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REPLY TO APPELLEE/CROSS-APPELLANT'S RESPONSE

I. APPELLEE'S BRIEF AND EXTRACT CONTAIN MATERIAL IN VIOLATION OF THE MARYLAND RULES AND MARYLAND CASE LAW AND HER APPEAL AND RESPONSE SHOULD BE DISMISSED.

Appellee's brief (the Wife) and record extract violate the requirements of Maryland Rule 8-504 by citing in the brief, and including in the extract, material that is outside of the trial record. The Wife included in her extract the transcript of a motion hearing that was held on September 19, 2002, along with the Trial Judge's ruling on that motion. The Wife also refers to a portion of that ruling several times in her brief, alleging that "the Trial Court found that Appellant had voluntarily impoverished himself" (Appellee Brief, p. 8). Furthermore, the Wife mislabeled her extract "*Joint Record Extract*" (emphasis added), implying that Appellant (the Husband) joined in the submission of the disputed material; the Husband's Counsel was not consulted regarding the inclusion of the disputed material and did not agree to its inclusion.

Maryland Rule 8-504 (a)(4) provides:

A clear concise statement of the facts material to a determination of the questions presented, except that the appellee's brief shall contain a statement of only those additional facts necessary to correct or amplify the statement in the appellant's brief. Reference shall be made to the pages of the record extract supporting the assertions. If pursuant to these rules or by leave of court a record extract is not filed, reference shall be made to the pages of the record or to the transcript of testimony as contained in the record.

Regarding that rule, the Court of Appeals has said, "Section (a) (4) of this Rule contemplates that an appellant's brief shall rely on facts established by the

record,” Roged, Inc. v. Paglee, 280 Md. 248, 372 A.2d 1059 (1977) and that the appellate court “has no power to inspect documents or consider evidence which was not offered below to determine whether the findings were correct.” Burke v. Burke, 204 Md. 637, 106 A.2d 1059 (1977).

The disputed material was not offered below, either as an exhibit or by testimony, nor was the ruling allegedly made by the Judge ever made part of the record. The Trial Judge never referred to the alleged prior ruling at any point in the trial and did not cite or rely upon it in his ruling. Even Counsel for the Wife did not argue the point to the Trial Judge. Counsel did mention it in passing during his closing argument, but never referred to it as a standing ruling in the case that the Judge must or should abide by. Despite these facts, the Wife refers to the alleged ruling at least four times in her brief and evidently expects this Court to consider it in its deliberations on this appeal. The Court should not consider the material or the alleged ruling.

Maryland Rule 8-131(a) provides that “[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.” The principal purposes of section (a) of this Rule are: (1) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (2) to prevent the trial of cases in a piecemeal

fashion, thus accelerating the termination of litigation. Clayman v. Prince George's County, 266 Md. 409, 416, 292 A.2d 689 (1972).

Obviously potential issues regarding the matter were never debated by the parties in front of the Trial Judge and hence, were never framed appropriately for this Court to consider. For example, the Husband disagrees with the Wife on the basic issue of whether the Trial Judge actually made a “finding” of “voluntary impoverishment.” The Wife characterizes the Judge’s language that way, but the Judge himself never framed it that way and his remarks were vague and unclear. If the Wife had made the argument to the Trial Judge, the Husband would have vigorously contested the point.

Furthermore, if the Trial Judge did make such a “finding,” the Husband contends that it was overturned by a Master’s Ruling on January 5, 2004 which was ratified separately by the Court on January 13, 2004. Regardless, in order for the Court to properly consider the matter these issues should have been presented for argument below. They were not.

It is disturbing to note that the issue of whether past testimony was part of the trial record was debated at the very beginning of the instant trial, and that debate appeared to have concluded that such testimony was not part of the trial record.

On the morning of the first day of trial, Counsel for the Wife stated:

Mr. Abramson: I’m objecting to Officer Adams, because I think it’s duplicative. He testified, you read the transcript, it’s the exact same thing. Mr. Fishbein will tell us it’s the precise testimony that was

before. When you ruled on the exceptions, you had to make an independent judgment by reading the transcript. It's the same thing..." (E 84)

Counsel for the Husband replied:

Mr. Fishbein: "... That wasn't on the merits. Your Honor has to hear the trial on the merits, because the facts are the facts. But the only facts that would be on the record on the merits would be the evidence that you heard, not what occurred in a Master's hearing. I mean we need a record. And the only way to make the record is to have the witnesses testify." (E 85)

The Trial Judge never explicitly ruled on that question, but apparently agreed that the prior testimony would not be part of the record for the instant trial because he "reserve[d] ruling on the request that the officer be taken out of turn." That afternoon, the parties stipulated and agreed on the record to adopt the testimony of three witnesses who had testified at a Master's hearing earlier in the case thereby ensuring that the testimony was part of the trial record. (E 122)

According to Maryland Rule 8-602(a)(8), the Court may dismiss an appeal if a brief or record extract do not comply with Rule 8-504. The Wife's inclusion of matters outside of the trial record clearly was knowing and intentional given the dialogue on that very issue cited above. Such know violations of long-standing Court rules and precedents should not be lightly regarded.

II. THE COURT ABUSED ITS DISCRETION BY MAKING AN AWARD OF PERMANENT ALIMONY TO THE WIFE.

The Wife asserts in her brief that "Appellant admits that the Court considered factors as required..." Appellant/Husband admitted no such thing. Instead, the Husband's brief said that, "the Court considered many of the factors

required by §106(b), but it failed to consider several crucial ones or it considered those factors inadequately.

The Wife is correct, citing Tracey v. Tracey, 328 Md. 380 (1992), that great deference is given to the findings and judgments of the trial court in reviewing an alimony award. That does not mean, however, unlimited deference. See e.g., Hart v. Hart, 2006 Md. App. LEXIS 75 (June 2, 2006); Simonds v. Simonds, 165 Md. App. 591, 886 A.2d 158 (2005); Francz v. Francz, 157 Md. App. 676, 853 A.2d 839 (2004); Strauss v. Strauss, 101 Md. App. 490, 647 A.2d 818 (1994), cert. denied, 337 Md. 90, 651 A.2d 855 (1995). When the trial court fails to adequately consider the factors enumerated in §11-106 of the Family Law Article of the Annotated Code of Maryland, the appeals courts have not hesitated to remand the cases for proper consideration. Hart, supra.

The Trial Court awarded indefinite alimony to the wife based upon its finding of an unconscionable disparity in the standards of living of the husband and wife, but it did not adequately analyze those standards of living according as a matter of law.

The Trial Court found that “both parties are self-supporting.” (E 57) He found that neither party was more at fault than the other for their estrangement, both contributed sufficiently to the well-being of the family, there was no agreement between them regarding alimony, and that neither the duration of their marriage nor their age, physical conditions, or mental conditions had any bearing on the alimony decision.

The Trial Judge made the decision to award indefinite alimony based upon only two of the factors: 1) the standards of living and 2) the financial resources of the parties. Clearly, however, financial resources was the critical factor because the Trial Judge mentioned only two things about their standards of living: 1) the Husband lives on a 150 acre farm and the Wife lives in a “single family rancher,” and 2) the Husband can still use the Sea Colony condominium in Bethany Beach, Delaware while the Wife can’t. (E 63)

The Trial Judge then goes on to opine that “one’s standard of living, more often than not, bears a relationship to financial condition.” (E 63) Maybe so, but if those two factors are so inextricably intertwined, why did the General Assembly list them separately? Obviously there is something about “standard of living” that is separate and different from financial matters.

The Trial Judge even recognized this when he again opined, “I can conceptualize that there might be occasions where someone of independent means chooses to live like a hermit or a pulper (sic) or a street person. And I guess that person’s standard of living would be very limited, notwithstanding his financial condition. But that’s not this case.” He then goes on again to discuss the Husband’s lack of debt, net worth, and his financial resources again – no discussion at all about standard of living apart from finances. Maryland case law, however, mandates that certain analysis be done regarding standard of living.

The Court of Special Appeals, in Simonds v. Simonds, 165 Md. App. 591, (2005) set out the necessary method of analyzing the parties' standards of living.

While it is useful to make a "percentage comparison" with other cases, it cannot be overemphasized that "whether the post-divorce standards of living of former spouses are unconscionably disparate only can be determined by a fact-intensive case-by-case analysis." Karmand, 145 Md. App. at 338. As the above quoted cases make clear, to determine whether there is an unconscionable disparity between the parties' post-divorce standards of living, the circuit court cannot merely "do the math." ...[I]n addition to determining each party's present and potential earning capacity, the circuit court must determine whether and/or the extent to which appellant "contributed to [appellee's] success in building his professional career." Solomon, 383 Md. at 201. The Solomon Court emphasized that, "although Mrs. Solomon did not play as direct a role in promoting the financial aspects of her marriage as [the dependent spouse did in Turner, supra., her work in the home no doubt contributed to Mr. Solomon's success in building his professional career." *Id.* at 201.

While this evaluation begins with a determination of each party's actual income and/or earning potential as of (1) the day that they were married, and (2) the date of their divorce, the contributions made by the dependent spouse cannot be measured by a "one size fits all" mathematical formula. "Each divorce situation is different, and must be evaluated individually." Alston v. Alston, 331 Md. 496, 509, 629 A.2d 70 (1993).

Upon remand, the circuit court must (1) determine each party's actual income and/or earning potential as of (a) the day that they were married, and (b) the date of their divorce, (2) determine whether and/or the extent to which appellant contributed to appellee's professional success during their 22 years of marriage, and (3) include that "contribution" evaluation in its FL 11-106 analysis. Simonds v. Simonds, 165 Md. App. 591, 611-613 (2005) (emphasis added).

In the instant case while the Wife evidently made positive contributions to the marital home and the happiness of the children, nothing she did contributed to

the Husband's income or assets. Virtually all of the assets he has were inherited from his mother and the income he made during the marriage came in a career he had prior to the marriage from a job he also had prior to the marriage. This is not a case of a wife or husband sacrificing so the other can go to law school or medical school or graduate school. No insult is intended when it is said that this wife contributed nothing to the Husband's income or wealth; he had the income prior to the marriage and the assets were inherited.

Over and over again the Court of Special Appeals has said that financial factors are not the sole determinate of alimony decisions.

“If the marriage has been of short duration and there was a great disparity in the standards of living prior to the marriage, it might not be unconscionable for the dependent spouse to be returned to his or her premarital standard of living. If the dependent spouse was guilty of a fault which destroyed the marriage, permitting considerable disparity in standards of living may be tolerated. But in this case the parties entered the marriage with comparable standards of living, the wife's efforts contributed greatly to the husband's career, and it was the husband's fault that destroyed the marriage.” Holston v. Holston, 58 Md. App. 308, 323 (1984)

In this case, though the marriage was not of short duration, it also was not long, and there probably was a great disparity in the standards of living prior to the marriage though it is impossible to conclude that because there was no evidence presented at trial as to the wife's standard of living prior to the marriage. In this case, as suggested by Holston, supra, it would not be unconscionable for the wife to be returned to her premarital standard of living.

Again the Court is reminded, because the Trial Court completely ignored it, that by all accounts the parties led a modest lifestyle during their marriage. They lived on a house owned by his mother, did not travel extravagantly or lead an otherwise wealthy lifestyle. What the trial judge opined about regarding the millionaire who chooses a more modest life style was exactly the case here.

Additionally, it is the spouse seeking indefinite alimony who bears the burden of proof as to the existence of the prerequisites to entitlement to such an award.” Francz v. Francz, 157 Md. App. 676, 692 (2004). The Wife did not come close to meeting that burden in this case.

RESPONSE TO APPELLEE/CROSS-APPELLANT’S ARGUMENT

I. IF AN AWARD OF ATTORNEY’S FEES TO APPELLEE WIFE WAS APPROPRIATE, THE COURT DID NOT ABUSE ITS DISCRETION IN ITS DETERMINATION OF THE AMOUNT

The trial courts are given discretion in awarding attorney’s fees, in exercising that discretion, the trial judge must consider and balance the required considerations in the statutes. Kierein v. Kierein, 115 Md. App. 448 (1997).

Appellant refers the Court to Section IV of its original brief for his argument regarding attorney fees. There, Appellant argues that the Trial Court abused its discretion in making an award of Attorney fees in any amount to the Wife. The same facts and argument apply to the application of discretion in the amount of fees awarded should this Court not overturn the award of fees to the Wife.

CONCLUSION

For the reasons set forth in this brief, Appellant James Scott Doe requests that this Court dismiss the Appeal and response of Appellee, Mary Margaret Doe, or in the alternative, remand the case to the Circuit Court for Howard County for proceedings consistent with case and statutory law cited in this brief.

Md. FAMILY LAW Code Ann. § 11-106 (2006)

§ 11-106. Same -- Determination of amount and duration

(a) Court to make determination. --

(1) The court shall determine the amount of and the period for an award of alimony.

(2) The court may award alimony for a period beginning from the filing of the pleading that requests alimony.

(3) At the conclusion of the period of the award of alimony, no further alimony shall accrue.

(b) Required considerations. -- In making the determination, the court shall consider all the factors necessary for a fair and equitable award, including:

(1) the ability of the party seeking alimony to be wholly or partly self-supporting;

(2) the time necessary for the party seeking alimony to gain sufficient education

or training to enable that party to find suitable employment;

(3) the standard of living that the parties established during their marriage;

(4) the duration of the marriage;

(5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;

(6) the circumstances that contributed to the estrangement of the parties;

(7) the age of each party;

(8) the physical and mental condition of each party;

(9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;

(10) any agreement between the parties;

(11) the financial needs and financial resources of each party, including:

(i) all income and assets, including property that does not produce income;

(ii) any award made under §§ 8-205 and 8-208 of this article;

(iii) the nature and amount of the financial obligations of each party; and

(iv) the right of each party to receive retirement benefits; and

(12) whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health - General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

(c) Award for indefinite period. -- The court may award alimony for an indefinite period, if the court finds that:

(1) due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting; or

(2) even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate.

Md. Rule 8-131(a) (2006)

(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

Md. Rule 8-504 (2006)

(a) Contents. A brief shall comply with the requirements of Rule 8-112 and include the following items in the order listed:

(4) A clear concise statement of the facts material to a determination of the questions presented, except that the appellee's brief shall contain a statement of only those additional facts necessary to correct or amplify the statement in the appellant's brief. Reference shall be made to the pages of the record extract

supporting the assertions. If pursuant to these rules or by leave of court a record extract is not filed, reference shall be made to the pages of the record or to the transcript of testimony as contained in the record.

Md. Rule 8-602(a)(8) (2006)

(a) Grounds. On motion or on its own initiative, the Court may dismiss an appeal for any of the following reasons:

(8) the style, contents, size, format, legibility, or method of reproduction of a brief, appendix, or record extract does not comply with Rules 8-112, 8-501, 8-503, or 8-504.