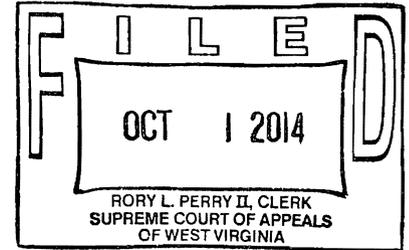


Supreme Court Case No. 14-0429
(Civil Action No. 12-D-60, Webster County)

---- 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 REPLY BRIEF

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ARGUMENT

A. A PREEMPTIVE MODIFICATION SUPPORTED BY THE UNDISPUTED FACTS IS NOT ERROR.

An event that *both parties and the Family Court* agree will happen cannot be speculative under any circumstances.¹ The Family Court's preemptive modification of Wife's spousal support in three years is based on the occurrence of undisputed, definite events, namely, the end of Husband's court-ordered attorney fee award and marital debt payments. Once those court-ordered payments are completed, Husband will have an additional \$850 per month available in disposable funds from which an increased spousal support payment can be made.

It is unchallenged that Husband has the present funds to pay \$100 per month toward Wife's attorney fee award and \$750 per month toward the marital debt he was assigned in equitable distribution. Husband does not dispute that both of these court-ordered obligations will be paid off in three (3) years. In fact, in his response, Husband agrees with the Family Court's position that these court-ordered obligations will be paid off within the next three (3) years.²

In his response, Husband misstates and apparently misunderstands this Court's holding in *Mayle*.³ He claims that *Mayle* requires evidence of the "future financial standing of the parties" before the Family Court preemptively modify an alimony award. Husband then proceeds to speculate that he may lose his job or become injured in the future and because there is no evidence that these things won't happen, a preemptive modification is error.⁴

However, *Mayle* does not require sufficient evidence of the "future financial standing of the parties" in order to preemptively modify spousal support. To the contrary, this Court held

¹ Appellee's Brief in Opposition, Page 5.

² *Id.*

³ *Mayle v. Mayle*, 229 W.Va. 179, 727 S.E.2d 855 (2012).

⁴ Appellee's Brief in Opposition, page 4.

that sufficient evidence was required only *to support the preemptive modification*.⁵ The Family Court does not need to imagine every future scenario to justify the modification, it must only have sufficient evidence to support the modification itself.

This distinction is critical because requiring evidence of the parties' future financial standings would have the exact result that this Court tried to avoid in *Mayle*, namely, that the Family Court would have to not only *speculate*, but essentially perform the functions of a psychic. Family Court Judges would be barred from awarding spousal support for more than days at a time unless he or she could predict the parties' financial standing at all points in the future.

The better, more rational approach is the one actually taken by this Court in *Mayle* that preemptive modifications are permissible where supported by the evidence. In this case, there is sufficient, undisputed evidence that Husband's court-ordered payments in the total amount of \$850 will come to an end in three (3) years. At that time that Husband's court-ordered payments end, taking the financial conditions of the parties at the time of the final order, Husband's spousal support obligation will increase by a mere \$300. The Family Court's preemptive modification is clearly nonspeculative, undisputed, and supported by the evidence. The Circuit Court abused its discretion in reversing and vacating the Family Court's award.

B. OBTAINING MEDICARE IN THREE YEARS HAS ZERO EFFECT ON WIFE'S NEED FOR \$650 PER MONTH AT THE TIME OF THE INCREASE.

Husband's argument that Wife's potential receipt of Medicare affects her need for an increased award is an obvious red herring because Medicare has no genuine effect on Wife's monthly need. The Family Court found that Wife had an "obvious deficit of over \$1,800 per month considering her current income and expenses." A.R. 202. Importantly, the Family Court's calculation of Wife's deficit did not include that she would need to purchase private healthcare

⁵ *Mayle*, 229 W.Va. 179.

insurance until she is eligible for Medicare at age 65. A.R. 202, Paragraph D. Therefore, whether or not she was eligible for Medicare, her monthly need for at least \$1,800 per month would not change.

Even if this Court accepts Husband's argument that Wife's monthly need of \$1,800 per month will be reduced when she receives Medicare, there will still be no effect on Wife's future need for the increased spousal support award of \$650 per month. The Family Court found that Wife's estimated private health insurance cost was between \$500 to \$700 per month although he did not include that estimation in Wife's monthly need. However, for sake of argument, deducting Wife's highest estimated health insurance cost from Wife's monthly deficit, her monthly need is still only reduced to \$1,100 per month, which is still only a drop in the bucket compared to the support she really needs. See diagram below.

	Family Court's Findings	Husband's Argument
Wife's Current Monthly Need <i>(A.R. 202, Par. D)</i>	\$1,800 <i>does not include Wife's estimated private health insurance cost of \$500-\$700 per month</i>	\$1,800
Effect of Wife's Receipt of Medicare	(\$0) <i>Family Court did not include private health insurance cost in monthly need above. (A.R.202, Par. D)</i>	(\$700) <i>Based on Wife's highest estimated private health insurance cost.</i>
WIFE'S NEED FOR SPOUSAL SUPPORT IN 3 YEARS	\$1,800/month	\$1,100/month

The Circuit Court's Order vacating the Family Court's award of alimony to Wife based on her receipt of Medicare in three years was clearly erroneous when it has absolutely no effect on her monthly need for the increased award of \$650 per month because under either circumstance, Wife's monthly needs are still not met.

C. HUSBAND WILL HAVE THE ABILITY TO PAY \$300 MORE IN MONTHLY ALIMONY IN THREE YEARS BECAUSE IT IS UNDISPUTED THAT HE WILL

HAVE AN ADDITIONAL \$850 PER MONTH IN DISPOSABLE INCOME AT THAT TIME.

The Family Court properly found that Husband will have the ability to pay an increased spousal support award in three years because he will have an additional \$850 per month in disposable income as a result of the payoff of Wife's attorney fee award and the marital debts described above. Husband argues that the additional \$850 per month in disposable income will not increase his ability to pay a mere \$300 more per month in alimony. This is pure and simple math. Common sense dictates that when a debt is paid off, the income used to pay the debts is freed up to pay other items. By awarding an increase of only \$300 per month, the Family Court still provided Husband with a \$550 monthly cushion of disposable income from which any of Husband's speculative future expenses could be paid.

D. PROHIBITING THE COURT'S PREEMPTIVE MODIFICATION UNJUSTLY PENALIZES WIFE FOR RECEIVING AN AWARD OF ATTORNEY FEES AND RECEIVING LESS OF THE MARITAL ESTATE IN EXCHANGE FOR HUSBAND'S TEMPORARY PAYMENT OF MARITAL DEBT.

The Family Court basically found that at the time of the final hearing, Husband had the financial ability to pay a total of \$1,200 as follows: \$350 per month in spousal support, \$100 per month in attorney fees and \$750 per month in marital debt. Husband was ordered to pay more of the marital debt because he was awarded more of the marital assets (i.e. the debt free former marital home, his retirement accounts, etc.).

In exchange for these short-term court-ordered payments, Wife's *initial* spousal support award was set at only \$350 per month to enable Husband to timely make the payments and complete them over a course of three years. Once Husband's court-ordered payments were completed in three years, the Family Court preemptively increased Wife's spousal support award to \$650 per month for twelve (12) additional years.

If the Circuit Court's Order is affirmed, then Wife will be severely and unjustly penalized by her award of attorney fees and Husband's temporary payment of marital debt. For instance, had Wife assumed her own attorney fees and Husband's court-ordered marital debt, then under the same circumstances, Husband could have paid her \$1,200 per month⁶ for 15 years⁷ instead of paying three years of attorney fees and marital debt.

The fact that Husband's \$100/month attorney fee obligation and a portion of the \$750 marital debt payment converts to alimony once the court-ordered payments are completed is not error. To rule otherwise, is unjust and inequitable insofar as Wife is being penalized for being awarded her attorney fees over a three year period and for granting Husband a greater portion of the marital estate in exchange for his short term payment of marital debt.

E. THE CIRCUIT COURT ABUSED ITS DISCRETION AND WAS CLEARLY ERRONEOUS IN REDUCING WIFE'S TOTAL SPOUSAL SUPPORT AWARD FROM 15 YEARS TO 3 YEARS.

Husband's brief in opposition provides absolutely no reasonable basis to the Circuit Court's termination of Wife's 15 year alimony award after three (3) years without any findings of fact or conclusions of law explaining why the substantial reduction was appropriate given the parties' 28 year marriage and financial disparity. Even if the Circuit Court erroneously believed that the preemptive modification was impermissible, there was no justification for then reducing the entire 15 year award to a mere three (3) years. Without any findings of fact or required analysis of the factors set forth in West Virginia Code § 48-6-301, the Circuit Court abused its discretion in terminating Wife's entire spousal support award in three years at the age she reaches 65.

⁶ \$350/month spousal support award, \$100/month attorney fee award and \$750/month marital debt payment.

⁷ The total duration of the family court's award. Three years at \$350 per month and 12 years at \$650 per month

CONCLUSION

WHEREFORE, your Petitioner, Carol Warren, prays that this Court **REVERSE** the Circuit Court's *Order on Petition for Appeal*; **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.



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