

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 05-D-171

SHAWN ROMANO,

Petitioner,

v.

WENDY GREVE,

Respondent.

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KANAWHA COUNTY CIRCUIT COURT

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PETITION FOR APPEAL
FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
(Civil Action No. 05-D-171)

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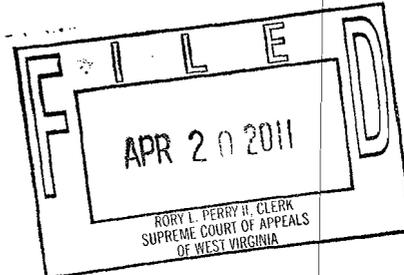


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I. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

In January 2006 the parties to this proceeding, both of whom are experienced lawyers, and both of whom were represented by experienced domestic relations attorneys, settled a dispute over how to calculate the parties' respective incomes for child support purposes at that time and in the future. The agreement was placed on the record and approved by the Family Court Judge. Three years later, in an effort to avoid paying child support to Petitioner, Respondent tried to "change the rules." The Family Court correctly refused to revise the methodology previously adopted by the parties. However, the Circuit Court ignored the record and wrongfully concluded that the Family Court had no factual basis to hold the parties to their prior agreement.

Thus, Petitioner Shawn Romano, by counsel, petitions this Court for an appeal of the *Order on Petitions for Appeal and for Cross Appeal* which was entered by the Circuit Court of Kanawha County, West Virginia (Judge Zakaib presiding) on November 19, 2010,¹ in a certain civil action styled In Re The

¹This Order was "entered" by Judge Zakiab on November 19, 2010, but for purposes of appeal, was "entered" by the circuit clerk on November 22, 2010. Rule 58 of the West Virginia Rules of Civil Procedure provides that "[t]he notation of a judgment in the civil docket as provided by Rule 79(a) constitutes entry of the judgment; and the judgment is not effective before such entry."

Marriage/Children of: Wendy Greve and Shawn Romano, Kanawha
County Civil Action No. 05-D-171.

This Petition for Appeal challenges the Circuit Court's appeal Order that vacated the Family Court's child support Order and remanded the matter back to the Family Court to recalculate Petitioner's child support obligation. Despite the plain, unambiguous language of the Family Court's Order to the contrary, the Circuit Court wrongfully found that there was no factual basis in the record to support a finding that the parties agreed to deviate from the strict application of the child support guidelines in determining the parties' respective incomes for child support purposes. Further, the Circuit Court found that the Family Court did not abuse its discretion when it made the recalculation of child support retroactive to April 1, 2010, rather than January 1, 2010.

II. STATEMENT OF FACTS

A. Background and Family Court Procedural History

Petitioner and Respondent are both practicing attorneys. They were divorced in 2005. They share equal custodial time with their two minor children. At the time of their divorce, Petitioner ("Mr. Romano") was employed as a associate at Daniels Law Firm in Charleston, West Virginia. At all relevant times hereto, Respondent ("Ms. Greve") was a

partner/member of the firm Pullin, Fowler, Flanagan, Brown & Poe, PLLC.

In 2005, Mr. Romano left his employment with Daniels Law Firm and accepted a position with the law firm of Ray, Winton & Kelley, PLLC. Mr. Romano left his prior employment largely in part to the fact that his work requirements were interfering with his parental obligations, and also because he wanted to eventually become an equity owner in a law firm.

Mr. Romano's acceptance of a new position resulted in an anticipated reduction in his income and, in response, he filed a motion seeking a modification of his child support obligation. Ms. Greve opposed the modification and argued that even though Mr. Romano changed his employment (in large part to be able to spend more time with his children) the Court should attribute to him the income he earned at Daniels Law Firm, which was considerably more than his new position.

On January 31, 2006, a hearing was held on Mr. Romano's motion. Prior to the start of the hearing, the parties negotiated a settlement which was later placed on the record and, subsequently, reduced to a written *Order Regarding Modification of Child Support* entered by the Family Court on October 30, 2006. [Cir. Ct. Docket Line 51.] Among other things, the parties agreed that, for the calendar year 2006, Mr. Romano would pay to

Ms. Greve the sum of \$550.00 per month for support of the parties two (2) minor children.²

As to child support for 2007 and thereafter, the parties agreed to and adopted a method for determining child support. The crux of the parties' agreement was that in any given year, the parties' respective child support obligations would be determined using their income from the prior year. After Mr. Romano's counsel placed this methodology on the record, Ms. Greve's counsel, Mr. Swartz, stated the following:

I think we need to make clear that this future disclosure **and formula** is for as long as we have minor children to deal with so it's an every year thing. I don't think you actually said - these . . . that you know you were talking about '07. **We're gonna do this in '08 '09 whatever.**

See DVD of 01/31/2006 hearing, at 5:27.53 PM [Emphasis added].

The parties' agreement, which properly constituted a knowing and intelligent waiver of the strict application of the West Virginia Guidelines for Child Support, was then reflected in the written Order that resulted from that hearing. Paragraph 4 of the Court's findings of fact in the October 30, 2006, *Order Regarding Modification of Child Support* states:

Both parties' incomes fluctuate. Accordingly, the Court finds that the parties' agreement as set forth below which determines the manner and method of establishing child support is fair and equitable and is

²In light of the parties' disagreement over how Mr. Romano's income was to be determined, this was a compromised amount. However, it was based, in large part, on Mr. Romano's income the year before.

in the best interests of the parties' minor children. In addition, the Court finds that, in entering into such agreement, the parties have made a knowing, intelligent, and voluntary waiver of the strict application of the West Virginia Child Support formula.

Later, at Paragraphs 2 through 4, pages 2 and 3, the Court ordered as follows:

2. On or before February 15, 2007 and on February 15 of each subsequent year, the parties shall exchange all pertinent financial information, including W-2s, K-1s, 1099s, quarterly documents, and any other financial documents which reflect income earned by the parties in 2006.

3. After such exchange of data, Respondent's (or Petitioner's, as the case may be) child support obligation for 2007, using the Guidelines for Child Support Awards promulgated as W. Va. Code § 48-13-101, shall be calculated based upon the parties' respective incomes for 2006. The formula shall include an appropriate adjustment for child care expenses and for health insurance; however, no other adjustments shall be included in the calculation. Once that number is determined, that number shall be the fixed amount of child support for the year 2007, and will not be subject to modification, retroactive or otherwise, for the year 2007.

4. Until further Order of the Court, the parties shall in subsequent years calculate child support in accordance with this method. Each year the parties shall submit an Agreed Order noting any applicable modification. If there be any disagreement regarding the calculation, either party may schedule a hearing with the Court.

Order Regarding Modification of Child Support, entered October 30, 2006.

Thus, under the method established by agreement of the parties and accepted by the Court, for the year 2006, Mr. Romano earned \$80,156.32 and Ms. Greve earned \$88,156.32. Yet Mr.

Romano, who earned less money that year, paid Ms. Greve \$6,600 in child support.

In January of 2007, Mr. Romano left the law firm of Ray, Winton & Kelley, PLLC and became a member in a newly-formed law firm, Romano & Olivio, PLLC. When it came time to establish the child support obligation for 2007, the parties, as directed, used the methodology set forth in the 2006 Order. However, doing so showed that Ms. Greve owed child support to Mr. Romano. Mr. Romano, after discussions with Ms. Greve, later asserted that the parties reached an oral agreement that neither would pay child support to the other in 2007, and subsequent years. Ms. Greve denied that any such agreement was ever reached, despite the fact that she never paid her child support obligation to Mr. Romano in 2007. See generally, DVD from October 28, 2008 hearing.

During the year 2007, due to a single fee received by his new firm, Mr. Romano made more money in one year than he had ever made in any previous year. Upon realizing such, and despite the parties' oral agreement, and Ms. Greve's failure to pay any support for 2007, Ms. Greve decided that she wanted to partake in Mr. Romano's good fortune and demanded child support from him in 2008.

Thus, because of these disputes the parties were back in court on October 28, 2008. At that hearing, the Family Court refused to enforce the alleged oral agreement where the parties

agreed to forego child support payments to each other indefinitely. Thus, using the parties' income figures for 2007, the Court calculated that Mr. Romano owed Ms. Greve \$1,825.73 per month for 2008 (\$21,908.76). The court then deducted from that amount the \$1,600.00 in child support that Ms. Greve owed to Mr. Romano from 2007 (which was based on the parties' 2006 incomes). **At no time did Ms. Greve assert that the parties' incomes should be averaged.** Indeed, this would have resulted in a lower payment to her from Mr. Romano. Rather, the child support calculations were properly based on the methodology agreed to at the January 31, 2006 hearing.

In addition to ruling on the 2007 and 2008 child support issues, and recognizing that Ms. Greve's windfall child support of 2008 was not likely to reoccur for 2009, the *Final Order* entered December 23, 2008 [Cir. Ct. Docket Line 84], contained the following provision regarding the 2009 child support, in Paragraphs 6 and 7, at pages 3 and 4:

6. That commencing January 1, 2009, and continuing thereafter after [sic] on the first of each following month, the Respondent shall pay to Petitioner the sum of \$1,825.73 per month in child support, until further order of the Court above named.

7. That, by agreement of the parties, a motion to modify child support which is filed with the requisite financial disclosures, including without limitation, W-2s, complete 1040's and K-1's before March 31, 2009, shall be retroactive in effect to January 1, 2009.

On March 26, 2009 Mr. Romano filed a *Motion to Modify Child Support* [Cir. Ct. Docket Line 86] and, by letter dated the same day, forwarded a copy of his Schedule K-1 for 2008 to Ms. Greve's counsel and requested that Ms. Greve provide her 2008 financial disclosures. Mr. Romano's accountant had not yet completed his income tax return and as a consequence it was not attached to the motion³. However, a copy of the return was forwarded to Ms. Greve's counsel on April 15, 2009, along with another request that Ms. Greve provide her 2008 financial disclosures.

Ms. Greve's counsel finally forwarded to Mr. Romano's counsel a copy of Ms. Greve's 2008 W-2 by letter dated April 27, 2009 and a complete copy of her federal tax return by letter dated June 8, 2009.

Based upon the parties' 2008 financial disclosures, and by calculating the parties' incomes as was done in the prior years, it became apparent that Ms. Greve would owe child support to Mr. Romano for the year 2009. To avoid paying that support, Ms. Greve sought to change the rules. Despite their prior agreement (from which she benefitted greatly), she sought to

³The administrator of Mr. Romano's investment account did not provide information necessary for the completion Mr. Romano's return until April 13, 2009 as evidenced by the attached fax cover sheet (attachments omitted.)

average the parties' incomes over the last three years.⁴ Ms. Greve also argued that the child support order could not be retroactive to January 1, 2009 because Mr. Romano did not disclose his completed Form 1040 until after March 31, 2009.

The parties, at the insistence of the Family Court, engaged in unsuccessful settlement negotiations, after which the Family Court ordered the parties to submit briefs on the contested issues. Mr. Romano thereafter submitted *Respondent's Brief in Support of Respondent's Motion to Modify Child Support* [Cir. Ct. Docket Line 88] and attached various supporting documentation to that brief. On November 23, 2009, the Family Court convened a telephonic hearing to announce its rulings, which reaffirmed the Court's methodology in its October 30, 2006, *Order Regarding Modification of Child Support*, and those rulings were subsequently reduced to a written order entered on January 28, 2010 [Cir. Ct. Docket Line 90], which was the subject of the Circuit Court appeal filed by Ms. Greve. In short, the Family Court's Order entered on January 28, 2010, acknowledged that (1) the parties had formerly entered into an agreement with the advice and assistance of counsel in which they agreed that for any given year their respective incomes would be based on the

⁴The parties did not dispute the data used to calculate the formula; rather, the only dispute concerned whether the parties' income from the prior year would be used or whether their incomes for the past three years would be averaged.

prior year's income; (2) in 2006, the parties knowingly and voluntarily agreed to deviate from the strict application of the child support guidelines in order to accommodate their financial circumstances; (3) the *2006 Order Regarding Modification of Child Support* adequately states the reasons for deviating from the strict application of the child support guidelines; and (4) neither party should be permitted to unilaterally alter the agreed-upon methodology when doing so would benefit that party in any given year.

Thus, the Family Court ruled that, for 2009, Ms. Greve owed Mr. Romano child support of \$777.79 per month. The Family Court denied Mr. Romano's request to make that support order retroactive and effective January 1, 2009, citing his failure to produce the tax return by March 31, 2009, and instead made it effective on April 1, 2009. The effect of the latter ruling was that Mr. Romano owed Ms. Greve child support of \$1,825.77 per month for the period of January to March 2009. See *Order Regarding Respondent's Motion to Modify Child Support* [Cir. Ct. Docket Line 90].

B. The Circuit Court Appeal

On March 1, 2010, Ms. Greve filed her *Petition for Appeal from Family Court Order Entered January 28, 2010* [Cir. Ct. Docket Line 92]. In her Appeal, Ms. Greve argued that (1) "[t]he Family Court erred and abused its discretion when it arbitrarily,

and without factual basis determined 'that in 2006 the parties knowingly and voluntarily agreed to deviate from the application of the child support guidelines'", and (2) "[t]he Family Court clearly erred and abused its discretion when it arbitrarily, and without legal or factual basis determined that it should disregard the formula, i.e., the amount of child support generated by the application of the guidelines."

On March 19, 2010, Mr. Romano filed his *Respondent/Appellee's Reply to Petition for Appeal and Cross-Petition for Appeal* [Cir. Ct. Docket Line 93] asserting that the record in the case was clear that the parties agreed to deviate from the application of the child support guidelines and that the Family Court's order adequately set forth the factual basis for doing so. Further, Mr. Romano filed a Cross-Appeal asserting that the Family Court erred in not making the 2009 child support order effective January 1, 2009, since the reason for the untimeliness of submitting his financial disclosures was due to no fault of his own. By *Order on Petitions for Appeal and Cross Appeal* entered on November 19, 2010 [Cir. Ct. Docket Line 98], the Circuit Court ruled in favor of Ms. Greve on her assignments of error, and against Mr. Romano on his Cross-Appeal.

III. ASSIGNMENTS OF ERROR

- A. The Circuit Court erred when it concluded, contrary to the evidence, that there was no factual support in the record for the Family court's decision to uphold a prior agreement of the parties regarding the

determination of the parties' incomes for child support purposes.

- B. The principle of judicial estoppel bars Respondent from "changing the rules" and arguing against the Family Court's decision.
- C. The Circuit Court erred by failing to reverse the Family Court's refusal to make the 2009 child support calculation effective January 1, 2009.

IV. POINTS AND AUTHORITIES RELIED UPON

W. Va. Code § 48-13-702(a)	14
W. Va. Code § 48-1-228(a)(6).	21
W. Va. Code § 48-1-228(a)(7)	21
W. Va. Code § 48-1-288(a)(8)	21
W. Va. Code § 48-1-288(a)(9)	21
<i>Turley v. Keesee</i> , 218 W. Va. 231, 233, 624 S.E.2d 578, 580 (2005).	13,15
Syl. Pt., <i>Carr v. Hancock</i> , 216 W. Va. 474, 607 S.E.2d 803 (2004)	13,15
<i>State ex rel. West Virginia Dept. of Health and Human Resources</i> , 196 W. Va. 369, 374, 472 S.E.2d 815, 820 (1996)	15
Syl. Pt. 3, <i>Stephen L.H. v. Sherry L.H.</i> , 195 W. Va. 384, 465 S.E.2d 841 (1995).	15
Syl. Pt. 2, <i>West Virginia Department of Transportation, Division of Highways v. Robertson</i> , 217 W. Va. 497, 618 S.E.2d 506 (2005).	19
<i>Corcoran v. Corcoran</i> , 202 W. Va. 76, 501 S.E.2d 793 (1988)	21
<i>Pelliccioni v. Pelliccioni</i> , 214 W. Va. 28, 585 S.E.2d 28 (2003)	21
<i>Banker v. Banker</i> , 196 W. Va. 535, 548 474 S.E.2d 465, 478 (1996)	22

V. 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, 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.

Turley v. Keesee, 218 W. Va. 231, 233, 624 S.E.2d 578, 580 (2005), citing Syl. Pt., *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).

VI. DISCUSSION OF LAW

- A. **The Circuit Court erred when it concluded, contrary to the evidence, that there was no factual support in the record for the Family court's decision to uphold a prior agreement of the parties regarding the determination of the parties' incomes for child support purposes.**

The Circuit Court's *Order on Petitions for Appeal and Cross Appeal* of November 19, 2010 overturned the Family Court's decision regarding the computation of the parties' incomes on the ground that "there is no factual basis in the record, including the several Orders entered by the family court, to support a finding or conclusion the parties reached an agreement not to use the guidelines when calculating child support." *Q.v.*, at p. 1. Accordingly, the Court determined that "[t]here was no evidence in the record below to support the Family Court's finding that the parties agreed to deviate from the child support guidelines when calculating child support." *Id.*, at p. 2, ¶ 1. The Circuit

Court's determination is clearly contrary to the record in this matter.

West Virginia Code § 48-13-702(a), which addresses a deviation from the child support guidelines, provides that

If the court finds that the guidelines are inappropriate in a specific case, the court may either disregard the guidelines or adjust the guidelines-based award to accommodate the needs of the child or children or the circumstances of the parent or parents. In either case, the reason for the deviation and the amount of the calculated guidelines award must be stated on the record (preferably in writing on the worksheet or in the order). Such findings clarify the basis of the order if appealed or modified in the future.

Paragraph 4 of the Family Court's findings of fact in the October 30, 2006 Order states:

Both parties' incomes fluctuate. Accordingly, the Court finds that the parties' agreement as set forth below which determines the manner and method of establishing child support is fair and equitable and is in the best interests of the parties' minor children. In addition, the Court finds that, in entering into such agreement, the parties have made a knowing, intelligent, and voluntary waiver of the strict application of the West Virginia Child Support formula.

This paragraph of the Family Court Order clearly sets forth that the reason for deviating from the guidelines is due to the fact that "[b]oth parties' incomes fluctuate". Moreover, the Order clearly states that the amount of the calculated award is established in the manner and method set forth below, and was agreed upon by the parties. Thus, as set forth in W. Va. Code § 48-13-702(a), the Family Court clarified the basis of its order

and such finding should have been recognized and upheld by the Circuit Court on appeal; not vacated under a clearly erroneous standard.

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.

Turley v. Keesee, 218 W. Va. 231, 233, 624 S.E.2d 578, 580 (2005), citing Syl. Pt., *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004). "Under the clearly erroneous standard, if the findings of fact and the inferences drawn by a family law master are supported by substantial evidence, such findings and inferences may not be overturned even if a circuit court may be inclined to make different findings or draw contrary inferences." *State ex rel. West Virginia Dept. of Health and Human Resources*, 196 W. Va. 369, 374, 472 S.E.2d 815, 820 (1996), citing Syl. Pt. 3, *Stephen L.H. v. Sherry L.H.*, 195 W. Va. 384, 465 S.E.2d 841 (1995). Indeed, "a circuit court may not substitute its own findings of fact for those of a family law master merely because it disagrees with those findings." *Id.* Additionally, if a circuit court reverses a family court's order under the clearly erroneous standard, it must "explain how it finds the family law master's findings of fact to be clearly erroneous." *Id.* at 376, 822.

The Order of the Circuit Court simply stated that there was no factual basis or evidence in the record below to support the Family Court's findings; it did not explain how it finds the Family Court's findings of fact to be clearly erroneous. As the following discussion establishes, the evidence was overwhelmingly to the contrary.

First, Ms. Greve's appeal to the Circuit Court challenged the Family Court's factual finding that "in 2006 the parties knowingly and voluntarily agreed to deviate from the application of child support guidelines." Such a finding by the Family Court is not applying law to fact; rather it is simply finding, as a fact, that previously in this case, the parties agreed to deviate from the formula with regard to calculating the parties' incomes for child support purposes and the factual basis for such was due to the fact that the parties' respective incomes fluctuate. This fact is clearly established and, as such, cannot be held to be clearly erroneous.

The parties' agreement, which constitutes a knowing and intelligent waiver of the strict application of the child support guidelines, and the Court's factual basis for permitting the agreement, was then reflected in Paragraph 4 of the Court's findings of fact in the October 30, 2006 Order, as set forth, *supra*.

Later, at pages 2 and 3, paragraphs 2 through 4, the Court ordered as follows:

2. On or before February 15, 2007 and on February 15 of each subsequent year, the parties shall exchange all pertinent financial information, including W-2s, K-1s, 1099s, quarterly documents, and any other financial documents which reflect income earned by the parties in 2006.

3. After such exchange of data, Respondent's (or Petitioner's, as the case may be) child support obligation for 2007, using the Guidelines for Child Support Awards promulgated as W. Va. Code § 48-13-101, shall be calculated based upon the parties' respective incomes for 2006. The formula shall include an appropriate adjustment for child care expenses and for health insurance; however, no other adjustments shall be included in the calculation. Once that number is determined, that number shall be the fixed amount of child support for the year 2007, and will not be subject to modification, retroactive or otherwise, for the year 2007.

4. Until further Order of the Court, the parties shall in subsequent years calculate child support in accordance with this method. Each year the parties shall submit an Agreed Order noting any applicable modification. If there be any disagreement regarding the calculation, either party may schedule a hearing with the Court.

Order Regarding Modification of Child Support, entered October 30, 2006. This Order was not appealed and its findings and conclusions were reiterated in the Family Court's January 28, 2010 *Order Regarding Respondent's Motion to Modify Child Support*. The factual basis for the Court's decision to deviate is set forth in the Order and the course of dealings of the parties in the year subsequent to the Order establishes that the findings and methodology in the Order are not clearly erroneous.

Indeed, at the hearing on January 31, 2006, the parties' agreement to deviate (in part) from the formula was placed on the record.⁵

After placing the agreement on the record, Ms. Greve's own counsel, Mr. Swartz, stated:

I think we need to make clear that this future disclosure **and formula** is for as long as we have minor children to deal with so it's an every year thing. I don't think you actually said - these . . . that you know you were talking about '07. **We're gonna do this in '08 '09 whatever.**⁶

DVD of 01/31/2006 hearing, at 5:27.53 PM [Emphasis added].

Thus, not only did Mr. Swartz acknowledge on the record that the parties had an agreement, the agreement was reflected in writing along with the factual basis for the finding that the parties were waiving the strict application of the guidelines. Accordingly, any denial by Ms. Greve or her counsel of the agreement is demonstrably false.

⁵ It is important to note that the parties herein did not abandon the formula. Rather, they simply agreed that, for any given year, they would look back at the actual incomes from the prior year to determine their respective incomes for child support purposes for the following year. **In all other respects, the parties now and have always used the guidelines.** The exception to this statement is that Mr. Romano bore the full responsibility for the children attending private school. Those costs were not factored into the formula, a decision that greatly benefitted Ms. Greve.

⁶In light of this statement from Ms. Greve's counsel, it is baffling how the Circuit Court concluded that "[i]t is not reasonable to imply from this agreement another further agreement that income averaging and/or attribution guideline concepts would not be used when child support was calculate." *Order on Petitions for Appeal and Cross Appeal*, p. 2.

For the reasons set forth above, the Circuit Court should not have vacated the Family Court's child support Order under the clearly erroneous standard and, as such, the Circuit Court's Order on Petitions for Appeal and Cross Appeal entered November 19, 2010, must be reversed (and thus the Family Court's ruling reinstated) on that issue.

B. The principle of judicial estoppel bars Respondent from "changing the rules" and arguing against the Family Court's decision.

The principle of judicial estoppel applies in this case and should, thus, bar Respondent from attempting the "change the rules" and argue for a different methodology for determining the parties incomes for child support purposes.

Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.

Syl. pt. 2, *West Virginia Department of Transportation, Division of Highways v. Robertson*, 217 W. Va. 497, 618 S.E.2d 506 (2005).

Here, all the elements are met. Ms. Greve took a position completely opposite to her counsel's comments and to the written orders entered in the case. Her contrary positions were asserted in the same case with the same parties. Her position

now is to avoid a support obligation, when she benefitted from a prior position taken when she would be receiving more support than she otherwise would have if Mr. Romano's income had been "averaged".⁷ Mr. Romano would unarguably be adversely affected by paying child support to Ms. Greve for a year in an amount that was based upon a one-time windfall by Mr. Romano, but otherwise would not be receiving support when using the same methodology would result in Ms. Greve owing him child support. Aside from the fact that Ms. Greve may now owe a support obligation to Mr. Romano, nothing else has changed. The parties' incomes still fluctuate from year to year.

In her *Petition for Appeal from Family Court Order Entered January 28, 2010*, Ms. Greve argued that the court should somehow now "average" the parties' incomes because the parties were "W-2" employees in 2006 and somehow it would not have been appropriate to "average" their incomes until now.

The "W-2" argument is a "red-herring." It has never been disputed in this case that Ms. Greve and her counsel were fully aware that in 2006 Mr. Romano was not working for a fixed salary. Rather, his income was to be based upon a formula which took into account revenues and clients generated. This formula

⁷Although the actual calculations are not in the record, Ms. Greve has asserted that averaging the parties incomes for the purposes of 2009 child support will result in the parties having nearly equal incomes.

is referenced in the record of the hearing as an "Income Reconciliation Sheet." Accordingly Mr. Romano's income was not fixed, and would fluctuate from year to year.⁸ In the absence of an agreement, a court's decision to average a party's income is not dependent on whether he or she is "W-2 employee". Instead, the test is whether the person's income fluctuates.⁹ See, e.g. W. Va. Code § 48-1-228(a)(6) (relating to self-employed persons); W. Va. Code § 48-1-228(a)(7) (relating to seasonal employment or "other sporadic sources"); *Corcoran v. Corcoran*, 202 W. Va. 76, 501 S.E.2d 793 (1998) (relating to averaging of income which fluctuates due to overtime).

The crux of Ms. Greve's position is that, after having benefitted from the methodology used for 2006-2008, she simply

⁸Indeed, Ms. Greve's income also fluctuates, albeit to a lesser extent than Mr. Romano's, due to annual bonuses that she receives.

⁹Moreover, there is no rule that only permits averaging after three years. For example both W. Va. Code §§ 48-1-288(a)(8) and (9) contain identical language stating that "the amount of monthly income to be included in gross income shall be determined by averaging the income from such employment during the previous thirty-six-month period or during a period beginning with the month in which the parent first received such income, whichever period is shorter[.]" A court not only has the discretion to average income over a period shorter than three years, it can also average income over a longer period if circumstances warrant. See *Pelliccioni v. Pelliccioni*, 214 W. Va. 28, 585 S.E.2d 28 (2003) (holding that it is permissible to average an obligor's income over five years, instead of three years).

wants to change the rules now that she is called upon to pay support over to Mr. Romano.

Thus, the principle of judicial estoppel should bar the relief that Ms. Greve seeks, i.e., income averaging.

C. The Circuit Court erred by failing to reverse the Family Court's refusal to make the 2009 child support calculation effective January 1, 2009.

The Circuit Court also erred when it upheld the Family Court's decision to make the 2009 child support effective as of April 1, 2009, instead of January 1, 2009. In denying Mr. Romano's Cross-Appeal, the Circuit Court, without any discussion at all, simply concluded that: "[Mr. Romano] has not demonstrated that the Family Court's determination that the recalculation of child support be retroactive to April 1, 2009, instead of January 1, 2009, was either clearly erroneous or an abuse of discretion." *Order on Petitions for Appeal and Cross Appeal*, p. 3.

Respectfully, the Family Court did abuse its discretion when it failed to make Ms. Greve's child support obligation effective January 1, 2009.

An abuse of discretion occurs in three principal ways: (1) when a relevant factor that should have been given significant weight is not considered: (2) when all proper factors, and no improper ones, are considered, but the family [court judge] in weighing those factors commits a clear error of judgment: and (3) when the family [court judge] fails to exercise any discretion at all in issuing the order.

Banker v. Banker, 196 W. Va. 535, 548 474 S.E.2d 465, 478 (1996).

The *Final Order* entered December 23, 2008 contained the following provision regarding the 2009 child support, in Paragraphs 6 and 7, at pages 3 and 4:

6. That commencing January 1, 2009, and continuing thereafter after [sic] on the first of each following month, the Respondent shall pay to Petitioner the sum of \$1,825.73 per month in child support, until further order of the Court above named.

7. That, by agreement of the parties, a motion to modify child support which is filed with the requisite financial disclosures, including without limitation, W-2s, complete 1040's and K-1's before March 31, 2009, shall be retroactive in effect to January 1, 2009.

On March 26, 2009 Mr. Romano filed a *Motion to Modify Child Support* and by letter dated the same day forwarded a copy of his Schedule K-1 for 2008 to Ms. Greve's counsel and requested that Ms. Greve provide her 2008 financial disclosures. See Exhibit A to *Respondent's Brief in Support of Respondent's Motion to Modify Child Support*.

Mr. Romano concedes that he did not disclose his income tax return until April 15, 2009. See Exhibit B to *Respondent's Brief in Support of Respondent's Motion to Modify Child Support*. However, the return was not yet completed on March 31, 2009, and therefore, Mr. Romano could not disclose that which he did not have.¹⁰ Aside from being beyond his control, any "harm"

¹⁰The administrator of Mr. Romano's investment account did not provide information necessary for the completion Mr. Romano's return until April 13, 2009. See Exhibit E to *Respondent's Brief in Support of Respondent's Motion to Modify Child Support*.

resulting therefrom was *de minimus*, as the income shown in his K-1, \$25,029.00, constitutes the bulk of his ultimate adjusted gross income (for child support purposes) of \$28,579.¹¹

Nonetheless, based on these facts the Family Court declined to make Ms. Greve's child support obligation effective January 1, 2009, which resulted in Mr. Romano owing \$5,477.19 for the period January to March 2009, when instead, Ms. Greve should have owed him \$2,333.37 for the same period. *See Order Regarding Respondent's Motion to Modify Child Support*, ¶¶ 2-3, p. 8.

Here, the Family Court essentially punished Mr. Romano for something that was beyond his control and for something that caused no harm whatsoever to Ms. Greve. Accordingly, Mr. Romano asserts that the Family Court abused its discretion in this regard because it gave improper weight to Mr. Romano's *de minimus* failure to comply strictly with the Court's March 31, 2009 deadline. As a consequence, the Circuit Court's and Family Court's orders in this regard should be reversed, and Ms. Greve's child support obligation should begin effective January 1, 2009.

VII. CONCLUSION

The Circuit Court of Kanawha County, West Virginia erred when it set aside the Family Court's order which merely

¹¹This figure was derived by taking Mr. Romano's total income of \$30,347 and subtracting one-half of his self-employment tax, which was \$1,768, for a total adjusted gross income of \$28,579.

enforced an agreement of the parties which had been in effect for three years. Despite the Circuit Court's "findings," there is ample support in the record for the Family Court's decision on this issue. Moreover, Ms. Greve should be judicially estopped to argue for a different methodology, when Mr. Romano has relied to his detriment on that methodology which resulted in him paying child support to her in years where his income was actually less than hers. She benefitted from the court-approved agreement, and now seeks to disavow it only because she will have to pay him child support. This Court should not tolerate such shenanigans.

Furthermore the Circuit Court also erred when it refused to reverse the Family Court's Order making the 2009 child support modification effective April 1, 2009, instead of January 1, 2009. Although Mr. Romano missed (by 15 days) a deadline to disclose his income tax return (which was prepared by his accountant), he only did so because he did not have a return to disclose. Thus, he was effectively punished for failing to do something which was out of his control.

For the reasons stated herein, this Court should accept this *Petition for Appeal* and correct these errors.

VIII. RELIEF PRAYED FOR

WHEREFORE, for the reasons stated herein, Petitioner Shawn R. Romano prays that the Court:

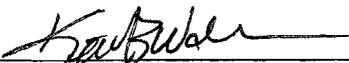
1. Accept this *Petition for Appeal*;

2. Reverse the *Order on Petitions for Appeal and Cross Appeal* insofar as it reversed the Family Court's rulings on the determination of the parties' respective incomes for child support purposes;

3. Reverse the *Order on Petitions for Appeal and Cross Appeal* insofar as it affirmed the Family Court's rulings on the effective date of the 2009 modification; and

4. Award to Petitioner such other relief as the Court deems just and proper.

Respectfully submitted this 21st day of March, 2011.



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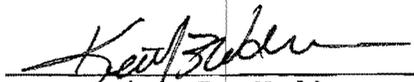
CERTIFICATE OF SERVICE

I, Keith B. Walker, an attorney for Petitioner Shawn Romano, hereby certify that on March 21, 2011, I served a true and correct copy of the foregoing "**PETITION FOR APPEAL**" on the parties hereto via U.S. Mail, first class, postage prepaid, addressed as follows:

Mark A. Swartz, Esq.
SWARTZ LAW OFFICES, PLLC
601 Sixth Avenue, Suite 201
P.O. Box 1808
St. Albans, WV 25177
Counsel for Petitioner Below, Wendy Greve

2011 MAR 21 AM 11:36
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

FILED



Keith B. Walker
(WV Bar No. 10912)