

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

**SANDRA KAY LONGERBEAM,  
f/k/a SANDRA KAY CREA, Petitioner Below,**

**Appellee,**

**vs.**

**Case No. 33656**

**RICHARD CREA, Respondent Below,**

**Appellant.**

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**ON APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY  
THE HONORABLE THOMAS W. STEPTOE, JR.  
CASE NO. 06-D-123**

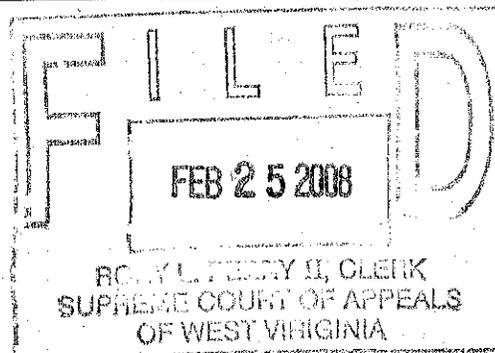
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**BRIEF ON BEHALF OF APPELLEE  
SANDRA KAY LONGERBEAM**

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## **I. STATEMENT OF CASE**

This matter comes before the court upon the resolution of this matter by trial before Family Court Judge, William T. Wertman, Jr. and upon an appeal to the Circuit Court. Both the Appellee and the Respondent were represented by counsel, both appeared at trial and offered testimony in support of their respective positions. In accordance with the Court's scheduling order, the parties filed a lengthy joint pretrial memorandum. In addition, at the conclusion of testimony the parties were afforded the opportunity to file proposed findings of fact and conclusions of law and were ordered to supplement the record with current pay stubs showing the parties' income at the time of the hearing.

On January 19, 2007, the Family Court entered its Final Order containing its Findings of Fact and Conclusions of Law.<sup>1</sup> On February 26, 2007 the Respondent filed his appeal with the Circuit Court. On March 13, 2007 the Appellee filed her response to the appeal of the Respondent. On March 29, 2007 the Circuit Court refused the appeal of the Respondent.

Thereafter, review has been sought in this Court by the Appellant.

## **II. STATEMENT OF FACTS**

This is a long term marriage well in excess of twenty years and there is a disparity in income between the Appellee and the Appellant. The Appellee is employed by the Jefferson County Board of Education in a paraprofessional position as a teacher's aid. The Appellee has training as a nurse in the distant past, but has never held a nursing license or practiced as a nurse. The Appellee is fifty years of age and testified that she does not have any realistic prospect of improving her income or

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<sup>1</sup> By the terms of the Court's Order, the Appellee was restored to her premarital name of Sandra Kay Longerbeam.

changing jobs. The Appellee further testified that she is unwilling to leave her present employment because she receives health benefits and retirement benefits. A change in employment would enable her to increase her income, albeit not substantially. The Appellant husband is employed as an IT specialist at a financial institution and has in the past operated a computer business. The Appellant did not testify as to any limitations upon his future earnings or job change options. Neither party testified to any health problems that would effect their ability to sustain employment. Final Divorce Order ¶17.

The Appellant's pay stub most recently filed with the Family Court, shows an increase in pay consistent with his testimony to a gross pay of \$60,000.00 (\$5,000.00) per month with a net pay of \$3,952.54. This is an increase in net pay of approximately \$300.00 per pay period at the time of trial, from the time that the Appellant filed his financial form with the Family Court, an amount potentially available as spousal support to the Appellee at the time of the Family Court's decision. Final Divorce Order ¶15.

Previously, on June 30, 2004, the parties sold a parcel of real estate located at 111 Valley Branch Drive, Ranson, West Virginia and divided the net proceeds. Both parties agree that they each received a sum equal to \$24,548.26. Final Divorce Order ¶9.

The Appellant estimated that his credit card debt was increasing at a rate of \$600.00 per month for 36 month prior to separation and through this formula, the Appellant estimated that approximately \$21,000.00 was marital debt. Final Divorce Order ¶19

The Appellee disagrees that as a matter of fact, \$21,000.00 of the Appellant's credit card debt was acquired during the marriage. Appellant's Statement of Facts ¶11.

The Appellee disagrees with ¶13 of the Appellant's Statement of Facts to the extent that it

contends that the Circuit Court erroneously found that Appellant should receive no credit for reduction in principal of the parties' marital home. The decision of the Circuit Court was not erroneous.

To the extent that any statement of fact of the Appellant is contrary to the Findings of Fact of the Family Court, the Appellee disagrees with such statement of fact. The Appellee urges that the Findings of Fact of the Family Court are correct in toto.

**III. STATEMENT OF ISSUES**

The Appellee accepts the statement of issues except as follows:

Is the Appellant's appeal jurisdictionally defective for failure to comply with the requirements of Rule 28(a) of the Rules of Practice and Procedure For Family Court.

#### **IV. POINTS AND AUTHORITIES**

##### **1. West Virginia Supreme Court of Appeals.**

*Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004).

*Downey v. Kamka*, 189 W.Va. 141, 428 S.E.2d 769 (1993).

*Evans v. Frye*, 207 W.Va. 524; 534 S.E.2d 389 (2000).

*Gebr. Eickhoff Maschinenfabrik und Eisengießerei mbH v. Starcher*, 174 W.Va. 618, 626 n.12, 328 S.E.2d 492, 500 n.12 (1985).

*In Re Cesar L*, \_\_\_\_ W.Va. \_\_\_\_, 654 S.E. 2d 373 (2007).

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

*Nichols v. Nichols*, 160 W.Va. 514, 236 S.E.2d 36 (1977).

*Chrystal R. M. v. Charlie A. L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

*Selitti v Selitti*, 192 W Va 546, 453 S. E. 2d 380 (1994).

*State v. Hedrick*, 204 W.Va. 547, 514 S.E.2d 397, (1999).

*State v. De Spain*, 139 W.Va. 854, 81 S.E.2d 914 (1954).

*Washington v. Washington*, \_\_\_\_ W.VA. \_\_\_\_, 654 S.E. 2d 110 (2007).

*West Virginia Department of Energy v. Hobet Mining & Construction Co.*, 178 W.Va. 262, 358 S.E.2d 823 (1987).

##### **2. West Virginia Code**

*West Virginia Code §48-5-508*

*West Virginia Code §48-6-301(b)(1)*

*West Virginia Code §48-6-301(b)(2)*

*West Virginia Code §48-6-301(b)(3)*

*West Virginia Code §48-6-301(b)(4)*

*West Virginia Code §48-6-301(b)(5)*

*West Virginia Code §48-6-301(b)(6)*

*West Virginia Code §48-6-301(b)(7)*

*West Virginia Code §48-6-301(b)(9)*

*West Virginia Code §48-6-301(b)(10)*

*West Virginia Code §48-6-301(b)(17)*

*West Virginia Code §48-6-301(b)(20)*

**3. Rules of Practice and Procedure For Family Court**

*Rule 28(a)*

*Rule 28(e)*

*Rule 32*

*Rule 33(b)*

## V. STANDARD OF REVIEW

The standard for review of the Family Court's decision is the same as the standard of review of a Circuit Court decision appealed to the Supreme Court of Appeals:

This Court's standard of review for an appeal from a circuit court that reviewed a family court's final order, or refused to consider a petition for appeal to review a family court's final order, is the same. In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

Accordingly in this case, the decision of Judge Wertman of the Family Court and Judge Steptoe of the Circuit Court will be tested against a three part test.<sup>2</sup> The Family Court's decision as to factual matters will be measured by a clearly erroneous standard, the Court's decision to the extent it applies the law to the facts, under an abuse of discretion standard. Questions of law will be considered by this Court on a *de novo* basis. This is a daunting standard that evidences a clear preference for leaving the majority of Family Court decisions undisturbed.

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<sup>2</sup> The Circuit Court's refusal of the appeal of the Respondent in effect left the Family Court decision intact and unmodified. Accordingly, other than as to the Family Court Rule 28(a) issue, which is addressed separately, the basis Appellee's reply and the basis of the Appellant's appeal must rest upon the Findings of Fact and Conclusions of Law of the Family Court.

## **VI ARGUMENT - ASSIGNMENTS OF ERROR**

### **1. THE APPELLANT DOES NOT CHALLENGE EITHER THE FINDING OF FACT OR CONCLUSIONS OF LAW OF THE FAMILY COURT WHICH MUST BE TAKEN AS CORRECTLY DECIDED FOR THE PURPOSES OF THIS APPEAL.**

#### **A. The Appeal of the Appellant Does Not Challenge Any of the Family Court's Findings of Fact as Erroneous. For the Purposes of this Appeal All of the Factual Findings of the Family Court must Be Taken as True.**

The appeal of the Appellant cites as error three aspects of the Family Court's decision. The first of these is the decision the Court not to deem any of the credit card debt of the Appellant to be marital debt. The second of these was the decision of the Court to not award to the Appellant a credit for the reduction of the mortgage indebtedness on the marital home. The third of these was the decision of the Court to award spousal support to the Appellee. In reviewing the decision of the Family Court on these matters all of the factual findings of the Court must be taken as true and the decision of the Family Court must be reviewed based upon the totality of the Court's factual findings. What the Appellant cannot do is to choose only those facts that it likes and ignore factual findings of the Court that it has not challenged, introduce new facts on appeal or reargue factual arguments rejected by the Court in its Findings of Fact.

#### **B. The Appeal of the Appellant Does Not Challenge Any of The Family Court's Conclusions of Law As Erroneous. For the Purposes of This Appeal All of the Conclusions of Law of the Family Court Must be Taken As Correct.**

As stated above, the standard for review of the Family Court's conclusions of law is a de novo standard. *Syl. Pt 1, Chrystal R. M. v. Charlie A. L., 194 W. Va. 138, 459 S.E.2d 415 (1995)*. Here the appeal does not assert any specific error in the legal conclusions of the Family Court. For this reason, the Circuit Court's decision is reduced to a single standard of review taking all of the factual determinations as true and the conclusions of law as correct and only inquiring as to whether

the facts as applied by the Family Court represents an abuse of discretion. For the reasons stated below, it does not.

**2. THE CIRCUIT COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING THE APPEAL OF THE APPELLANT AND SUSTAINING THE FAMILY COURT'S RULING REGARDING EQUITABLE DIVISION OF THE PARTIES MARITAL ESTATE**

**A. The Family Court's Did Not Abuse 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 made very specific findings of fact on the issue of the allocation of the debt of the Appellant . The Court found that:

At trial the Respondent was unable to produce any documentary evidence that any of the identified debt was marital debt or even existed at the time of separation. Further, the Respondent testified that his credit card indebtedness has increased to near \$50,000.00. The Respondent did not offer any explanation as to the purposes for which the debt was incurred or as to how the debt was a benefit to the marriage or to the Petitioner. The Respondent did testify that he believed that the marital debt was in the range of \$21,000.00 estimating the amount of debt incurred on a monthly basis for a period of time prior to separation (\$600.00 per month for 36 months). The Petitioner testified that she was aware that the Respondent had credit cards during the marriage but that she did not know how many he had or how much he was paying on them. Final Divorce Order ¶19.

In reaching its conclusion on the issue, the Family Court imposed as a threshold factual inquiry, an obligation upon both parties to show that the debt incurred solely by that party was not debt incurred outside the marriage, but rather was debt incurred within the marriage for a marital purpose and was therefore marital debt. Based upon the evidence before the Court, and upon the absence of evidence introduced by the Appellant, the Court concluded that the Appellant did not meet the burden placed upon him.

The burden for showing that contested debt standing solely in the name one of the spouses: (a) was incurred prior to separation, (b) was for a marital purpose and (c) is marital debts rests with the party asserting that claim. The Respondent in this case asserting a contested claim based on an estimate devoid of any written documentation whatsoever, has not sustained this burden. The credit card debt in the name of the husband is therefore to be treated as his separate debt. Final Divorce Order ¶21.

This is hardly an abuse of discretion on the part of the Family Court. Moreover, the Family Court indicated that the same standard would have been applied to any contested debt of the Appellee, but that the Respondent did not contest that the credit card debt of the Appellee was marital debt. Final Divorce Order ¶21.

This approach is the only logical way to address this issue where one party controls all of the documentary evidence of the debt, and cannot or will not provide adequate documentation either through required financial disclosure, through discovery, or at trial. To place the burden differently, would place an impossible burden upon a party to establish that debt was not marital debt when the evidence of that fact was beyond the reach of the party seeking to show that fact. To do so would also be at odds with the requirements of West Virginia Code §48-7-201 et seq. which requires in "any divorce action" that "all parties shall fully disclose their assets and liabilities within forty days after the service of summons" and requires that information provided on financial forms be updated on the record to the date of the hearing.

Moreover, such records as were produced by the Appellant in discovery on the issue of debt consisted of a meaningless credit report which did not provide any information at all as to when the debts were incurred, whether the debts were purchases or cash advances, and for what marital purpose the debts were incurred. No credit card statements of any sort were produced by the Appellant in discovery at any time despite a timely request for credit card statements on June 28,

2006, less than two months after the service of the Petitioner's petition for divorce on May 3, 2006. *Respondent's Reply To Petitioner's Interrogatories Request For Production of Documents. Exhibit 1 Appellant's Brief In Support of Petition For Appeal.*

Nor did the Appellant provide any meaningful testimony on how the credit cards were used, when they were used, for what purpose, marital or otherwise. The Appellant did not even offer any testimony as to whether the credit cards were used for purchases or cash advances.<sup>3</sup>

Faced with no documentary evidence or other meaningful evidence that any of the debt was incurred prior to the separation of the parties on January 20, 2004, the Court properly concluded that the debt was incurred outside the marriage. This determination is at bottom a factual determination and is dispositive on this issue. Nevertheless, the Court went beyond this and found that whenever the debt was acquired, there was no evidence introduced by the Appellant that the debt was of benefit to the marriage or to the Appellee. This is also a factual determination which should be dispositive on this issue. Moreover, the Appellant did not testify as to an exact amount owed in credit card debt as of the date of separation. Instead the Appellant estimated that the credit card debt was increasing at a certain rate per month as far as he remembered. He did not testify as to why the debt was incurred or how it served a marital purpose. On its face, this testimony is simply inadequate to sustain a claim that the credit card debt should be the responsibility of the Appellee, and the Appellant's in acting as he did in not producing any relevant documentary evidence of the nature of his credit card debt, acted at his own peril. Accordingly, the Family Court's finding on this issue is neither clearly erroneous as factual finding nor an abuse of discretion. Indeed to permit litigants to

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<sup>3</sup> The Appellant in his brief does not refer the Court to any specific testimony of the Appellant in the record of the Family Court that answers any of these questions.

shift debt incurred solely by them to the other party without any showing that it even existed as of the date of separation would create the potential for enormous abuse. Family Court judges decide issues of the allocation of marital debt day in and day out and a Family Court judge's decision when supported by specific findings that are not controverted by contrary evidence rendering the decision clearly erroneous, should be given the deference that decision deserves.

This Court has previously concluded that it was inappropriate for a Family Court, in making a division of marital property, to charge debts incurred by one party to the marriage, outside of the marriage, to the other party. *Selitti v Selitti*, 192 W Va 546, 453 S. E. 2d 380 (1994):

“In the present case, it appears that the debt in question was a debt incurred separately by the appellee apparently without the appellant's permission. Although the beneficiary of the debt was the appellant's adult son, the debt cannot appropriately be considered a marital debt, since it was apparently not incurred jointly by the parties and since it was not incurred for any apparent marital purpose. Nor can the debt appropriately be characterized as a debt assumed by the appellant.” *Selitti, supra* at 192 W. Va. 549, 453 S.E. 2d 383. See also *Downey v. Kamka*, 189 W.Va. 141, 428 S.E.2d 769 (1993)

The decision of the Family Court in this instance avoids a pitfall that the *Selitti* decision admonishes Family Courts to avoid in shifting debts incurred outside the marriage to the other spouse.<sup>4</sup>

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<sup>4</sup> If anything, the facts in *Selitti* were more compelling than the facts in this case, where the debts incurred outside the marriage benefitted the child and daughter in law of the Appellant.

**B. The Family Court Did Not Abuse 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 in addressing the question of the reduction of the mortgage principal stated:

“The Respondent seeks a credit for payments toward the mortgage principle. However, the Respondent had the use of the marital residence which is in excess of 2,000 square feet while the Petitioner resided in very modest circumstances with her father. The Respondent also had the use of the house hold goods in the home, and received the tax benefit of the mortgage interest payment. The Respondent further paid no spousal support. The Petitioner testified that she made payments of the electric bill in the amounts of \$154.00, \$383.70, and \$157.79 and the water bill in the amount of \$87.30 and \$28.90. On balance, it would not be equitable to award to the Respondent a credit for the payment of mortgage payments particularly given the substantial rental value of the property”.

In effect the Family Court determined that as a matter of fact, the use of the residence, the tax benefits, the use of the household goods in the residence was as valuable as the reduction of the principal, particularly in light of the fact that the Appellant did not pay any spousal support to the Appellee and where the Appellee made payments on the utilities. Moreover, the principles articulated in *Kapfer v Kapfer* 187 W.Va. 396; 419 S.E.2d 464, (1992) do not support the proposition that there is a preference for awarding a credit for the reduction in principle to a resident spouse for payments made prior to the granting of the divorce. In fact the Supreme Court of Appeals merely found that the Circuit Court did not abuse its discretion in approving the recoupment of payments upon the marital home where the parties had agreed to the result. In addressing this specific issue, the Court stated:

“In the present case, the parties agreed to allow Mr. Kapfer to recoup from the sale all mortgage principal he paid on the marital home after the date of separation and the circuit court's order sets forth the parties agreement. Given the parties' agreement, we find no abuse of discretion in allowing Mr. Kapfer to recoup from the net

proceeds of the sale of the marital home the principal he paid after the date of separation.” *Kapfer v Kapfer, supra, at 187 W. Va. 396, 401-402; 419 S.E. 2d 464, 469.*

And, to the extent that *Kapfer* finds the equitable division of the Circuit Court was not an abuse of discretion, *Kapfer* offers little solace to the position of the Appellant. Indeed this case is easily distinguishable from *Kapfer* in that: (a) there was no agreement between the parties to afford a credit to the Appellant for reductions in principle and (b) in that the Family Court ruled for the Appellee and it is the appellant who is attempting to demonstrate an abuse of discretion, not the Appellee. As is the case above, absent an abuse of discretion, these matters should be left to the sound judgment of the Family Court to resolve in the context of the over all property division of the marital estate.

Finally, as pointed out by the Family Court, there was no provision for temporary spousal support for the Appellee despite the length of marriage, the disparity in incomes and the lower standard of living of the Appellee vis-a-vis the Appellant. See also the Court’s temporary order of July 18, 2006 finding that an award of spousal support to the Appellant would be appropriate.

West Virginia Code §48-5-508 provides further guidance on this issue. Section 48-5-508 provides that:

- (a) *If the pleadings include a specific request for specific property or raise issues concerning the equitable division of marital property, the court may enter an order that is reasonably necessary to preserve the estate of either or both of the parties.*
- (c) *The court may order either or both of the parties to pay the costs and expenses of maintaining and preserving the property of the parties during the pendency of the action. At the time the court determines the interests of the parties in marital property and equitably divides the same, the court may consider the extent to which payments made for the maintenance and preservation of property under the provisions of this section have affected the*

*rights of the parties in marital property and may treat such payments as a partial distribution of marital property. The court may release all or any part of such protected property for sale and substitute all or a portion of the proceeds of the sale for such property.* (Emphasis added).

When the word "may" is used as it is in West Virginia Code §48-5-508, it is generally afforded a permissive connotation, which renders the referenced act discretionary, rather than mandatory, in nature. See *State v. Hedrick*, 204 W.Va. 547, 552, 514 S.E.2d 397, 402 (1999) ("The word 'may' generally signifies permission and connotes discretion." (citations omitted)); *Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher*, 174 W.Va. 618, 626 n.12, 328 S.E.2d 492, 500 n.12 (1985) ("An elementary principle of statutory construction is that the word 'may' is inherently permissive in nature and connotes discretion." (citations omitted)). See *In R Cesar L*, \_\_\_\_\_ W.Va. \_\_\_\_\_, 654 S.E. 2d 373 (2007). Thus, the Family Court had discretion to give a credit for the payments made by the Appellant or decline to do so, which discretion it properly exercised in the context of the overall equitable division of property.

**3. THE CIRCUIT COURT DID NOT COMMIT REVERSIBLE ERROR BY REFUSING APPELLANT RICHARD CREA'S APPEAL AND AFFIRMING THE FAMILY COURT'S RULING AWARDING PERMANENT SPOUSAL SUPPORT TO APPELLEE SANDRA KAY LONGERBEAM.**

Questions relating to alimony are within the sound discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused. *Nichols v. Nichols*, 160 W.Va. 514, 236 S.E.2d 36 (1977). In the instant case the Family Court made detailed findings and provided cogent reasons for its award of spousal support. Contrary to the contentions of the Appellant the Family Court decision is not only equitable and well within the bounds of the Court's discretion, it is the only result that would not truly result in an injustice, a circumstance that the Court duly notes. The Family Court's well reasoned decision on

this point is as follows:

Both the Petitioner and the Respondent seek an award of alimony. The parties agreed at trial to file with the Court copies of their most recent pay stubs for the purpose of verifying the current income of the parties. Final Divorce Order ¶13

The Petitioner's pay stub from 12/22/06 shows gross income through 12/10/06 of \$27,195.65 with deductions of \$7,765.36. Her gross income is, therefore, \$2,402.44 per month and her net income is \$1,716.14 per month. Final Divorce Order ¶14

The Respondent's most recently filed pay stub shows an increase in pay, consistent with his testimony, to a gross pay of \$60,000 per year (\$5,000) per month, with a net pay of \$3,952.54 per month. This is monthly income of \$3,952.54. This is an increase in net pay of approximately \$300.00 per month from the time the Respondent filed his financial statement, an amount potentially available as spousal support to the Petitioner. The Petitioner's health insurance has increased a small amount during that period. Final Divorce Order ¶15

Previously, the parties stated to the Court the amount of their regular monthly expenses. The Petitioner has stated expenses of \$1,930.00 and has also a car payment which was not an expense at the time of the hearing before the Court in July, 2006. The husband has stated expenses of \$5,030.00. The husband is seeking to refinance the marital home to purchase the interest of the wife. The husband's housing expenses will increase to an amount in excess of \$2,000.00 if he refinances the marital home. Final Divorce Order ¶16

This is a long term marriage well in excess of twenty years and there is a disparity in income between the Petitioner and the Respondent. The Petitioner is employed by the Jefferson County Board of Education in a paraprofessional position as a teacher's aid. The Petitioner has training as a nurse in the distant past, but has never held a nursing license or practiced as a nurse. The Petitioner is fifty years of age and testified that she does not have any realistic prospect of improving her income or changing jobs. The Petitioner further testified that she is unwilling to leave her present employment because she receives health benefits and retirement benefits. A change in employment could enable her to increase her income, albeit not substantially. The Respondent husband is employed as an IT specialist at a financial institution and has in the past operated a computer business. The Respondent did not testify as to any limitations upon his future earnings or job change options, nor did he offer any specific testimony in support of a spousal support claim. Neither party testified to any health problems that would affect their ability to sustain employment. Final Divorce Order ¶17

Based upon the testimony of the parties it is apparent that the Respondent has

incurred extremely high credit card debts without any showing of the reason for the debt or of any benefit to the marriage. The Respondent has further testified that he has the ability to borrow approximately \$280,000.00 on the marital home. This would permit the Respondent to both pay to the Petitioner 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. The end result would be inequitable, insofar as the Respondent would own the marital home, would have little or no debt other than the debt on the marital home and would have no obligation to pay spousal support. The Petitioner has a reasonable life expectancy of approximately another 28 years. At even a modest sum of \$300.00 per month the amount of alimony avoided by the Respondent would be equal to a total of \$100,800.00. The Respondent should not benefit from voluntarily incurring excessive debt and the Petitioner should not be penalized for the Respondent having done so. Sale of the home would enable the Respondent to relieve himself of his current obligation to pay over \$1,400 per month in credit card payments as reflected in his financial statement. The equitable solution under the circumstances is to have the marital residence sold and the equity of the parties divided equally, subject to the adjustments noted. This will permit the Respondent to reduce or eliminate his credit card debt and still have funds with which to meet expenses and pay spousal support. Accordingly, the marital residence shall be sold and the Petitioner shall be awarded spousal support of \$600.00 per month. Final Divorce Order ¶27. <sup>5</sup>

The Family Court in its decision made very specific findings as set out above. In doing so the Family Court rejected a buy out of the Appellee's interest in the home, the effect of which would be to avoid the spousal support payments that a marriage of this duration and with this disparity in income demands. Rather, the Family Court having first determined that the marital residence was marital property, exercised the discretion specifically afforded it under West Virginia Code §48-7-104(7)(E) and ordered the property sold and the proceeds divided equally, subject to certain offsets that benefit the Appellant. This the Family Court had every right to do. *Evans v. Frye*, 207 W.Va. 524; 534 S.E.2d 389 (2000). <sup>6</sup>

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<sup>5</sup> The actual amount of spousal support ordered in the Family Court's order is \$325.00 per month.

<sup>6</sup> Section 48-7-104(7) affords a series of options which the Family Court may employ to effect equitable division: (A) Direct either party to transfer their interest in specific property to

The Court specific findings that address the factors set out in West Virginia Code §48-6-301(b)(1), (b)(2), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), (b)(9), (b)(10), and (b)(17). The Family Court's Finding refusing to permit the Appellant to manipulate debt to leave the Appellee with only her share of the equity in the home, and nothing more, is specifically permitted under West Virginia Code §48-6-301(b)(20):

*(b) The Court shall consider the following factors in determining the amount of spousal support ... :*

*(20) Such other factors as the Court deems necessary or appropriate to consider in order to arrive at a fair and equitable grant of spousal support ... . (Emphasis added).*

The Family Court further found that as a factual determination that upon the sale of the marital home the Appellant would have adequate income to pay expenses and to pay spousal support. This finding of the Court is neither clearly erroneous nor an abuse of discretion.

Upon the sale of the marital home the Appellant will have the means to eliminate \$1,400.00 per month in credit card payments and will have eliminated \$1,259.41 in mortgage payments. This sum is a total of \$2,659.41 of the Appellant's claimed expenses of \$5,030.00. This leaves \$2,330.00 for all of the Appellant's claimed expenses other than mortgage payments and credit card payments.

The Appellant's net income is \$3,952.54 and deducting the sum of \$2,330.00 from this sum

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the other party; (B) Permit either party to purchase from the other party their interest in specific property; (C) Direct either party to pay a sum of money to the other party in lieu of transferring specific property or an interest therein, if necessary to adjust the equities and rights of the parties, which sum may be paid in installments or otherwise, as the court may direct; (D) Direct a party to transfer his or her property to the other party in substitution for property of the other party of equal value which the transferor is permitted to retain and assume ownership of; or (E) Order a sale of specific property and an appropriate division of the net proceeds of such sale: Provided, That such sale may be by private sale, or through an agent or by judicial sale, whichever would facilitate a sale within a reasonable time at a fair price. West Virginia Code §48-7-104(7)(A) through (E).

the Appellant would have \$1,622,54 to pay spousal support of \$325.00 leaving \$1,297.54 to pay housing expenses. This may not be enough to purchase a 2,000 square foot home but it is certainly enough to purchase a home for one person, or pay rent. It certainly will pay for better housing than the basement bedroom in her father's home that the Appellee has had to live in.

Not only is the Family Court's decision within the sound discretion of the Court, and hardly an abuse of that discretion, upon the record before the Court, the decision of the Court is the only equitable decision that the Court could make.<sup>7</sup> The Appellant would have the Court find an inequity in the Appellant's receiving a mere \$39,376.58 in cash, having no debt, and having to live on a paltry \$3,952.54 before paying \$325.00 per month in spousal support. Moreover, this is an increase of approximately \$300.00 over the amount of net income earned by the Appellant at the time that Appellant filed his financial form with the Family Court. The Appellant makes much of the limited choices that he would have in purchasing new real estate. However, the Appellant is hardly worse off than the Appellee. While the Appellee would have more to put down on a house, her earnings are such that her choices are similarly limited. The Appellee has resided in the basement of her father's home since separation. The Appellant has resided in the marital residence and managed to incur by his own admission well over Twenty Three Thousand Dollars in unexplained debt since separation. The Appellant's poor financial choices are his own doing. Neither he nor the Appellee are guaranteed any particular standard of living and the Appellant will have to make do with a fair share of marital assets. Despite the Appellant's protests, on balance he will have far more income

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<sup>7</sup> The Appellant argues that he paid for the care of one of the children of the parties without assistance of the Appellee. This assertion is contrary to the record in this case as the Appellee has testified without rebuttal that she made a lump sum gift to her son of \$5,000.00 from the proceeds of the sale of real estate. The child in question, Richard M. Crea, Jr. turned 19 years of age on July 21, 2006.

than the Appellee for the remainder of his working life and at least an equal opportunity to purchase a home comparable to the home that the Appellee will be able to afford. The situation of the Appellant is one that many in West Virginia would envy. There is no abuse of discretion in the Family Court's decision in this case and this case was rightly decided by the Family Court and rightly affirmed by the Circuit Court.

**4. THE APPEAL OF THE APPELLANT IS NOT TIMELY FILED AS REQUIRED BY RULE 28(A) OF THE RULES OF PRACTICE AND PROCEDURE FOR FAMILY COURT.**

Rule 28 of the Family Court Rules provides that:

*(a) Time for petition. A party aggrieved by a final order of a family court may file a petition for appeal to the circuit court no later than thirty days after the family court final order was entered in the circuit clerk's office. If a motion for reconsideration has been filed within the time period to file an appeal, the time period for filing an appeal is suspended during the pendency of the motion for reconsideration.*

Rule 32 of the Family Court Rules provides that:

*The circuit court may, for good cause shown in a written motion, extend the time prescribed by these rules for doing any act related to the appeal before it, or may permit an act to be done after the expiration of such time. Provided, however, that any extension of time granted by the circuit court may not exceed a period of ten days.*

In the instant case, the decision of the Family Court was entered on January 19, 2007. The appeal of the Appellant was not filed until February 26, 2007, well beyond the thirty days provided for in the Family Court Rules. No written motion was filed by the Appellant requesting additional time pursuant to Rule 32 of the Family Court Rules and no exigent circumstances have been offered for the delay in filing the Appellant's appeal. No motion for reconsideration was filed with the Family Court.

As provided in Rule 28(e) the Appellee filed a response to the appeal of the Appellant objecting to the appeal as untimely. On March 29, 2007 the Circuit Court refused the appeal pursuant to Rule 33(b) of the Family Court Rules.

The failure of the Appellant to comply with the thirty-day appeal deadline in Rule 28(a) of the Family Court Rules is a jurisdictional infirmity in West Virginia. *Washington v. Washington*, \_\_\_ W.VA. \_\_\_, 654 S.E. 2d 110 (2007) In *Washington, supra*, which also considered an untimely appeal under Rule 28(a), the Court found that the appeal was properly denied by the Circuit Court. As was the case in *Washington*, the Final Decree clearly advises both parties of the thirty day time frame for appeal. When those time frames are not met, the Circuit Court lacks jurisdiction to consider the appeal from the Family Court. "'Where the Legislature has prescribed limitations on the right to appeal, such limitations are exclusive, and cannot be enlarged by the court.' *State v. De Spain*, 139 W.Va. 854, [857,] 81 S.E.2d 914, 916 (1954)." *Syllabus Point 1, West Virginia Department of Energy v. Hobet Mining & Construction Co.*, 178 W.Va. 262, 358 S.E.2d 823 (1987).

Moreover, absent the consent of the parties, there is no direct appeal of a Family Court decision to the Supreme Court of Appeals.<sup>8</sup>

Accordingly, the appeal of the Appellant is jurisdictionally defective and must be dismissed. *Washington v Washington, supra*.

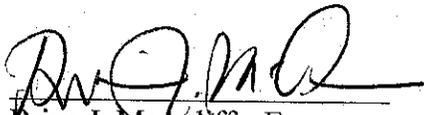
## VII. CONCLUSION

For the reasons stated, the appeal of the Appellant must be denied and the decision of the Family Court and the Circuit Court affirmed.

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<sup>8</sup> Rule 26 of the Rules of Practice and Procedure For Family Court.

Respectfully Submitted,  
Appellee, Sandra Kay Longerbeam  
By Counsel



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

**SANDRA KAY LONGERBEAM,  
f/k/a SANDRA KAY CREA, Petitioner Below,**

**Appellee,**

**vs.**

**Case No. 33656**

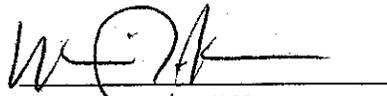
**RICHARD CREA, Respondent Below,**

**Appellant.**

**CERTIFICATE OF SERVICE**

I, Brian J. McAuliffe, counsel for the Appellee, do hereby certify that I have served a true copy of the attached **Brief of Appellee Sandra Kay Longerbeam** upon the below listed counsel of record, by mailing a true copy of same, United States mail, first class, postage prepaid, on the 25<sup>th</sup> day of February, 2008, addressed to:

Christopher J. Prezioso, Esquire  
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Brian J. McAuliffe