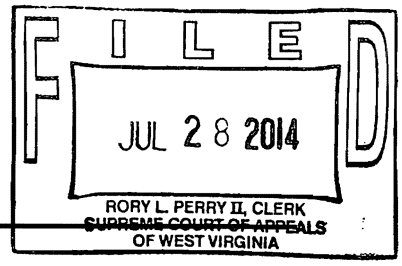
Supreme Court Case No. 14-0429
(Civil Action No. 12-D-60)

---- CONFIDENTIAL CASE ----



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CAROL ELAINE WARREN,

Petitioner herein and
Respondent Below

v.

TODD E. GARLAND,

Respondent herein and
Petitioner Below

PETITIONER'S BRIEF

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REFERENCE TO THE PARTIES

For ease of reference, the Petitioner herein and Respondent below, Carol Elaine Warren, shall be referred to as "Wife." The Respondent herein and Petitioner below, Todd E. Garland, shall be referred to as "Husband."

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ASSIGNMENTS OF ERROR

A. **THE CIRCUIT COURT ERRED IN REVERSING AND VACATING THE FAMILY COURT'S INCREASE OF SPOUSAL SUPPORT TO WIFE WHEN THE INCREASE WAS BASED ON SUFFICIENT EVIDENCE.** 8

B. **THE CIRCUIT COURT ERRED IN FINDING THAT THE INCREASE OF ALIMONY TO WIFE WAS ABITRARY AND CAPRICOUS WHERE THE FAMILY COURT SET FORTH SPECIFIC FACTUAL FINDINGS SUPPORING THE INCREASE.** 11

C. **THE CIRCUIT COURT ERRED IN REVERSING AND VACATING FAMILY COURT'S AWARD BECAUSE HUSBAND HAS THE CURRENT ABILITY TO PAY THE INCREASED ALIMONY.** 12

D. **THE CIRCUIT COURT'S FINDING THAT WIFE WOULD NOT HAVE THE NEED FOR *$650/MONTH* ALIMONY IN 3 YEARS BECAUSE SHE WILL BE ELIGIBLE FOR MEDICARE WAS CLEARLY ERRONEOUS BECAUSE THE FAMILY COURT FOUND THAT WIFE OPERATED AT AN OBVIOUS DEFICIT OF $1,800/MONTH *EXCLUDING* HER ESTIMATED PRIVATE HEALTH INSURANCE COST OF $500-$700/MONTH.** 14

E. **THE CIRCUIT COURT ABUSED ITS DISCRETION BY REDUCING WIFE'S ALIMONY AWARD FROM 15 YEARS TO 3 YEARS WITHOUT APPLYING W.VA. CODE § 48-6-301(B).** 15

STATEMENT OF THE CASE

Wife appeals the decision of the Circuit Court of Webster County, which reversed and vacated, a substantial portion of the Family Court's spousal support award to Wife completely disregarding the judgment and sound discretion of the trial court, and without consideration of the parties' long-term marriage, disparity of their income, and Wife's desperate financial need. As a result of the Circuit Court's Order on Appeal, Wife's spousal support will terminate when she reaches the age of 65 (May 2015), leaving her with a mere $888 in gross monthly income to support herself. Wife ask this honorable court to REVERSE the Circuit Court's Order on Appeal, REINSTATE the Family Court's original spousal support award to Wife, and AWARD Wife her attorney fees and costs.

A. Factual Background

The parties were married on February 14, 1984 and separated on February 17, 2012 after **28 years of marriage**. A.R. 172. At the time of the parties' divorce, **Husband was only 51 years old** and in **excellent health**, while **Wife was close to retirement age at 62** and **suffering from major depressive disorder**. A.R. 200.

Wife's mental health began to severely deteriorate after the parties' separation due to the fact that her Husband suddenly wanted to end their long-term marriage through no fault of Wife and against her wishes. A.R. 200. Wife was, and still is, shattered at the loss of her spouse and best friend of over 28 years and the man she anticipated spending the rest of her life with.

Wife became severely depressed, lost weight and could barely concentrate enough to read and comprehend a sentence on a page. Worst of all, Wife began experiencing suicidal ideation and taking some affirmative steps toward ending her life (i.e. looking under the sink for something to ingest until her cousin fortunately intervened, visualizing jumping off the fire tower at the former marital home, etc.). A.R. 1/30/2013 Hearing. Wife could not think of many

moments in the past 30 years that she and her husband did not share together and she did not want to go on living knowing they could not share the future. *Id.*

Wife's mental instability became increasingly worse and she was in-patient hospitalized for her own safety at Riverpark Psychiatric Hospital in **April 2012**. *Id.* at 21:00. After this first hospitalization, Wife began seeing psychologist Lisa Ryan and continued seeing her weekly or semi-monthly thereafter. *Id.* at 24:20. Throughout this time and since the separation, Wife begged Husband not to leave, but he refused to give her another chance. *Id.* at 19:15. Wife's mental instability continued to get worse as Wife would cry constantly and go to bed hoping she did not wake up. *Id.* at 25:15. In **May 2012**, Wife was again committed to Riverpark Psychiatric Hospital and placed on suicide watch where she was checked every 15 minutes. *Id.* at 26:00. After her release, Wife was placed on antidepressants to manage her mood and help her sleep. *Id.* at 27:30.

In **July 2012**, Wife went to the fire tower near the marital home and planned to jump off in order to kill herself. *Id.* at 28:00. On cross-examination, Husband's counsel demanded to know why Wife had not jumped. *Id.* at 58:50. Wife stated that she thought about her daughter and how devastated she would be. *Id.* at 59:15. In **August 2012**, Wife was subsequently hospitalized again for a third time at Riverpark Psychiatric Hospital. *Id.* at 28:00.

At the time of the parties' separation, Wife was employed at the Ohio Valley Environmental Coalition as a project coordinator and lobbyist during the 2012 legislative session. Wife's former boss, executive director Janet Keating, testified that she began noticing physical and emotional changes in Wife's work in early 2012 when the parties' separated. *Id.* at 3:38. Ms. Keating visited Wife at the mental institution in May 2012 and testified she was afraid that Wife was losing the will to live. *Id.* at 3:41.

As a result of Wife's hospitalizations, mental state and her inability to work, Ms. Keating testified that she could no longer afford to keep Wife on staff at the non-profit organization. *Id.* at 3:42. Mrs. Keating further testified that the position had since been filled and that Wife could not be rehired nor did she believe that, based on her own observations, Wife was mentally able to return to work. *Id.* at 3:42.

At the final hearing on January 30, 2013, Wife testified that she had lost 20 pounds, does not want to eat, cannot sleep without medication, and still feels like she wants to harm herself. *Id.* at 30:50. Wife's concentration was very bad, she cannot read and remember what she read and has no content retention. *Id.* at 30:50 She is unfocused and mentally shown and gets overwhelmed easily. *Id.* at 30:50.

Wife's treating psychologist, Dr. Lisa Ryan, testified at the final hearing that Wife was diagnosed with major depressive disorder and that she is unable to return to work because of her mental health issues. *Id.* at 3:17 She further testified that the stress of a job would be too much for her to cope with at this time. *Id.* at 3:17

As she could no longer work and no longer had a source of employment income, Wife elected to draw early Social Security Retirement benefits. *Id.* at 1:02. Wife's gross income from these benefits is approximately $888 per month. A.R.130, 202. The Family Court found Wife's monthly expenses average $2,662.58. A.R. 202. The Family Court did <u>not</u> include Wife's estimated cost of health insurance in her average monthly expenses although she needed to obtain upon being divorced and losing coverage under Husband's policy. A.R. 200. Therefore, the Court found that Wife's total monthly need, excluding health insurance costs is nearly $1,800. *Id.*

Throughout the proceedings, Husband argued that Wife should return to work and that she had essentially retired a few years prematurely at the age of 62. Wife presented unrivaled

expert testimony from her treating psychologist, Lisa Ryan, that Wife was suffering from major depressive disorder. A.R., 1/30/2013 Hearing at 3:12. The majority of Wife's depression and suicidal ideation stemmed from the fact that she had spent so much time with her husband. *Id.* at 3:26. Dr. Ryan testified that Wife should not return to work and that she could not handle any more stress. *Id.* at 3:17. The psychologist feared that any additional stress would put Wife back in a "bad place." *Id.* at 3:17. Furthermore, although Wife had been building skills to handle stress, Dr. Ryan was against Wife working at all at this point. *Id.* at 3:17. Dr. Ryan said she could not be sure how long Wife's depression would last and that in some cases, it lasts people for the rest of their lives. *Id.* at 3:12. Above all, the Dr. Ryan testified that Wife was highly fragile right now and that it would not take much to put her into her previous state. A.R., 1 *Id.* at 3:28.

To the contrary, the Family Court found that Husband has a net income of approximately $3,250. A.R. 201. The Family Court found that Husband's monthly expenses averaged approximately $2,740 per month. A.R. 202.[1] Of Husband's monthly expenses, his largest expense was the payment of marital credit card debt in the amount of $750 per month A.R. 245. Husband is *voluntarily overpaying* the discover credit card by nearly $500 in order to reduce the balance as quickly as possible. A.R. 9/30/2013 Hearing Tape.

The Family Court awarded Wife alimony in the amount of $350 per month until she reached the age of 65 (approximately 3 years) and then increased her alimony to $650 per month until such time as Husband obtains the age of 67. A.R. 202. The Family Court also awarded Wife attorney fees in the amount of $3,600 per month to be paid in three years at a rate of $100 per month. *Id.* The Family Court's increase in alimony in three (3) years was sufficiently

[1] On remand regarding attorney fees, Husband submitted updated monthly expenses in the amount of **$2,460** (which included his $350/month alimony and $100/attorney fees). A.R. 249. Although

supported by the foreseeable increase in Husband's ability to pay due to the retirement of Wife's attorney fee award ($100/month) and the monthly marital credit card payment ($750/month).

The increase of Wife's alimony at age 65 also corresponded with the age the parties would have naturally anticipated for her to retire. Though Husband arguably could have afforded the payment of $650 at the time of the divorce, the delay in the increase was likely a response to Husband's argument throughout trial that income should be attributed to Wife due to her inability to work and decision to seek early retirement benefits. Regardless, there are sufficient facts supporting the Family Court's increase when Wife reaches the age of 65.

B. <u>Procedural History</u>

Husband filed a *Petition for Divorce* on June 21, 2012 and Wife filed her *Answer and Counter-Petition for Divorce* on or about July 18, 2012. A.R. 1-4, 74-80. A temporary hearing was held on September 20, 2012. Husband was ordered to pay Wife spousal support in the amount of $350 per month effective October 1, 2012. A.R. 139. Final Evidentiary Hearings were held on three separate days before the Family Court on January 17, 2013, January 30, 2013 and February 28, 2013. Each party testified. Wife also called psychologist Dr. Lisa Ryan and her former employer, Janet Keating to testify. Husband presented no other witnesses.

The Family Court entered a *Bifurcated Final Divorce Order* divorcing the parties on January 24, 2013, which incorporated the parties' agreement on all issues with the exception of spousal support and attorney fees. A.R. 172-175. The parties agreed that the distribution of marital assets and debts was as close to a "50-50" division as possible. A.R. 201. Although Husband assumed 60-65% of the marital debt, he was compensated with a greater share of the marital property. *Id.*

On March 5, 2013, the Family Court entered a *Final Order on the remaining issues of spousal support and attorney fees*. A.R. 200. The Family Court awarded Wife $350 per month

until she reached the age of 65 and $650 every month thereafter until Husband reaches his normal retirement age of 67. *Id.* Wife was awarded $3,600 in attorney fees, *also* over the course of three years, to be paid $100 per month. *Id.*

Husband filed a *Motion to Reconsider the Final Order on Remaining Issues* entered on March 5, 2013, which was denied by the Family Court on or about March 21, 2013. A.R. 204, 205. Husband then appealed to the Circuit Court of Webster County on April 4, 2013. A.R. 209-217.

By *Order on Petition for Appeal* entered July 11, 2013, Circuit Court Judge Alsop reversed and vacated the Family Court's Order increasing Wife's alimony award in three years, which had the effect of reducing the duration of alimony award by 12 years and terminating all support to Wife when she reaches the age of 65. A.R. 239-244.

Essentially, the only basis provided for the Circuit Court's drastic reduction was as follows:

> G. That the Family Court's finding that the [Husband] would have more available income at a later date is based on nothing more than speculation, which is prohibited under West Virginia case law. *Mayle v. Mayle,* 229 *W. Va.* 179, 727 *S.E.2d* 855 (2012).
>
> H. That even more perplexing is the finding of the Family Court that even though [Wife] will have reduced her medical expenses once she is eligible for Medicare, the [Husband's] spousal support obligation still almost doubles (from *$350.00/month* to *$650.00/month)* when the [Wife]reaches the age of 65. In short, there is no correlative findings, however speculative, about the need of the [Wife] when she turns 65 years of age, nor is there any finding regarding her potential income, if any, at that point in time, as well.
>
> I. That the increase of the [Husband's] alimony obligation to the [Wife] when she attains the age of 65, as set forth in the Family Court Judge's March 5, 2013 Order, *sub judice,* is as arbitrary and capricious as the termination of the [Husband's] obligation to [Wife]when *he* turns 67 under the same Order.
>
> J. That the Family Court Judge's increase of [Husband's] monthly alimony when [Wife] becomes 65 years of age is an impermissible and speculative

projection of future circumstances which may or may not occur, and as such, the same is a preemptive modification without sufficient evidence, as proscribed by *Mayle, supra.*

K. That the Family Court is without jurisdiction to make a preemptive modification without sufficient evidence. *Id.*

Id.

The Circuit Court erred in reversing and vacating, in part, the spousal support award to Wife without any justifiable factual or legal basis. It is from this Order that Wife appeals.[2]

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellant asserts that this case is among the cases suitable for oral argument pursuant to Rule 20 of the Revised Rules of Appellate Procedure.

STANDARD OF REVIEW

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, the West Virginia Supreme Court of Appeals reviews the findings of fact made by the family court judge under the clearly erroneous standard, the application of law to the facts under an abuse of discretion standard and questions of law *de novo*. *Carr v. Hancock,* 216 W. Va. 474, 607 S.E.2d 803, 2004 W.Va. LEXIS 204 (2004).

The Family Court, as the trial court, is accorded much deference with regard to questions of alimony. This Court has held that such decision "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." Syl. pt. 1, *Mayle v. Mayle*, 229 W.Va. 179, 727 S.E.2d 855 (2012), quoting Syl.,*Nichols v. Nichols*, 160 W. Va. 514, 236 S.E.2d 36 (1977).

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[2] The Circuit Court of Webster County, West Virginia would not certify the *Final Order on Petition for Appeal* entered July 11, 2013 as a "final, appealable order" until March 26, 2014. A.R. 291. *See also* Notice of Appeal to W.Va. Supreme Court for detailed Procedural History Chart explaining delay in entry of final decision order. A.R. 293.

The circuit court should have given deference to the family court's findings of fact and conclusions of law, or the application of the facts to the law, if the family court has not violated one of the established standards of review. *Stephen L.H. v. Sherry L.H.,* 195 W.Va. 384, 465 S.E.2d 841 (1995).

The circuit court, as an immediate appellate court for family court decisions, cannot substitute its judgment for the family court, and the family court's findings and inferences may not be overturned even if a circuit court may be inclined to make different findings or draw contrary inferences. *Protan v. Ghannam*, 2011 LEXIS 121 (Memorandum Decision 2011) and *Rosen v. Rosen*, 222 W.Va. 402, 664 S.E.2d 743 (2008).

ARGUMENT

A. THE CIRCUIT COURT ERRED IN REVERSING AND VACATING THE FAMILY COURT'S INCREASE OF SPOUSAL SUPPORT TO WIFE WHEN THE INCREASE WAS BASED ON SUFFICIENT EVIDENCE.

1. The family court's increase in spousal support is based on concrete and foreseeable events substantially reducing Husband's monthly indebtedness and therefore, increasing Husband's ability to pay.

This Court's decision in the *Mayle* case does prohibit the Family Court from prospectively increasing an award of alimony, it only requires that there be sufficient evidence in support of the reduction. Mayle v. Mayle, 229 W.Va. 179, 185. In *Mayle*, the Family Court's decrease in permanent support was clearly erroneous because it was based on speculative events that might or might not happen, including *conjecture* that the wife would return to her hometown and a *suggestion* that she would assume a greater role in her family's business, without any evidence to support this speculation. *Mayle v. Mayle,* 229 *W. Va.* 179, 727 *S.E.2d* 855 (2012)(emphasis added). There was simply no evidence elicited that would support that type of speculation. *Mayle v. Mayle,* 229 *W. Va.* 179, 727 *S.E.2d* 855 (2012).

Contrary to the facts in *Mayle*, the Family Court's ruling to increase Wife's spousal support award from $350 per month to $650 per month when she reaches the age of 65 in approximately three (3) years is not based on conjecture or speculation. It is clearly based upon the fact that all other things remaining the same, as Husband reduces his monthly expenses, he will have additional funds from which to pay an increased alimony award.

In paragraph 12D of the *Final Order on Remaining Issues* entered on March 5, 2012, the Family Court found as follows:

> [w]hen [Wife] reaches age 65, a time at which the parties could have reasonably anticipated she would retire in any event, the spousal support should increase because at that time [Husband] will **reasonably be anticipated to have reduced his monthly indebtedness assumed in the equitable distribution** herein. In addition, he will have **retired the award of attorney fees**... The combination of the retirement of debt and attorney's fees **increases [Husband's] excess net income from which an enhanced award of alimony can be made**, particularly at a time when Respondent's income will be only Social Security benefits. At age 65, alimony should increase to $650.00 per month, and it should continue until Petitioner then reaches his normal retirement age of 67, at which time alimony should terminate.
>
> A.R. 200. (emphasis added).

The Family Court further stated in paragraph 11 that, "[w]ithing about three years, some of [Husband's] expenses will be reduced as he eliminates some or all of the debt he assumed in equitable distribution approved by the Court." *Id.*

In reversing the sound judgment of the Family Court who had the benefit of reviewing the evidence and testimony, the Circuit Court hastily determined as follows:

> That the Family Court's finding that the [Husband] would have more available income at a later date is based on nothing more than speculation, which is prohibited under West Virginia case law. *Mayle v. Mayle,* 229 *W. Va.* 179, 727 *S.E.2d* 855 (2012).
>
> A.R. 239-244.

The Circuit Court failed to articulate *why* the Family Court's finding was "nothing more than speculation." In fact, the Family Court's award was based on two concrete and foreseeable events, set forth below.

a) Husband's Attorney Fee obligation to be paid off in 3 years.

Husband was ordered to pay Wife's attorney fees in the amount of $3,600 by paying $100 per month until such time as the attorney fees are paid in full. It is simple math to determine that Husband's payment is for a term of 36 months, or three years, the approximate amount of time until Wife reaches the age of 65. Assuming Husband remains current on his attorney fee obligation as ordered, there is a definite and distinct date upon which Mr. Garland's indebtedness will be reduced by at least $100, which consequently increases his ability to pay by the same amount.

b) Discover Credit Card Balance to be Reduced/Paid Off in 3 Years.

It is unambiguous that Husband will have substantially reduced, if not paid off, the marital discover credit card debt he assumed in equitable distribution by the time that Wife reaches the age of 65 in approximately three (3) years. It is implicit in Husband's agreement to be responsible for this marital credit card debt that he will remain current on their payment, and therefore, it cannot be speculative that the marital balance will at least be reduced after three (3) years of payments.

Husband pays $750 per month is attributable to his payment of a marital Discover Credit Card. A.R. 249. The amount owed on the Discover Credit Card as of June 27, 2012 was $8,979.19. Husband had no other marital credit card debt. Husband testimony indicated that he was voluntarily overpaying the minimum payment by at nearly $500 in order to **pay it off as quickly as possible**. *See* A.R. Hearing Tape 09/30/2013. It is only logical that should Husband continue to make the timely payments of these debts over the next three (3) years then he can

reduce if not eliminate the payment in its entirety. As the credit card balance decreases, so will the minimum monthly payment. Upon the debt being paid in full, Husband would have an additional $1,025 in excess funds each month.

2. Under the facts of this case, the Family Court had sufficient evidence upon which to base an increased spousal support award after three years.

This Court's decision in *Mayle* is entirely distinct from the facts presented in that the family court in that case based its findings on speculation that the Petitioner *may* return to her hometown and *may* assume a greater role in the operation of the family business within a ten year period of time. *Mayle v. Mayle*, 229 W.Va. 179, 727 S.E.2d, 855 (2012)(emphasis added).

In this case, the Family Court's order to increase the spousal support award when Wife reaches the age of 65 is based on concrete evidence that at the time of the increase in spousal support Husband will have reduced his indebtedness associated with the $100 attorney fee payment and the credit card debt he assumed in equitable distribution.

It is clear and unambiguous that upon reducing or eliminating his indebtedness over the next three years, Husband will have an increased ability to pay spousal support by virtue of his decreased monthly expenses. Thus, the Circuit Court abused its discretion in reversing the Family Court's increased award of spousal support to Wife.

B. THE CIRCUIT COURT ERRED IN FINDING THAT THE INCREASE OF ALIMONY TO WIFE WAS ABITRARY AND CAPRICOUS WHERE THE FAMILY COURT SET FORTH SPECIFIC FACTUAL FINDINGS SUPPORING THE INCREASE.

The Family Court's increase of alimony to Wife when she reached the age of 65 was not arbitrary and capricious as the Family Court based the decision on Husband's increased ability to pay a higher amount in three years when his attorney fee obligation was paid in full and his marital credit card payment was reduced or paid off.

The Circuit Court Judge clearly substituted his own fact evaluation for that of the Family Court. This is highly problematic because the Family Court is in a unique fact finding position to hear the testimony, review the evidence, and judge the credibility of the witnesses. To the contrary, the Circuit Court did not hear one witness or review any evidence presented at the final hearings below. Without any deference to the trial court, the Circuit Court simply decided it did not like the result. The Circuit Court failed to understand that as Husband reduced and paid off up his marital debt obligation (discover credit card and Wife's attorney fees), he absolutely would have more available income.

The Circuit Court did not hear Husband's arguments below regarding his desire to voluntarily overpay the discover credit card in order to quickly pay it off. The Circuit Court did not hear Wife and Dr. Lisa Ryan's testimony regarding Wife's severe depression and the devastating toll it had taken upon her mind and body. The Circuit Court did not hear how Wife was scraping by on $888 per month, which often had her deciding between paying bills and buying food for herself.

The Circuit Court's misapplication of the *Mayle* case creates a rigid prohibition against any prospective increases of spousal support despite reasonable fact based decisions by the Family Court tailored to the needs and circumstances of the parties.

C. THE CIRCUIT COURT ERRED IN REVERSING AND VACATING FAMILY COURT'S AWARD BECAUSE HUSBAND HAS THE CURRENT ABILITY TO PAY THE INCREASED ALIMONY.

Even if this Court finds that the Family Court speculated as to the decrease in Husband's monthly credit card payment, it was harmless error because looking at the financial realities as they existed at the time of the final hearing, Husband already has the <u>current</u> ability to pay the increased award of $650 per month.

1. After tax, it only costs Husband $448.50 to pay Wife $650 per month.

Husband will receive a tax benefit on his federal and state income tax return for payment of support to Wife which will reduce his adjusted gross income and lower his tax obligation each year. When the support of $650 per month is *tax affected* based on Husband's tax bracket, the actual cost to Husband is only $448.50 per month (see chart below).

After Tax Cost of Husband's Spousal Support Payment	
Alimony Paid	$650
Federal Tax Rate[3]	25%
WV Tax Rate[4]	6%
Tax Savings	$201.50
After Tax Cost	**$448.50**

The Family Court found that Husband has **$510 in excess disposable income**, therefore, regardless of the timing of the increase, Husband already has the ability to pay $650 per month.

2. **If Husband only paid the *minimum* payment on the Discover Credit Card, he would have an additional $500 per month in disposable income.**

Husband testified that he paid $750 per month toward the Discover Credit Card. However, the Discover Card statements indicated that his actual *minimum* monthly payment is between $200 to $300 per month. While his considerable overpayment may help reduce the indebtedness much faster (i.e. in three years), it is an unnecessary, voluntary, expense. If Husband were to pay only the minimum monthly payment on the marital Discover Credit Card, he would have approximately $500 in additional disposable income to combine with the $510 the Family Court found he already had in excess each month. Therefore, Husband's **true current ability to pay is $1,010 per month**. He not only has the current financial ability to pay the

[3] Based on 2014 Federal Income Tax Rate for single taxpayers earnings between $36,900 and $89,350.
[4] Based on 2013 WV State Income Tax Rate for single tax payers earning between $40,000 and $60,000.

award of $650 per month, he would also have approximately $360 remaining in disposable income.

D. THE CIRCUIT COURT'S FINDING THAT WIFE WOULD NOT HAVE THE NEED FOR *$650/MONTH* ALIMONY IN 3 YEARS BECAUSE SHE WILL BE ELIGIBLE FOR MEDICARE WAS CLEARLY ERRONEOUS BECAUSE THE FAMILY COURT FOUND THAT WIFE OPERATED AT AN OBVIOUS DEFICIT OF $1,800/MONTH *EXCLUDING* HER ESTIMATED PRIVATE HEALTH INSURANCE COST OF $500-$700/MONTH.

The Circuit Court completely disregarded the factual findings of the Family Court as to Wife's monthly expenses and the cost of health insurance. The Circuit Court was highly perplexed as to why the Family Court would increase Wife's monthly alimony award when she will reduce her medical expenses upon attaining the age of 65 and be eligible for Medicare. In reversing the Family Court's increase of alimony, the Circuit Court explained as follows:

> H. That even more perplexing is the finding of the Family Court that even though [Wife] will have reduced her medical expenses once she is eligible for Medicare, the [Husband's] spousal support obligation still almost doubles (from *$350.00/month* to *$650.00/month)* when the [Wife]reaches the age of 65. In short, there is no correlative findings, however speculative, about the need of the [Wife] when she turns 65 years of age, nor is there any finding regarding her potential income, if any, at that point in time, as well.

A.R. 241.

However, the Family Court's findings of fact make it clear that Wife had an "obvious deficit of over $1,800 per month considering her current income and expenses." A.R. 202. That deficit did **not** include her estimated health insurance costs. A.R. Therefore, whether or not she was eligible for Medicare, her monthly need for at least $1,800 per month would not change.

Ironically, despite reversing the Family Court's award of alimony under the theory that concrete math is pure speculation, the Circuit Court basis its reversal on the Family Court's failure to speculate as to Wife's future monthly need or potential income in three years. Unlike the evidence presented as to Husband's reduction in debt, there was no evidence presented that Wife income would change from $888 per month.

The Circuit Court's reasoning above makes it perfectly clear as to why the trial court is given such high deference. The Circuit Court was clearly erroneous and abused its discretion as Wife will have a monthly need for at least $1,800 per month regardless of whether she is eligible for Medicare.

E. THE CIRCUIT COURT ABUSED ITS DISCRETION BY REDUCING WIFE'S ALIMONY AWARD FROM 15 YEARS TO 3 YEARS WITHOUT APPLYING W.VA. CODE § 48-6-301(B).

The Circuit Court abused its discretion in reducing Wife's alimony award from 15 years to three (3) years without any findings of fact supporting the reduction and without applying the factors found in West Virginia Code § 48-6-301(b).

The parties heavily litigated the issue of spousal support below at three separate evidentiary hearings before the Family Court. At the conclusion of the evidence and testimony, the Family Court entered its *Final Order on Remaining Issues* which listed each of the factors set forth in W.Va. Code § 48-6-301(b) including reasoning in applying each of the factors to the facts of this case. The chart below briefly summarizes the Family Court's factual findings[5] as applied to the statutory factors:

Length of Marriage	The parties were married for **28 years**.	
	WIFE	**HUSBAND**
Age	Age **62**	Age **51**
Health	**Fair to poor mental health.** Hospitalized in mental institution several times.	**Excellent health**
Monthly **Income**	**$888 (gross)**	**$4,666.97**
Monthly **Expenses**	($2,662.58) *Excluding health insurance*	($2,740)
Health Insurance	Estimated $500-$700 per month for private insurance. Not eligible for Medicare until age 65.	Health insurance available through work. *included in net income*
Education	College Degree	College Degree

[5] A.R. 201.

Plan for further education	None	None
Distribution of Marital Assets/Debts	Agreed "50-50" equal division.	Agreed "50-50" equal division. Husband received 60-65% of marital debt, but received more marital assets
Marital Fault	None considered.	None considered.

The parties were married for 28 years. A.R. 200. Wife is now 62 years old and suffers severe mental health problems. *Id.* She is barely surviving in government-subsidized housing on $888 gross monthly income, whereas Husband's gross monthly income is $4,666.87. *Id.* Husband was 51 years old and in excellent health. *Id.* After hearing the testimony and review the evidence, the Family Court made extensive findings of fact and analysis supporting his award of alimony, as required by West Virginia Code § 48-6-301(b). *Id.*

Pursuant to W.Va. Code § 48-6-301(b), the court shall consider the following factors in determining the amount of spousal support to be ordered:

> (1) The length of time the parties were married;
> (2) The period of time during the marriage when the parties actually lived together as husband and wife;
> (3) The present employment income and other recurring earnings of each party from any source;
> (4) The income-earning abilities of each of the parties, based upon such factors as educational background, training, employment skills, work experience, length of absence from the job market and custodial responsibilities for children;
> (5) The distribution of marital property to be made under the terms of a separation agreement or by the court under the provisions of article seven of this chapter, insofar as the distribution affects or will affect the earnings of the parties and their ability to pay or their need to receive spousal support, child support or separate maintenance: *Provided*, That for the purposes of determining a spouse's ability to pay spousal support, the court may not consider the income generated by property allocated to the payor spouse in connection with the division of marital property unless the court makes specific findings that a failure to consider income from the allocated property would result in substantial inequity;
> (6) The ages and the physical, mental and emotional condition of each party;
> (7) The educational qualifications of each party;
> (8) Whether either party has foregone or postponed economic, education or employment opportunities during the course of the marriage;
> (9) The standard of living established during the marriage;

(10) The likelihood that the party seeking spousal support, child support or separate maintenance can substantially increase his or her income-earning abilities within a reasonable time by acquiring additional education or training;
(11) Any financial or other contribution made by either party to the education, training, vocational skills, career or earning capacity of the other party;
(12) The anticipated expense of obtaining the education and training described in subdivision (10) above;
(13) The costs of educating minor children;
(14) The costs of providing health care for each of the parties and their minor children;
(15) The tax consequences to each party;
(16) The extent to which it would be inappropriate for a party, because said party will be the custodian of a minor child or children, to seek employment outside the home;
(17) The financial need of each party;
(18) The legal obligations of each party to support himself or herself and to support any other person;
(19) Costs and care associated with a minor or adult child's physical or mental disabilities; and
(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, child support or separate maintenance.

Without establishing <u>any</u> factual findings or providing legal analysis as required by West Virginia Code § 48-6-301(b), the Circuit Court swiftly reversed and reduced Wife's alimony award, both in length and duration. Not only should deference should have been given to the Family Court as to the amount and duration of the alimony award, but the Circuit Court's Order should have contained application *See Stephen L.H. v. Sherry L.H.*, 195 W.. 384, 465 S.E.2d 841 (1995).

CONCLUSION

WHEREFORE, your Petitioner, Carol Warren, prays that this Court **REVERSE** the Circuit Court's *Order on Petition for Appeal*, which reversed and vacated, in part, the Family Court's award of spousal support to Wife; **REINSTATE** the Family Court's award of spousal support; **AWARD** Wife her attorney fees and costs expended on all stages of appeal; and that Wife granted such other and further relief as this Honorable Court may deem equitable, proper, or otherwise just under the circumstances.

Carol Elaine Warren
By Counsel

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Supreme Court Case No. 14-0429
(Civil Action No. 12-D-60)

---- CONFIDENTIAL CASE ----

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CAROL ELAINE WARREN,

Petitioner herein and
Respondent Below

v.

TODD E. GARLAND,

Respondent herein and
Petitioner Below

CERTIFICATE OF SERVICE

I, Brittany Ranson Stonestreet, Esq., counsel for the Petitioner, Carol Elaine Warren, hereby certify that I have served, or have caused to be served, or have caused to be served, a true and exact copy of the foregoing **Perfected Appeal** upon:
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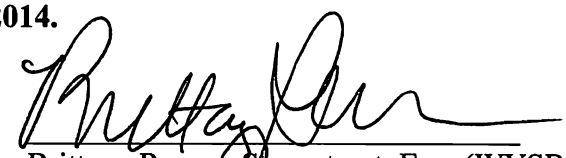
via U.S. Mail on July 28, 2014.



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