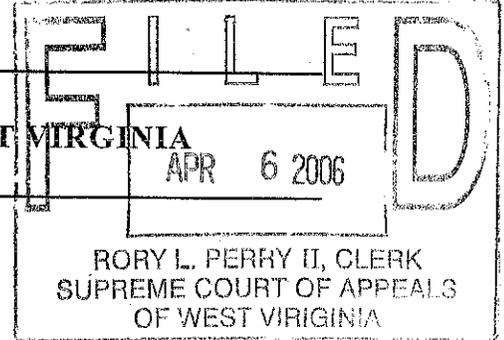


NO. 33045

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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**JAMES ROBERT EVANS JR.,**

**Petitioner-Appellant,**

v.

**SHARON ROSE EVANS,**

**Respondent-Appellee.**

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**BRIEF OF APPELLANT**

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**Appeal from a Judgment of the Family Court  
of Logan County, West Virginia**

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## KIND OF PROCEEDING AND NATURE OF RULING BELOW

This action began on July 13, 2004, when James Robert Evans Jr. (hereinafter "husband") filed a verified Petition for Modification seeking to terminate his spousal support obligation based on the remarriage of his former wife. The husband was ordered to pay \$1,800 per month to Sharon Rose Evans (hereinafter "wife") by a Final Order of Divorce entered by the Family Court of Logan County, West Virginia, the Honorable Kelly Gilmore Codispoti presiding, entered on January 7, 2003. This final order ratified, confirmed, and approved the parties' oral separation agreement.

On December 8, 2004, a hearing was held on the husband's Petition For Modification before the Family Court of Logan County, West Virginia, the Honorable Kelly Gilmore Codispoti presiding. The court entered an Order on January 25, 2005 granting the husband's petition and terminating his spousal support obligation.

The wife filed a Petition for Appeal from Family Court Final Order in the Circuit Court of Logan County, West Virginia, on February 9, 2005. The wife's petition for appeal was granted on July 12, 2005 by the Circuit Court of Logan County, West Virginia, the Honorable Eric H. O'Briant presiding. The circuit court reversed the family court's decision terminating the husband's spousal support obligation. The circuit court ordered that the husband resume making spousal support payments as required by the divorce judgment and that he pay arrearages that accrued after the family court entered its order terminating his spousal support obligation.

## STATEMENT OF THE FACTS OF THE CASE

The parties were married on March 27, 1970 and separated on or about October 14, 2001. (1/7/03 Final Order of Divorce [hereinafter "Fin. Order"] at 2.) The parties' marriage was terminated by a Final Order of Divorce entered on January 7, 2003. (Fin. Order at 1-6.) Prior to the entry of this order, the parties entered into an oral separation agreement which served to resolve issues of spousal support and the distribution of the marital estate. (Fin. Order at 2; 11/21/02 Transcript [hereinafter "2002 Tr."] at 5-12.) Under the provisions of the parties' agreement, the husband would pay the wife \$1,800 per month in spousal support, such obligation continuing until the death of either party. (Fin. Order at 3; 2002 Tr. at 7-8.) At the final divorce hearing held on November 21, 2002 in the Family Court of Logan County, West Virginia, the Honorable Kelly Gilmore Codispot presiding, both the husband and the wife were questioned concerning the terms of this agreement and their understanding thereof. (2002 Tr. at 5-12.) While this questioning revealed that the parties agreed that the husband's support obligation would terminate upon the death of either party, there was no provision regarding the effect of the wife's future remarriage on the husband's support obligation. (2002 Tr. at 7-8, 10.) The parties' agreement concerning spousal support was found to be fair, just, and equitable by the family court and was ratified, confirmed, and approved as part of the Final Order of Divorce. (Fin. Order at 3.) The final order also failed to make any provision for the effect of the wife's remarriage on the husband's spousal support obligation. (Fin. Order at 3.)

It is undisputed that subsequent to the parties' divorce, the wife remarried. As a result of the wife's remarriage, the husband petitioned for the termination of his spousal support obligation. (7/13/04 Petition for Modification at 1-3.) On January 25, 2005, an order was entered by the Family Court of Logan County, West Virginia, the Honorable Kelly Gilmore Codispoti presiding, granting the husband's petition and terminating his support obligation. (1/25/05 Order at 1-2.) The wife then petitioned to appeal the family court's decision to the Circuit Court of Logan County, West Virginia. (2/9/05 Petition at 1-2.)

On July 12, 2005 by the Circuit Court of Logan County, West Virginia, the Honorable Eric H. O'Briant presiding, the circuit court granted the wife's petition and reversed the decision of the family court terminating the husband's spousal support obligation. (7/12/05 Opinion Order Granting Petition for Appeal [hereinafter "Cir. Ct. Opinion"] at 1-6.) In its opinion, the circuit court concluded that although no provision for the effect of the wife's remarriage on the husband's support obligation was made in either the parties' agreement or the divorce judgment, this omission necessarily meant that the parties did not intend for the wife's remarriage to serve as the basis for terminating the husband's obligation. (Cir. Ct. Opinion at 4-5.). Instead, the court held that both the divorce order and the parties' agreement considered the wife's potential remarriage but chose that the husband's spousal support obligation would only terminate upon the death of either party. (Cir. Ct. Opinion at 4-5.)

## ASSIGNMENTS OF ERROR AND MANNER OF DECISION

I. The circuit court erred in reversing the family court's order terminating the husband's spousal support obligation based on the wife's remarriage.

The family court properly found that the wife's remarriage served to terminate the husband's spousal support obligation where there was no provision contained in either the parties' separation agreement or the final divorce order that the husband's obligation would survive the wife's remarriage. The circuit court reversed this holding, finding that the absence of any such provision concerning the effect of the wife's remarriage necessarily meant that the parties' agreement and the final order contemplated this occurrence but chose to only have the husband's support obligation terminate upon the death of either party.

## ARGUMENT

**THE CIRCUIT COURT ERRED IN REVERSING THE FAMILY COURT'S ORDER TERMINATING THE HUSBAND'S SPOUSAL SUPPORT OBLIGATION BASED ON THE WIFE'S REMARRIAGE WHERE BOTH THE PARTIES' SEPARATION AGREEMENT AND THE FINAL DIVORCE ORDER MADE NO PROVISION CONCERNING THE EFFECT OF THE WIFE'S REMARRIAGE.**

A. W. Va. Code Ann. § 48-6-203

The circuit court's decision that the wife's remarriage did not serve as a basis for the termination of the husband's spousal support obligation where both the parties' separation agreement and the final divorce judgment were silent as to the effect of remarriage is in direct contravention to the law of West Virginia and is contrary to the provisions of W. Va. Code Ann. § 48-6-203. Thus, by failing to properly apply the statutory requirements of § 48-

6-203, the circuit court fundamentally erred in reversing the correct decision of the family court. The proper resolution of the present case is dependent on the statutory provisions of W. Va. Code Ann. § 48-6-203.

In general, where parties execute a separation agreement that is found by the court to be fair and reasonable, the court should conform its decision to the provisions of such an agreement. W. Va. Code Ann. § 48-6-201; *see also Preece v. Preece*, 195 W. Va. 460, 465 S.E.2d 917 (1995) (likewise recognizing that a court should conform its order in accordance with the provisions of a fair and reasonable separation agreement). This rule applies to both written and, as in the present case, oral separation agreements. *Squirts v. Squirts*, 201 W. Va. 30, 32-33, 491 S.E.2d 30, 32-33 (1997).

In keeping with the statutory requirement that a court conform a final divorce order to the spousal support provisions of a fair and reasonable separation agreement, W. Va. Code Ann. § 48-6-203 also requires a court to examine the support provisions of a separation agreement to determine whether it provides that support should survive the remarriage of the payee spouse. This statute reads as follows:

When a separation agreement is the basis for an award of spousal support, the court, in approving the agreement, shall examine the agreement to ascertain whether it clearly provides for spousal support to continue beyond the remarriage of the payee or to cease in such event. When spousal support is to be paid pursuant to the terms of a separation agreement which does not state whether the payment of spousal support is to continue beyond the remarriage of the payee or is to cease, or when the parties have not entered into a separation agreement and spousal support is awarded, the court shall have the discretion to determine, as a part of its order, whether such payments of spousal support are to be continued beyond the remarriage of the payee. In the event neither an agreement nor an order makes provision for the remarriage of the payee, spousal support other than rehabilitative spousal support or spousal

support in gross shall cease on the remarriage of the payee. Rehabilitative spousal support does not cease upon the remarriage of the payee during the first four years of a rehabilitative period. In the event neither an agreement nor an order makes provision for the remarriage of the payee, spousal support in gross continues beyond the payee's remarriage.

W. Va. Code Ann. § 48-6-203.

As of this date, this Court has not had the occasion to address the scope of § 48-6-203.

However, as to its application in the present case, the correct result is clear—where neither the parties' separation agreement nor the final divorce order makes any provision for the effect of the remarriage of the wife, then the husband's support obligation terminates upon the wife's remarriage. This result is necessarily mandated by the unequivocal language in the statute that "[i]n the event neither an agreement nor an order makes provision for the remarriage of the payee, spousal support . . . *shall cease* on the remarriage of the payee." *Id.* (emphasis added). The effect of this provision is to establish a default rule that, unless the parties to a separation agreement or the court take affirmative steps to hold otherwise, a payor spouse's support obligation *shall cease* upon the payee spouse's remarriage. This effect is similar to that found in W. Va. Code Ann. § 48-6-201(b), which provides that spousal support awards will always be subject to modification "unless there is some explicit, well expressed, clear, plain and unambiguous provision to the contrary" contained in either a divorce order or a separation agreement. However, the circuit court erroneously chose to ignore this express language in the statute. Thus, the order of the circuit court is in direct conflict with the provisions of § 48-6-203.

A thorough review of the circuit court's opinion clearly reveals that the circuit court utterly failed to acknowledge the above-quoted language from § 48-6-203 mandating that spousal support ceases where neither a separation agreement nor an order provide for the effect of the remarriage of the payee spouse. Instead, the circuit court focused its analysis of § 48-6-203 on the requirement that a court approving a separation agreement shall examine it to ascertain whether it provides for support to continue beyond the remarriage of the payee spouse. (Fin. Order at 3.) The circuit court also focused on a court's discretion to determine whether support should continue past remarriage in absence of any such provision in the agreement. (Fin. Order at 3.) Based on its selective reading of § 48-6-203, the circuit court concluded that the parties only intended that the husband's spousal support obligation cease upon the death of either party because the final divorce order did not address the effect of the wife's remarriage. The circuit court concluded that the silence of the final divorce order necessarily meant that the family court had considered whether support should terminate upon the wife's remarriage and rejected this position. The circuit court's erroneous holding reads as follows:

What this Court can deduce from its review of the record is that the parties reached a definite, certain and bargained for agreement. As a part of that agreement, the Petitioner agreed to pay the Respondent a certain amount of spousal support until the death of either party. This award of spousal support was ratified by the Family Court in its Final Order of Divorce, which also states that the spousal support is to cease upon the death of either party. Since, pursuant to *W. Va. Code* §§48-6-202–203, the Family Court had the discretion to determine, as part of its final order, whether spousal support was to cease upon either the remarriage of the payee spouse or the death of the payor or payee, and the Family Court's Final Order of Divorce made only a provision of cessation of the spousal support upon the death of either party, this Court **FINDS** that both the agreement and the order contemplated the remarriage of

the payee, but chose only to cease payment on the death of either party and not upon the remarriage of the respondent. Therefore, this Court **FINDS** that the spousal support obligation of the Petitioner was to continue beyond the remarriage of the Respondent.

(Fin. Order at 4.)

It is clear from the circuit court's decision that it made the fatal error of presuming that the family court's order indicates that it contemplated the wife's remarriage and determined that such an event should not terminate the husband's support obligation. However, in order to reach such a conclusion, the circuit court must necessarily ignore the fact that while the family court certainly had the discretion to make a provision for the effect of the wife's remarriage, it clearly did not choose to exercise that discretion as evident from the lack of any provision in the final divorce order. Thus, the circuit court's conclusion is not permissible under the language of § 48-6-203. There is no requirement that after a court examines an agreement to ascertain whether it provides for spousal support to continue beyond the remarriage of the payee spouse that it render any decision thereon. Instead, the statute only states that the court "shall have discretion" but there is no requirement that a court exercise it.

Furthermore, if the circuit court's interpretation of § 48-6-203 is given credence, then the statutory language concerning what happens if both the separation agreement and the divorce decree fail to make any provision for the effect of the remarriage of the payee spouse is rendered superfluous. If, as the circuit court effectively held, the statute's provision that a court has discretion to make a provision for the effect of the payee spouse's remarriage if no such provision is contained in a separation agreement was actually mandatory, the

situation addressed by the later portion of the statute, i.e., where neither the separation agreement or the court order make any provision for remarriage, could never arise. Instead, under the circuit court's interpretation, any silence on the part of a court would be presumed to mean that the court found that remarriage should never operate to terminate a support award. Such an interpretation is impermissible under the well-settled rules of statutory construction. As this Court has repeatedly held, the Legislature will not be presumed to have enacted a meaningless or useless statute. Instead, "every word used is presumed to have meaning and purpose, for the Legislature is thought by the courts not to have used language idly." *Baker v. Board of Educ., County of Hancock*, 207 W. Va. 513, 517, 534 S.E.2d 378, 382 (2000). As the circuit court's interpretation of the statute would render a portion of § 48-6-203 meaningless, such an interpretation cannot be allowed to stand.

In addition, there is no support in the record for the circuit court's conclusion that both the parties' separation agreement and the final divorce order contemplated the remarriage of the wife, but chose not to have such an occurrence serve as a basis to terminate the husband's support obligation. As is evident from the transcript of the final hearing in the parties' divorce case, there was no consideration given to the effect of the wife's subsequent remarriage on the husband's support obligation. The husband was questioned by the wife's attorney concerning his understanding of the parties' agreement and its spousal support provisions.

Q. Is it also true that beginning with the month of January 1st of 2003 to let us get the paperwork done, beginning with January 1, 2003 you will pay her the sum of eighteen hundred dollars (\$1800.00) alimony, permanent alimony to her. Is that correct?

A. Yes.

Q. And that eighteen hundred dollars (\$1800.00) will be paid to her every month beginning with January of 2003 and continuing until her death or your death. Is that correct?

In other words, if you should die you will be no longer obligated to pay it and if she should die of course she doesn't get it. Is that correct?

A. Yes.

(2002 Tr. at 7-8.) Although not asked specifically about any provision in the parties' agreement, the wife was subsequently asked by her attorney if the husband's testimony accurately reflected the parties' agreement. (2002 Tr. at 7-8.) The wife acknowledged that it did. (2002 Tr. at 7-8.) These exchanges between the parties and the wife's attorney represent the only evidence in the record as to what was contemplated by the parties when they entered their agreement. It is indisputable that at no point did the parties express any indication that they had contemplated the effect of the wife's remarriage and decided in any way what effect it should have.

There is likewise nothing in the final divorce order that supports the circuit court's conclusion that they chose not to have the husband's support obligation cease upon the wife's remarriage. The parties' agreement as to the husband's spousal support obligation was made a part of the family court's final divorce order. The portion of that order setting forth the husband's support obligation reads as follows:

1. The Petitioner, James Robert Evans, Jr., shall pay the sum of One Thousand Eight Hundred (\$1,800.00) per month to the Respondent, Sharon Rose Evans, for her support and maintenance commencing January 1, 2003, and continuing each succeeding month thereafter until the death of either party. Further, the Petitioner, James Robert Evans, Jr., shall pay the sum of

Two Thousand Dollars (\$2,000.00) to the Respondent, Sharon Rose Evans for the months of November and December, 2002.

(Fin. Order at 3.) Much like the parties' testimony, the family court's order is also completely devoid of any provision for the effect of remarriage or even any indication that the family court intended to make such a provision..

Despite the findings made by the circuit court, the parties' testimony and the final divorce order conclusively establish that while the parties did consider the effect of his death on his obligation, there is no evidence that, as the circuit court contends, the parties ever even intended to make a provision for the effect of the wife's remarriage on the husband's support obligation. Thus, the circuit court erred in reversing the family court's decision to terminate the husband's support obligation made in accordance with W. Va. Code Ann. § 48-6-203.

**B. W. Va. Code Ann. § 48-6-202**

Although this Court has not had the occasion to address the scope of § 48-6-203, this Court has offered some guidance on the proper resolution of the present case as this Court has had the opportunity to address the scope of § 48-6-202. These two statutes are almost exact duplicates of each other and contain substantially similar provisions. The only chief difference between §§ 48-6-202 and 48-6-203 is that § 48-6-203 involves agreements for spousal support beyond the remarriage of the payee and § 48-6-202 involves agreements for spousal support beyond the death of the payor. In keeping with the practically identical provisions of both statutes, § 48-6-202 contains a similar default rule found in § 48-6-203 that in the event that neither a divorce judgment or separation agreement provides for the

effect of the death of the payor spouse, then the payor spouse's support obligation will cease upon his or her death. The relevant portion of W. Va. Code Ann. § 48-6-202 reads as follows:

In the event neither an agreement nor an order makes provision for the death of the payor or payee, spousal support other than rehabilitative spousal support or spousal support in gross shall cease on the death of the payor or payee.

See W. Va. Code Ann. § 48-6-203 ("In the event neither an agreement nor an order makes provision for the remarriage of the payee, spousal support other than rehabilitative spousal support or spousal support in gross shall cease on the remarriage of the payee.").

While the default rule of § 48-6-203 has not yet been addressed by this Court, this Court did address the similar provision under § 48-6-202 in *Braleley v. Hunt*, 213 W. Va. 764, 584 S.E.2d 906 (2003). In *Braleley*, the parties entered into an agreement that the husband would pay spousal support to the wife for the rest of her life regardless of whether she remarried. The parties' agreement did not, however, address the effect of the husband's death on this support obligation. Although not contained in the parties' divorce decree, this agreement was reflected in a subsequent consent order which provided that the husband would pay spousal support "for the remainder of [the appellee's] life or until the monies in a trust fund set aside for her benefit has been exhausted, and shall continue even in the event of the remarriage of [the appellee]." 213 W. Va. at 766, 584 S.E.2d at 908.

The main thrust of this Court's decision in *Braleley* was whether the husband was permitted to modify his support obligation. However, this Court noted in a footnote that although the parties had agreed that the husband's support obligation would survive the wife's

remarriage, the court found that it would not survive the death of the husband where both the parties' agreement and the relevant order were silent on this point. This Court specifically based this conclusion on the default rule established in W. Va. Code Ann. § 48-6-202.

We observe that because the parties' agreement and the court's order do not provide for the general spousal support obligation in question to continue beyond the death of the appellant, the principles embodied in *W.Va.Code*, 48-6-202 [2001] dictate that such support obligation will cease upon the appellant's death.

213 W. Va. at 766 n.1, 584 S.E.2d at 908 n.1..

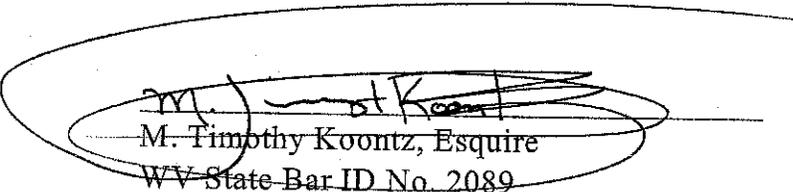
In *Braley*, this Court found that § 48-6-202 required that since no provision was made concerning the continuation of support after the death of the husband, then his support obligation would necessarily cease by operation of the statute at that time. The facts of *Braley* present the mirror image to the facts in the present case. In *Braley*, the parties' separation agreement and the court order provided that the husband's support obligation would survive the remarriage of the wife while it made no provision concerning the death of the husband. The opposite is true in the present case. However, the reasoning applied by this Court in *Braley* should control the outcome of the present case involving the substantially similar provisions found in § 48-6-203. As neither the parties' separation agreement nor the final divorce order provided for the husband's spousal support obligation to survive the remarriage of the wife, the operation of § 48-6-203 requires that his support obligation cease at that time.

**CONCLUSION AND PRAYER FOR RELIEF**

For the foregoing reasons, the husband respectfully requests this Honorable Court reverse the order of the circuit court and affirm the family court order terminating the husband's spousal support obligation because of the wife's remarriage.

Respectfully submitted,

JAMES ROBERT EVANS JR.  
Appellant-Petitioner below



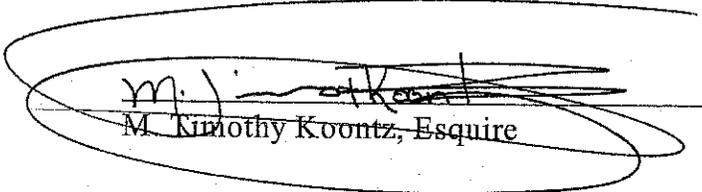
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## CERTIFICATE OF SERVICE

The undersigned herein certifies that he has served a true and correct copy of the foregoing Petition for Appeal by United States mail, first-class postage prepaid, on this the 5<sup>th</sup> day of April 2006, to the following counsel of record addressed as follows:

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