

CASE NO.: \_\_\_\_\_

**SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**CHARLESTON, WEST VIRGINIA**

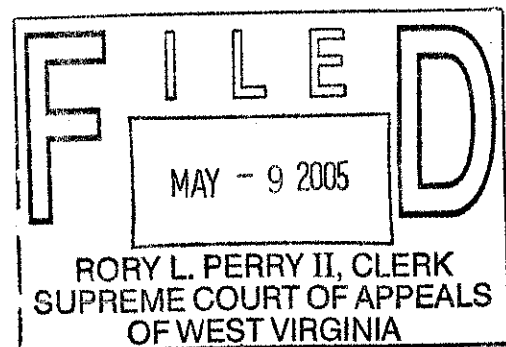
**DOUGLAS D. COTTRILL and PATRICIA A. COTTRILL**  
Petitioner Respondent

**APPELLANT'S BRIEF FROM JUDGEMENT**  
**OF DECEMBER 14, 2004 FROM THE CIRCUIT COURT**  
**OF MARION COUNTY, WEST VIRGINIA**  
**AND**  
**OF NOVEMBER 3, 2004 FROM THE FAMILY COURT**  
**OF MARION COUNTY, WEST VIRGINIA**

**CASE NO. 80-C-385-4**

**Brief Prepared By:**

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Threese Elaine T. v. Wavey Glenn G., \_\_\_ W. Va. \_\_\_, \_\_ S.E. 2d \_\_ (No. 29683,2001)..9

CASE NO.: \_\_\_\_\_

**SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**CHARLESTON, WEST VIRGINIA**

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DOUGLAS D. COTTRILL,  
Petitioner,

vs.

HARRISON COUNTY CIVIL ACTION NO. 80-C-385-4

PATRICIA A. COTTRILL (now FAGAN),  
Respondent.

**BRIEF OF PETITIONER, DOUGLAS D. COTTRILL**

**TO HONORABLE JUSTICES OF  
THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

NOW COMES the Petitioner, by Counsel, Michael F. Niggemyer, Attorney at Law appearing *pro bono publico*<sup>1</sup>, and Petitions this Honorable Court to reverse the Order Resolving Contempt Issue entered on December 14, 2004, by the Family Court of Harrison County. On the 27<sup>th</sup> day of October, 2004, the Family Court of Harrison County, the Honorable M. Drew Crislip presiding, heard testimony concerning a Petition for Contempt filed by the Bureau of Child Support Enforcement (hereinafter, "CSE"). Petitioner appeared *pro se*, CSE appeared by the Child Advocate-Attorney, and Respondent was permitted to appear and testify telephonically. The issue in said matter concerned an alleged arrearage of child support in the alleged amount of Forty Thousand Dollars (\$40,000.00) accrued from 1980 through 1994, along with subsequent interest.

Ultimately, the Family Court found an arrearage of \$7190.00, accrued from January 1, 1987 to September 30, 2004, with additional interest of \$2,314.25, to be added if the lesser amount was not paid by May 2, 2004. In ordering said arrearage, the Court noted: "The defense of the Statute of Limitations has not been raised by Douglas D. Cottrill, and the court does not do so now." From said order and finding, Petitioner seeks an appeal.

I. KIND OF PROCEEDING AND NATURE OF THE RULING

This appeal results from a domestic relations child support enforcement action, most recently set-down based upon a Petition for Contempt filed on January 26, 2004, and originally heard by the Honorable M. Drew Crislip in the Family Court of Harrison County, and considered on a Petition for Appeal, which was summarily denied, by Thomas A. Bedell in the Circuit Court of Harrison County.

The Family Court ruled that there was an arrearage of child support, although it was much less than prayed for by the Bureau of Child Support Enforcement. More importantly, the Family Court ruled that said arrearage accrued from January 1, 1987 to September 30, 2004, a period beginning over 17 years before the Petition was filed. The Court recognized that a statute of limitations issue exists, but the Court refused to address that issue otherwise.

II. FACTS OF THE CASE

A. PROCEDURAL HISTORY

The Parties were previously married and obtained a decree of divorce in 1980. Said decree called for the Petitioner to pay the Respondent Sixty Dollars per child for each of the parties' three children. In 1988, just after the start-up of the then newly created Child Advocate's Office, the Child Advocate sought and obtained an order of income withholding against the Petitioner. Despite the present allegations of over Forty Thousand Dollars (\$40,000.00) in uncollected back-child support, dating back to 1980, the Child Advocate took no further legal action during the subsequent fifteen years until the present Petition for Contempt was filed on or about January 26, 2004. A hearing was

set in the matter in the Spring of 2004. However, when Respondent failed to appear to testify, the Court granted CSE a continuance, but announced that if the Respondent failed to appear again, he would dismiss the action. Subsequently, on October 27, 2004, Respondent was permitted to appear telephonically. Petitioner appeared *pro se* in that litigation and the Family Court found and ordered a total arrearage of over Nine Thousand Five Hundred Dollars, which accrued beginning on January 1, 1987. The Court noted the Statute of Limitations issue, but refused to address the matter. The Petitioner, acting *pro se*, filed a Petition for Appeal to the Circuit Court which was summarily denied without oral argument, resulting in this appeal.

#### B. UNDERLYING FACTS

As a result of the parties' divorce proceeding in 1980, Patricia Cottrill gained custody of the Parties' three children, Kim now 38 years old (D.O.B. 2/14/67), Kevin now 32 years old (D.O.B. 9/15/72), and Jessica now 28 years old (D.O.B. 10/10/76). There was an order for child support in the amount of sixty dollars (\$60.00) per child and Petitioner utilized a right to have regular and frequent visitation with his children and two of the children even resided with Petitioner at times after the divorce. Petitioner contends that he paid his support obligations by various means which were proper and legally acceptable at that time, in the late 1980's and early 1990's, just after the Child Advocate's Office was created. Apparently, Respondent Patricia Cottrill received public assistance at times subsequent to the divorce which resulted in the Bureau of Child Support's (hereinafter, "CSE") involvement in this matter, after CSE came to exist in 1987. The CSE first appeared in 1988 in order to obtain an order for income withholding and, despite the present allegation of a significant arrearage in child support payments,

CSE never appeared again until this most recent Petition was filed in late-January of 2004. Petitioner was never previously aware that this litigation would occur since his children are all in their late twenties through late thirties. Petitioner is a 60 year old disabled Vietnam War Veteran living on a very limited income from his Veteran's disability benefits alone.

### III. ASSIGNMENTS OF ERROR

A. Whether a Family Law Judge, having recognized a clear legal defense such as a ten-year statute of limitations, be required to point-out the issue or aid a *pro se* litigant in addressing said issue, given that the right to appear *pro se* in a family court proceeding, in particular, is paramount and a constitutionally protected right, so that a Court has a duty to aid the *pro se* litigant.

B. Whether a State Agency (such as the Division of Child Support Enforcement) abuses its power by pursuing a cause of action that is generally-clearly barred by a legal defense, such as a statute of limitations.

IV. POINTS AND AUTHORITIES RELIED UPON  
STATUTES AND CONSTITUTIONS

West Virginia Code, Sections 38-3-18 & 38-3-19 .....8  
West Virginia Constitution, Art. III, Section 17 .....9

CASE LAW—WEST VIRGINIA

State ex rel. Dillon v. Egnor, 188 W.Va. 221, 423 S.E.2d 624 (1992).....9  
Threese Elaine T. v. Wavey Glenn G., \_\_\_ W.Va. \_\_, \_\_ S.E. 2d \_\_ (No. 29683,2001)..9

## 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, the Court reviews 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. Questions of law, such as in the instant matter, are reviewed *de novo*.

## VI. DISCUSSIONS OF LAW AND FACTS

A. Whether a Family Law Judge, having recognized a clear legal defense such as a ten-year statute of limitations on the underlying action, should be required to point-out the issue or aid a *pro se* litigant in addressing said issue, given that the right to appear *pro se*, particularly in a family court proceeding, is paramount and a constitutionally protected right, so that a Court has a duty to aid the *pro se* litigant.

This matter arose directly from a child support enforcement action, dated January 26, 2004, and brought by the State of West Virginia-Bureau of Child Support Enforcement (hereinafter, "CSE"), which originally alleged that the Petitioner owed Forty Thousand Dollars (\$40,000) in child support arrearages dating back to 1980 – twenty-four (24) years before the Petition was filed. Extraordinarily, the Child Advocate did not exist until 1987, and, therefore, CSE has no records to support said allegations. In fact, the entire CSE case was based upon its own absence of any record that Defendant/Petitioner had paid support, supplemented by the testimony of Plaintiff Patricia A. Cottrill (now Fagan), which testimony was found by the Court to be "inconsistent". Petitioner submits that he generally paid his child support payments, by various legal means at that time, and that no arrearage exists.

Notably, at the time of a prior hearing, the Family Court announced that if Ms. Fagan did not appear at the subsequent hearing, the matter would be dismissed. Instead, the Court accepted Ms. Fagan's claim of medical problems and allowed her to testify telephonically, even though her credibility, versus the credibility of the Petitioner, was the key issue in this matter.

It is also interesting to note that even though the Court recognizes that CSE did not exist prior to 1987, the Court found that certain monies intercepted from Petitioner's income would have been intercepted prior to 1987. Of course, CSE obtained an order to intercept monies from Petitioner's income, but it did not do so in this case until 1988. Obviously, the Family Judge's conclusion in this regard was also erroneous.

Regardless, throughout the hearing, the Petitioner argued that he had paid the support payments, but due to the passage of time and circumstances, he was now unable to provide the documentation or proof that he had made said payments. Among the issues raised, was the fact that Petitioner's home had caught fire and burned all of his financial records. Essentially, even though the *pro se* Petitioner raised the issue that the passage of time was problematic to his defense, he was not knowledgeable enough about the law in order to utter the magic phrase, "statute of limitations".

As a result, the Court ultimately found that "The defense of Statute of Limitations has not been raised by Douglas D. Cottrill, and the court does not do so now." See, Order Resolving Contempt Issue, at Para. 10. Of course, a ten year statute of limitations applies to actions to collect child support arrearages. See, West Virginia Code §§ 38-3-18 and 38-3-19. It is not clear whether or not a shorter statute of limitations might apply to an action for contempt. But, the Court made no ruling on contempt in this action.

This Court has repeatedly found that a person has a right under West Virginia Constitution, Art. III, §17 to appear *pro se*. State ex rel. Dillon v. Egnor, 188 W.Va. 221, 423 S.E.2d 624 (1992). This Court has also noted that this fundamental right must be preserved thus requiring that a trial court must make “reasonable accommodations to assist the *pro se* litigant in negotiating the labyrinth of legal proceedings.” Id. At 227, 423 S.E.2d at 630.

The instant case is very much analogous to Threecer Elaine T. v. Wavey Glenn G., \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 29683, 2001). In Threecer, the *pro se* Respondent denied paternity and made reference to the fact that he would desire genetic testing. Nevertheless, because the *pro se* Respondent had not formally filed an answer or otherwise formally insisted upon the genetic testing, the Circuit Court found paternity in the Respondent. On appeal, this Court found that based upon the Respondent’s mere reference to genetic testing, the Circuit Court should have ordered genetic testing *sua sponte*.

Similarly, in the instant case, the Petitioner made reference to his frustration that he would have been able to present more evidence if not for the loss of certain documents with the passing of time, and how long ago it had been since he had been required to pay regular support. Extraordinarily, the Family Court even recognized the issue based upon these statements or assertions. However, since Petitioner had failed to formally raise or utter the magic phrase, to wit: “statute of limitations”, the Court refused to address said issue.

Therefore, this matter should be remanded to the Family Court in order for the Court to make a finding commensurate the ten year statute of limitations applicable to this action.

B. Whether a State Agency (such as the Bureau of Child Support Enforcement) abuses its power by pursuing a cause of action that is generally-clearly barred by a legal defense, such as a statute of limitations.


If a private litigant asserts a cause of action against a defendant, knowing that said action is time-barred by a statute of limitations, it would be malicious prosecution subject to a counterclaim for damages. Of course, it is difficult to "sue the King". Therefore, one is entitled to utilize the remedy of a Writ of Prohibition or Writ of Mandamus to fend-off such abusive and costly actions that otherwise waste valuable resources of both litigants and the courts. Likewise, Courts can order the subject agency to pay the victims of the abuse their attorney fees. Therefore, it is prayed that this Court notify the Bureau of Child Support Enforcement that it is subject to sanctions and the levying of costs or attorney fees for abusing its power by asserting claims that are time-barred, and that the Petitioner in this matter be awarded these remedies.

#### VII. PRAYER FOR RELIEF

WHEREFORE, based upon the foregoing, Petitioner prays that this Honorable Court remand this matter to the Family Court of Harrison County to reconsider and apply the statute of limitations appropriately to recalculate Petitioner's child support arrearage, if any. (It appears that there may be an arrearage within the statute of limitations for eight months or \$480.00.)

Petitioner prays that he be awarded his attorney fees, costs and expenses for having to pursue this appeal to this Court, and any other remedy later found necessary or deemed appropriate by the Court.

Respectfully Submitted,  
Douglas D. Cottrill,  
By Counsel,



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Michael F. Niggemeyer, State Bar #5565  
P.O. Box 5057  
White Hall, WV 26554  
304-363-3636

<sup>1</sup> The undersigned Counsel was compensated in the amount of one thousand two hundred dollars (\$1200.00) for the handling of this entire appeal, including expenses.

**CERTIFICATE OF SERVICE**

I, Michael F. Niggemyer, do hereby certify that on the 14<sup>th</sup> day of April 2005, a true and correct copy of the following:

1. Petition For Appeal, was served upon the following by United States Mail to the following address:

Daniel Calvert, Esquire  
BCSE Attorney  
P.O. Box 1877  
Clarksburg, WV 26302



Michael F. Niggemyer

**VERIFICATION/CERTIFICATION**

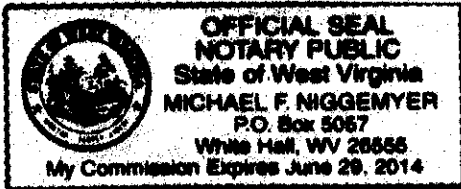
STATE OF WEST VIRGINIA

COUNTY OF Harrison, TO WIT:

Douglas Dr Cottrell  
I, ~~MICHAEL F. NIGGEMYER~~, Counsel for the Petitioner in the foregoing Petition for Appeal, does hereby certify and verify that the facts and allegations therein contained are faithfully represented and that they are accurately represented to the best of my ability.

x Douglas Dr Cottrell  
Michael F. Niggemyer

Taken, subscribed and sworn before me on this the 13<sup>th</sup> day of April, 2004<sup>5</sup>



[Signature]  
NOTARY PUBLIC

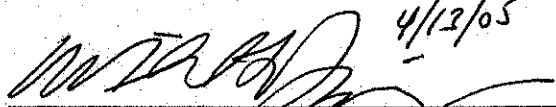
My commission expires: June 29, 2014

**VERIFICATION/CERTIFICATION**

STATE OF WEST VIRGINIA

COUNTY OF Harrison, TO WIT:

I, MICHAEL F. NIGGEMYER, Counsel for the Petitioner in the foregoing Petition for Appeal, does hereby certify and verify that the facts and allegations therein contained are faithfully represented and that they are accurately represented to the best of my ability.

 4/12/05  
\_\_\_\_\_  
Michael F. Niggemyer

Taken, subscribed and sworn before me on this the \_\_\_\_\_ day of \_\_\_\_\_, 2005

\_\_\_\_\_  
NOTARY PUBLIC

My commission expires: \_\_\_\_\_.