additional \$5,331.50 pursuant to equitable distribution. Therefore, Appellant will receive \$39,376.58 if the martial home sells at the appraised value after Appellant has paid off all of his debt. Appellant will be left

with \$39,376.58 to start a new life and assume a new mortgage payment, while paying Appellant \$325.00 per month.

The Family Court found that Appellant has expenses of \$5,030.00. If all marital debt is paid off from sale of the marital home, said expenses will theoretically be reduced by the erasure of Appellant's minimum monthly credit card payments of \$1,435.00 and the erasure of Appellant's mortgage payment of \$1,259.41. Appellant's expenses of \$5,030.00 minus \$2,694.11 (\$1,435.00 credit card payment + \$1,259.41 current mortgage payment) will leave Appellant with expenses of \$2,335.89. However, the Family Court's ruling is unreasonable, because the instant award of \$325.00 of spousal support does not take into account that a new mortgage payment on a home in today's market with applying a down payment of \$39,376.58 from the proceeds of equitable distribution would still be *more* than Appellant's current mortgage payment. However, assume that Appellant finds a place to live for \$1,300.00 a month after the home sales. Therefore, based on the modest hypothetical and the Court's findings of fact, Appellant's expenses would be \$3,635.89 with the debt paid and including the current home payment of \$1,300.00 a month.

As noted, the Court found that Appellant had a net income of \$3,952.54. Subtracting Appellant's net income of \$3,952.54 by Appellant's modest estimated expenses of \$3,635.89 would leave with Appellant with \$316.65 a month; which will not even cover the \$325.00 of spousal support he has been ordered to pay.

Further, Appellee has the ability to make more money and generate income. Appellee Sandra Crea is only fifty years of age and has never attempted to find employment that would pay more money. Appellee Sandra Crea received an

Associates Degree in Science and Nursing in 1979 and is able to continue full-time employment. Appellee Sandra Crea was able to support herself without the assistance of Appellant Richard Crea since the parties' separated on January 20, 2004. Further, Appellant Richard Crea solely supported the parties' minor child until said child reached the age of eighteen without any financial assistance from Appellee Sandra Crea; specifically, Appellant Richard Crea supported said child for a period of two years before said child reached the age of majority.

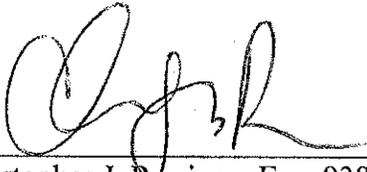
Taking all of the above into account, it is clear the Family Court abused its discretion when it Ordered that Appellant Richard Crea should pay the amount of \$325.00 per month of permanent spousal support was in error and said ruling should be reversed.

VII.

**CONCLUSION AND RELIEF REQUESTED**

For the reasons set forth above, Appellant respectfully requests the judgment of the Circuit Court of Jefferson County be reversed; that the Appellant be granted a hearing or new Final Divorce Hearing in this matter; and for such other relief as the Court deems just.

Respectfully submitted,  
Richard Crea



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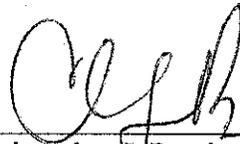
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**CERTIFICATE OF SERVICE**

I, Christopher J. Prezioso, counsel for the Appellant, do hereby certify that I have served a true and accurate copy of the foregoing BRIEF OF APPELLANT, upon Brian J. McAulliffe by First class mail, postage prepaid, at his address of 114 South Maple Avenue, Martinsburg, West Virginia 25401, on this 19<sup>th</sup> day of March, 2008.



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