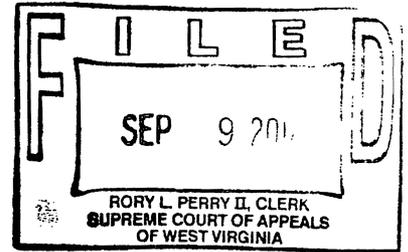


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

\_\_\_\_\_  
AT CHARLESTON  
\_\_\_\_\_



**CAROL ELAINE WARREN,**

**Appellant,**  
Respondent below.

vs.

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

**TODD E. GARLAND,**

**Appellee,**  
Petitioner below.

**BRIEF OF APPELLEE IN OPPOSITION**  
**TO PETITIONER'S PETITION FOR APPEAL**

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**BRIEF OF APPELLEE IN OPPOSITION**  
**TO PETITIONER'S PETITION FOR APPEAL**

Comes now the Appellee, **TODD E. GARLAND**, Petitioner below (hereinafter 'Respondent' or 'Husband'), by his attorneys, James Wilson Douglas and Jared S. Frame, pursuant to Rule 10(d) of the Rules of Appellate Procedure of the West Virginia Supreme Court of Appeals, and in and for his Brief in Opposition to Petitioner's Petition for Appeal, does aver, depose and say, as follows:

**STANDARDS OF REVIEW**

Respondent maintains that the appropriate standards of review for the issues presented hereinafter are *abuse of discretion* and *de novo*.

## REPLY TO PETITIONER'S STATEMENT OF THE CASE

In Paragraph 1, under the Factual Background, in bold lettering, the Petitioner states that at the time of the Parties' divorce, "Wife was close to retirement age at 62 and suffering from major depressive disorder." The Family Court, in its January 30, 2013 Final Order on Remaining Issues, Paragraph C.3., actually found that the Wife was in "fair to poor mental health" and did not begin to show such symptoms until the marriage was ending. (Appendix, p. 200). Furthermore, the Family Court found that the Wife was not "determined to be disabled by any government entity" and was "making progress". (Appendix, pp. 200 and 201).

In Paragraph 2, the Petitioner states that the long term marriage of the Parties ended "through no fault of the Wife and against her wishes." The Family Court, in its January 30, 2013 Final Order on Remaining Issues, Paragraph C.4., found that "neither party proved any fault, and at best, what little fault evidence may have been presented, was mutual fault." (Appendix, p. 201).

The Petitioner's further detailed statement of the Wife's mental history and troubles, which seems to be blamed on the Husband, can be summed up best by the following finding of the Family Court, in its January 30, 2013 Final Order on Remaining Issues, Paragraph C.5.:

*Respondent's mental health deterioration after the parties separated are not the fault of the Petitioner. No evidence was presented that*

*would support a conclusion that Petitioner is at fault for her mental health condition. All couples experience adjustments upon divorce; most do not become debilitated by it; Respondent is apparently among the distinct minority in that regard in that she has allowed her mental condition to prevent her from her former occupation and earning ability.* (Emphasis supplied) (Appendix, p. 201).

## SUMMARY OF ARGUMENT

The Petitioner Wife's appeal is broken up into five (5) arguments, but the arguments all deal with the Circuit Court correctly reversing and vacating the portion of the Family Court's January 30, 2013 Final Order on Remaining Issues regarding the increase of alimony to the Wife at age 65. The Respondent Husband contends that the Circuit Court was correct to reverse and vacate the Family Court's Order because: 1) the same was based on speculation of the future financial positions of the Parties, which is prohibited under the *Mayle* decision; 2) that the Family Court's Order increased the Wife's alimony even though her medical expenses will be reduced once she is eligible for Medicare; 3) that the Wife voluntarily, through no fault of the Husband, quit her employment and decided to draw Social Security early; 4) that the Family Court's increase of alimony when the Wife turned 65 was arbitrary and capricious; and, 5) that the Family Court was without jurisdiction to modify alimony at a future date without sufficient evidence of the future financial standing of the Parties. *Mayle v. Mayle*, 229 W.Va. 179, 727 S.E.2d 855 (2012)

On appeal below, the Circuit Court properly reversed and vacated the decision of the Family Court of Webster County, West Virginia.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Respondent Husband asserts that this case is not suitable for oral argument pursuant to Rule 18(a) of the Revised Rules of Appellate Procedure, which states that frivolous appeals shall not be presented by oral argument. Furthermore, the Respondent Husband would state that the criteria set forth in Rule 19(a) of the Revised Rules of Appellate Procedure have not been met by the Petitioner Wife, and the Petitioner Wife's Petition should not proceed to oral argument. In essence, there is no unique or novel issue to be addressed by this Court through the device of oral argument.

### **ARGUMENT**

#### **A. THE CIRCUIT COURT DID NOT ERR IN REVERSING AND VACATING THE FAMILY COURT'S INCREASE OF SPOUSAL SUPPORT TO WIFE WHEN THE INCREASE WAS BASED ON INSUFFICIENT EVIDENCE**

This Court has held it to be an error to base a future reduction or increase in spousal support on evidence that may or may not happen in the future; i.e., speculative evidence. *Mayle* at 861. Also, the Court has held that it is an "error for the family court to issue what appears to be a preemptive modification

without sufficient evidence.” *Id* at 861.

Also, West Virginia Code §48-6-301(b), states that the lower courts, when determining a spousal support award if any, shall consider “(3) The *present* employment income and other recurring earnings of each party from any source” (Emphasis supplied). If a family court is to utilize a parties’ present gross and net income, which the Family Court set forth in its January 30, 2013 Final Order on Remaining Issues, Paragraphs C9, C10, C11 and D., it would also hold true that the *present* expenses of the Parties would have to be considered by the Family Court. (Appendix, pp. 201 and 202.)

The Wife’s argument herein appears to be that the Family Court was correct in modifying the alimony award in the future based on evidence that was concrete, or that was not speculative in nature. The main push by the Wife is the findings of the Family Court that the Husband, in three (3) years, will have more available income due to the fact that he will have paid off his attorney fee award to the Wife, and will more than likely have paid off the marital Discover card bills. (Appendix at 202.).

Husband does not disagree with the Wife’s position that said bills should be paid off within the next three (3) years; however, how can the Family Court assume that the Husband will be in a better financial position in three (3)

years without sufficient evidence of each Parties' financial standing at said time? Three (3) years is a long time, in said time period the Husband could be laid off from work, could develop a medical condition, or could even be deceased. Only time will tell what the Parties' relative financial conditions are in three (3) years. Evidence of the future financial position of the Parties does not exist at the present time, and under the *Mayle* decision, the Family Court made an error in modifying the spousal support award based on speculation of future events that may or may not be occur; i.e., the Husband having more net income in three (3) years.

The evidence that the Family Court was presented during the hearing, which was not speculative of future events, consists of the following: 1) the Husband, after paying his monthly expenses, has net income of \$510.00 per month, or \$160.00 per month after paying the Wife \$350.00 in spousal support; 2) the Wife voluntarily allowed her health condition, which was no fault of the Husband, to substantially lower her earning ability; 3) that if any fault in the breakup of the marriage existed, it was mutual fault; 4) that the Wife's major monthly expense was her health care, which she lost when she voluntarily left her employment, through no fault of the Husband; and, 5) that Wife would be eligible for Medicare when she turns 65, or in three (3) years.

While the Husband argued below that no spousal support should awarded to the Wife, at least the Family Court's initial \$350.00 a month award to

Wife for three (3) years was based on non-speculative evidence presented at the hearing. As stated in the preceding paragraph, the evidence of the Parties' present income, expenses and other alimony factors, as they existed at the time of the final hearing in Family Court were not speculative, and the Family Court's Order regarding the \$350.00 per month spousal support award for three (3) years was upheld by the Circuit Court. The problems with the Family Court's Order only arise when said Court tried to fashion a future modification based on speculative circumstances that may or may not exist in the future, which the Circuit Court was quick to point out in its Order with the following finding:

*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).*

Based on the above, the Circuit Court below was correct in finding that the Family Court impermissibly modified the Husband's future alimony obligation based on circumstances that were speculative, and that may or may not occur. Therefore, the Circuit Court's Order should be affirmed on this issue.

**B. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE INCREASE OF ALIMONY TO WIFE WAS ARBITRARY AND CAPRICIOUS WHERE THE FAMILY COURT DID NOT SET FORTH SPECIFIC FINDINGS SUPPORTING THE INCREASE**

The Circuit Court was correct in finding that the increase in spousal support at a future date, when the Wife turns 65, was arbitrary and capricious.

(Appendix, pp. 241 and 242). Furthermore, the Circuit Court was correct when it found that increasing the Wife's spousal support when she turns 65 was an impermissible and speculative projection of future circumstances which may or may not occur, and was a preemptive modification without sufficient evidence, as proscribed by *Mayle, supra*. (Appendix, p. 242).

To avoid a duplicative argument, and waste the Court's valuable time, the Husband would reaffirm the arguments contained in Argument Section I above. The issue of the Family Court's modification of the Wife's alimony at a future date, whether the same is classified as speculative or arbitrary and capricious, is still based on a future event that may or may not occur, which is impermissible under West Virginia case law. *Mayle, supra*.

Also, the Wife's argument that the Circuit Court substituted its own fact evaluation for that of the Family Court is without merit. The Circuit Court's July 1, 2013 Order on Petition for Appeal, when read in its entirety, does not conduct a new fact evaluation, it only holds that the Family Court erred in trying to predict the positions of the Parties at a future date. Basically, what the Circuit Court held, and what the Wife seems to misunderstand, is that there are no available facts of the future positions of the Parties upon which the Family Court could base a preemptive modification. As stated above, there is no possible avenue available to the Family Court to determine what the future may hold for the

Parties other than mere speculation.

Lastly, it should be noted that the Circuit Court did not overturn or disrupt the Family Court's award of alimony to the Wife based on the present positions of the Parties; i.e., the initial \$350.00 per month for three (3) years. This is in line with the well established case law holding that a "circuit court must give due 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).

Therefore, the Circuit Court indeed gave due deference to the Family Court's findings of fact regarding spousal support insofar as they were based on non-speculative evidence. It was only when the Family Court erred in preemptively modifying the spousal support award, based on speculation of future events, that the Circuit Court found a violation of "one of the established standards of review." *Id.*

Based on the above, the Circuit Court below was correct in finding that the Family Court's preemptive modification of the Husband's alimony obligation, based on circumstances that were speculative, and that may or may not occur, was arbitrary and capricious. Therefore, the Circuit Court's Order should be affirmed on this issue.

**C. THE CIRCUIT COURT DID NOT ERR IN REVERSING AND VACATING THE FAMILY COURT'S AWARD BECAUSE THE HUSBAND DOES NOT HAVE THE CURRENT ABILITY TO PAY INCREASED ALIMONY**

A party who fails to advance a question at trial is precluded from raising the matter for the first time on appeal. *Skidmore v. Skidmore*, 225 W.Va. 235, 691 S.E.2d 830 (2010). A Circuit Court “must give due 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.” *Sherry L.H., supra*.

The Wife is arguing that even if the Family Court speculated on the future financial positions of the Parties in three (3) years, the Husband has the current ability to pay \$650.00 per month to the Wife. The Wife did not file an appeal of the Family Court’s January 30, 2013 Final Order on Remaining Issues, it was the Husband who appealed the alimony issue. This is the first instance that this issue has been heard on appeal, as the Wife did not challenge the inadequacy of the Family Court’s \$350.00 a month award by the process of an appeal. Therefore, in applying *Skidmore*, this issue should be considered waived by this Court. *Skidmore, supra*.

Also, the Wife has argued throughout the instant appeal that the Circuit Court was wrong to allegedly overturn the fact finding evaluation of the Family Court Judge. Now, the Wife is asking this Court to disregard the fact

finding of the Family Court, and to find that the Husband had the ability to pay \$650.00 a month to the wife at the close of the case below. The Family Court is in a unique position to hear testimony, review evidence and judge the credibility of witnesses. Absent a violation of an established standard of review, a reviewing court is to give deference to the Family Court's findings of fact.

In this case, the Family Court, who the Wife continually argues should be upheld, found that the present financial situations of the Parties, along with the other alimony factors, would merit an award to the Wife of \$350.00. The Circuit Court upheld the initial \$350.00 award, and only reversed the Family Court because of the preemptive modification of the alimony award based on speculative evidence. The issue of the Husband's ability to pay \$650.00, whatever the argument may be, is irrelevant. That particular issue was not appealed by the Wife below, and the initial \$350.00 award was affirmed by Circuit Court.

Based on the above, this Court should deem this issue irrelevant, and because the same was not appealed below, that the same was waived by the Wife.

**D. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE FAMILY COURT COULD NOT SPECULATE THAT THE WIFE WOULD HAVE THE NEED FOR \$650/MONTH ALIMONY IN 3 YEARS**

The Wife's argument under Section D. misinterprets the Circuit Court's findings. For some reason, the Wife is of the belief that the Circuit

Court's language, stating that it was "perplexing" that the Husband's spousal support would increase in the future when the Wife is eligible for Medicare, somehow implies that the Circuit Court was speculating on future events, which is the crux of this appeal. However, when read in its entirety, the Circuit Court's use of the word "perplexing" only goes towards the Family Court's reliance on future events that may or may not happen. In fact, in Paragraph H of the Circuit Court's July 1, 2013 Order, the Circuit Court goes on to state that "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."

In short, the Circuit Court did not rely on the decrease in the Wife's health insurance at 65 to make the decision below. What the Circuit Court did, was to point out that it would be speculative to base a future modification on an event that may or may not happen in the future; i.e., receiving Medicare, rejoining the workforce, etc. The reasoning of the Circuit Court in Paragraph H of its Order is consistent with the other provisions of said Order, and West Virginia case law, specifically the *Mayle* case. *Mayle supra*. In short, a Family Court cannot preemptively modify spousal support upon findings that are speculative, and may or may not happen in the future.

**E. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY REDUCING WIFE'S ALIMONY AWARD FROM 15 YEARS TO 3 YEARS**

The Circuit Court in reversing the Family Court found that a preemptive modification of the Husband's alimony obligation in the future was based on speculation, and was arbitrary and capricious. The Wife, in Argument Section E. of her Brief, attempts to lay blame at the Circuit Court's feet for the Family Court's abuse of discretion. The Circuit Court did not overturn or otherwise disrupt the Family Court's findings as they pertained to the Parties' present financial standing, as contemplated by West Virginia Code §48-6-301(b), but only overturned the Family Court when the same modified the Wife's alimony in the future, based on events that may or may not occur. *Mayle, supra.*

The chart provided by the Wife in her Brief, while informative in nature, does not provide anything new. The Circuit Court, by not overturning the initial alimony award, acknowledged the findings of the Family Court as to the present situations of the Parties, which is in accordance with West Virginia Code §48-6-301(b). Only after the Family Court ordered the Husband to pay \$650.00 a month alimony in the future for an additional twelve (12) years did the Circuit Court find an abuse of discretion. Therefore, the argument is the same, the Circuit Court was correct to reverse the Family Court when the same ordered a modification in the future, both in amount and length, based on the speculative

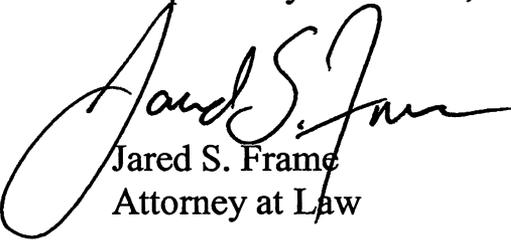
financial standings of the Parties. Any other outcome would have been mere guesswork on the part of the lower courts, as the circumstances of the Parties in three (3) years was unknown, both at the time of the hearings below, and today.

Based on the above, the Circuit Court below was correct in finding reducing the length of the alimony award to the Wife due to the same being awarded on speculative evidence of future events that may or may not occur. Therefore, the Circuit Court's Order should be affirmed on this issue.

### **CONCLUSION**

**WHEREFORE**, upon the authority cited, for the reasons given, noting other considerations appearing of record, Respondent Husband prays that this Honorable Court enter an Order **AFFIRMING** the Circuit Court's July 1, 2013 Order on Petition for Appeal in its entirety.

Respectfully submitted,

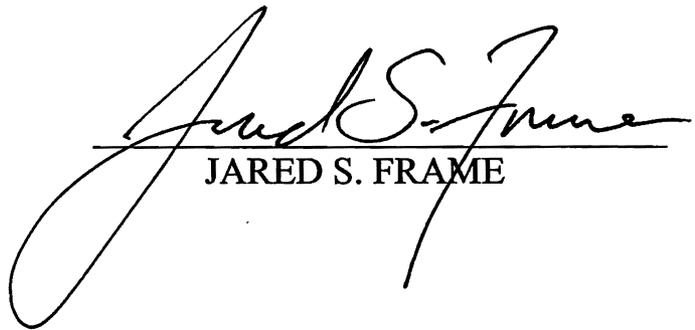


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**CERTIFICATE OF SERVICE**

I, JARED S. FRAME, the undersigned attorney does hereby certify that a true copy of the foregoing Brief of Appellee in Opposition to Petitioner's Petition for Appeal was deposited in the regular United States mail in an envelope properly stamped and addressed to Brittany Ranson, Attorney at Law, 1528 Kanawha Boulevard, East, Charleston, West Virginia 25311 on this 8<sup>th</sup> day of **September, 2014.**

  
JARED S. FRAME