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STATEMENT OF THE CASE

This is a divorce action. The parties were married on October 6, 1993 and had one child, who was long emancipated prior to this action. At the time of the parties marriage the Appellant was 36 years old and the Respondent was 31 years old. At the time of the divorce the divorce decree was entered the Respondent was 67 years old and the Appellant was 72 years old.

The Respondent was in the United States Army Reserves at the time of the marriage and had been since 1955. In 1963, the Appellant became employed with the Civil Service. The Appellant retired from both jobs in 1996. The essential facts of this case are not in dispute. Therefore, a transcript of the proceedings would be of little value in determining 1) whether the Trial Judge erred in applying the law to the facts and 2) whether the Trial Judge abused his discretion. The Appellant, of course, maintains that the Trial Judge both misapplied the law and abused his discretion. The Respondent disagrees.

ARGUMENTS

I. THE TRIAL COURT DID NOT ERR IN ITS RECONSTRUCTION OF THE RECORD.

In reconstructing the record as the transcript of the trial was not available, due to a Court Reporter's error or an electronic malfunction, the Trial Judge merely attempted to do what a Magistrate would do in an appeal from a Magistrate's Court. In the case at bar the testimony from the trial really is not that important to an appeal. The findings of fact in the Amended Final Decree and Order (ROA page 19) are not in dispute. The dates of when the parties were married, when the Appellant was in the military and when he worked for civil service are not in dispute. The percentages are really not in dispute.

In the Reconstruction of the Record (ROA page 37) the Trial Judge clarified certain matters including correcting the mathematical errors, which clarification should be adopted by this Court. In the Final Decree and Order (ROA page 12) and in the Amended Final Decree and Order (ROA page 19) the Trial Judge, in order to balance the tax consequences, required the Appellant to pay the sums on the equitable division as alimony until the Plan Administrators began deducting. The Appellant did not object to this scheme on his Motion for Reconsideration and is therefore barred from objecting to it now.

The only confusion that could possibly result from the Trial Judge's reconstruction of the record is a merging of the agreed upon corrections of the arithmetic in the Order.

II. THE TRIAL COURT DID NOT ERR IN DIRECTING THAT THE EQUITABLE SHARE OF THE MARITAL PROPERTY BE RETROACTIVE TO DECEMBER 1, 2009.

1976 South Carolina Code Section 20-7-473 specifically provides that equitable division

be as of the date of the filing of the action. This action was filed on February 25, 2009. The Appellant chooses to take umbrage with the fact that the Trial Judge decided to take a later date for the effective equitable division and the Appellant, in his argument fails to recognize that sums paid under the Pendente Lite Order would be credited. Therefore, no windfall would come to the Respondent. However, the Respondent would not object to using the February date as opposed to the December date. In either event the result is essentially the same.

III. THE TRIAL COURT DID NOT ERR IN AWARDING THE BENEFIT OF MR. BARBER'S SURVIVOR'S BENEFIT PLAN TO RESPONDENT.

In both the Complaint and Amended Complaint (ROA page 18) the Respondent requested equitable division and requested such other and further relief that the Court might deem just and proper. In the instant case the survivor's benefits plans are a part of the pensions and are subject to equitable division. Granted, the survivor's benefits plans only benefit the Respondent. The Appellant argued, speciously, that awarding the survivor's benefits plans to the Respondent is unfair to the Appellant's illegitimate son who was born after the survivor's benefits plans was put in place by the Appellant's retirement and who was not a factor in the equitable division decisions.

IV. THE TRIAL COURT DID NOT ERR BY AWARDING THE RESPONDENT ALIMONY.

The Trial Judge considered each of the factors in **1976 South Carolina Code Laws Section 20-3-120** and concluded that the Respondent was entitled to alimony and considered the fact that the calculations involved in the equitable division may not be accurate and, in that event, provided that the Respondent had the right to petition the court to modify the alimony as it was the intention of the Trial Judge to give the Respondent and income of approximately $2,400.00 per month. With the

modifications and corrections in arithmetic in the Reconstruction of the Record by the Trial Judge, the gross income from equitable distribution to the Respondent is $1,594.91 and since it was the intention of the Trial Judge to award her a gross income of approximatély $2,400.00 the alimony should be increased by this Court so as to effectuate the intention of the Trial Judge.

"An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion." **Allen vs. Allen**, 347 S.C. 177, 183-84, 554 S.E.2d 421, 424 (Ct. App.2001). Alimony is a substitute for the support that is normally incident to the marital relationship. **Spence vs. Spence,** 260, S.C. 526, 529, 197 S.E.2d 683, 684 (1973). "Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." **Allen,** 347 S.C. at 184, 554 S.E.2d at 424. "It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." **Section 20-3-130 (C)** lists the factors the family court judge must consider in deciding whether to award alimony or separate maintenance and support. **Allen,** 347 S.C. 184, 554 S.E.2d at 425.

The Survivor's Benefit Plan, prior to its vesting, was never contemplated by either party as possibly benefitting the Appellant's minor child, who is not a child of this marriage and did not exist when the Appellant retired in 1996.

V. THE TRIAL COURT DID NOT ERR BY AWARDING THE RESPONDENT ATTORNEY'S FEES.

The Trial Judge in the Final Decree and Order (ROA page 12) and in the Amended Final Decree and Order (ROA page 19) considered all of the relevant factors in accordance with **E.D.M. vs. T.A.M.,** 307 S.C. 471, 76-77, 415 S.E. 2d. 812, 816 (1992) and without citing the case the factors set forth in **Glasscock vs. Glasscock**, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).. The

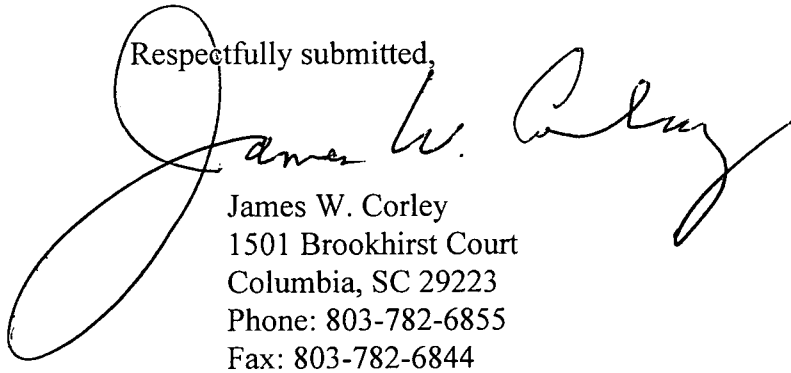
Supreme Court of South Carolina recently considered attorney's fees awards in **Chisholm vs. Chisholm** Opinion Number 27092 (SCSC) filed February 1, 2012 in which the Court reaffirmed the principal that the decision toward attorney's fees rests in the sound discretion of the Family Court and the Court must consider all of the relevant factors and that no one factor alone should prevail.

The Appellant, in his argument, argues that at the same time the Respondent brought this action in Richland County the Respondent also brought an action in Lexington to enforce an earlier Lexington County Order. Appellant maintains that the Lexington County action was frivolous and resulted in increasing the Appellant's attorney's fees. While the Lexington County action was necessary to clarify whether the Lexington Order was still valid or not valid and it was not valid, therefore matters were **de nuvo** in Richland County. The Supreme Court in **Chisholm, supra** specifically held that beneficial results were not determinative and should be no greater weight than any other factor.

CONCLUSION

For the forgoing reasons, this Court should affirm the judgment of the Family Court.

Respectfully submitted,



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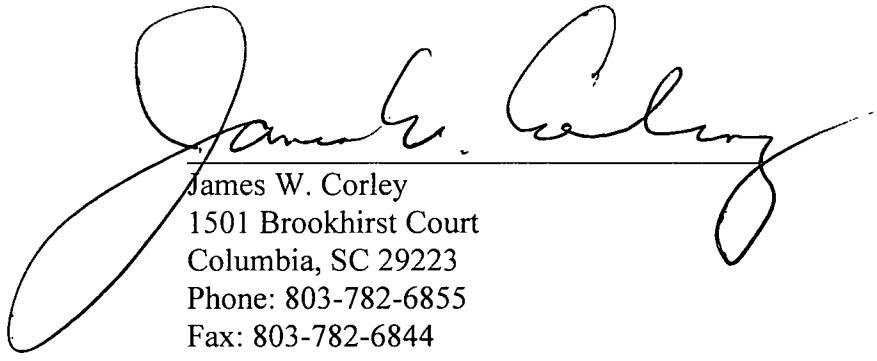
April 24, 2012

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of the Respondent complies with Rule 211(b), SCACR.



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April 24, 2012

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
IN THE FAMILY COURT

W. THOMAS SPROTT, JR., FAMILY COURT JUDGE

RECEIVED
APR 24 2012
SC Court of Appeals

CASE NUMBER: 2009-DR-40-0736

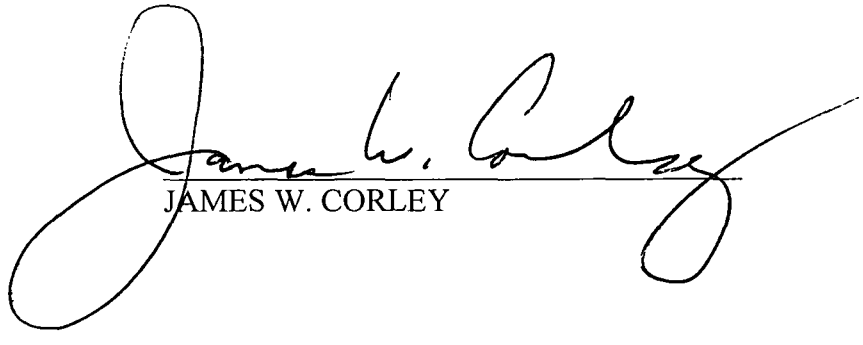
LINDA ROSE BARBER, RESPONDENT,

V.

ROBERT DONALD BARBER, APPELLANT.

PROOF OF SERVICE

I certify that I have served a copy of the Brief of Respondent on the Appellant by depositing a copy of the same in the United States Mail, postage prepaid on the 24 day of April, 2012 to the Appellant's, Robert Donald Barber, counsel Timothy G. Quinn, 2309 Devine Street, Columbia, South Carolina, 29205.



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