

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 32785**

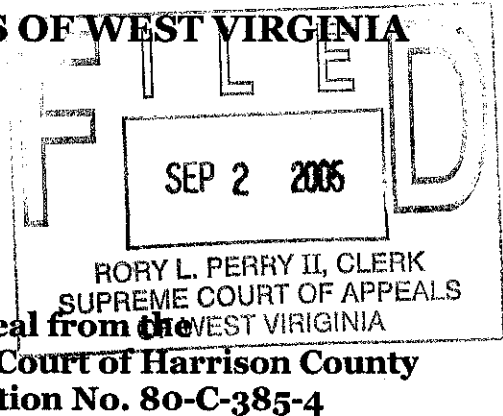
**PATRICIA A. COTTRILL (now FAGAN),  
Plaintiff Below/Appellee,**

**v.**

**DOUGLAS D. COTTRILL,  
Defendant Below/Appellant.**

**and**

**WV DEPARTMENT OF HEALTH AND HUMAN RESOURCES,  
BUREAU FOR CHILD SUPPORT ENFORCEMENT,  
Appellee.**



**RESPONSE BRIEF OF APPELLEE, BUREAU FOR  
CHILD SUPPORT ENFORCEMENT**

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### **Statement of Facts and Proceedings Below**

The civil action was instituted by divorce proceedings filed by Patricia Fagan. On September 2, 1980, the parties were divorced and custody of the three children was granted to Patricia Fagan, while Douglas Cottrill was ordered to pay \$60.00 per month per child commencing September 10, 1980.

The next court action was initiated in 1988 for the purposes of instituting income withholding. Douglas Cottrill appeared at the hearing. By Order of July 12, 1988, the Circuit Court ruled that support was to be collected by the BCSE (then Child Advocate Office) by income withholding. At that point, the findings of the Order recited that Douglas Cottrill owed arrears of child support in the amount of \$11,100.00 through April 1988. Thereafter, the BCSE attempted to collect by the issuance of income withholdings to the Veteran's Administration.

On January 29, 2004, Family Court Judge Crislip entered an Order to Show Cause why Douglas Cottrill should not be held in contempt of the Court's prior orders. At that hearing, the Court determined that no payment records were available from any party for the period prior to 1986. Because the BCSE was created in 1986, the Court granted the judgment based on the arrears accumulated from January 1, 1987, to September 30, 2004. Douglas Cottrill did not assert the defense of statute of limitations at that hearing or by prior pleading. Notwithstanding, the Court removed over six years of arrears owed by Douglas Cottrill.

Upon learning about the statute of limitations defense, Douglas Cottrill filed an appeal of the Family Court's Order of November 2, 2004, on that ground. The Circuit Court denied the appeal by Order of December 14, 2004, after complete review of the

video transcript and law related to the issue. The Circuit Court reiterated that the statute of limitations was not previously asserted by Douglas Cottrill. Finding no error of the Family Court in law or fact, the Circuit Court's Order recited the pertinent law upon which its decision was founded. Douglas Cottrill appeals from this Order.<sup>1</sup>

### **Standard of Review**

The Supreme Court of Appeals of West Virginia reviews the Circuit Court's final order and ultimate disposition under an abuse of discretion standard. Challenges to findings of fact are reviewed under a clearly erroneous standard. Conclusions of law are reviewed *de novo*. Shrader v. Shrader, 474 S.E.2d 579 (W. Va. 1996); Burgess v. Potterfield, 469 S.E.2d 114 (W. Va. 1996). *See also* Burnside v. Burnside, 460 S.E.2d 264 (W. Va. 1995).

### **Statement Regarding Alleged Errors**

The Order entered December 14, 2004, follows the pertinent statutory and case law established in the State of West Virginia relating to the duty of judges and pro se litigants. Said Order should be AFFIRMED.

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<sup>1</sup> The BCSE has no record of service of this appeal by Douglas Cottrill despite the certificate of service stating the same. Further, the BCSE has received no brief of Douglas Cottrill to date.

## Points and Authorities

W. Va. Const. Art. III § 17 (2004)

42 U.S.C.S. § 654 (2004)

45 C.F.R § 304.20 (2005)

W. Va. Code § 38-3-18 (2005)

W. Va. Code § 48-14-501 (2004)

W. Va. Code § 48-14-502 (2004)

W. Va. Code § 48-18-105 (2004)

W. Va. Code § 48-18-107 (2004)

W. Va. Code § 48-18-108 (2004)

Code of Judicial Conduct, Canon 3 B. (5) (2004)

W. Va. R. Civ. Pro. Rule 8 (2004)

W. Va. R. Civ. Pro. Rule 54 (2004)

Blair v. Maynard, 324 S.E.2d 391 (W. Va. 1984)

Burgess v. Potterfield, 469 S.E.2d 114 (W. Va. 1996)

Burnside v. Burnside, 460 S.E.2d 264 (W. Va. 1995)

Department of Health and Human Resources, Child Advocate Office ex. rel. Robert Michael B. v. Robert Morris N., 466 S.E.2d 827 (W. Va. 1995)

Heavner v. State Road Comm'n, 118 W. Va. 630 (1937)

Shaffer v. Stanley, 593 S.E.2d 629 (W. Va. 2003)

Shrader v. Shrader, 474 S.E.2d 579 (W. Va. 1996)

State ex rel. Dillon v. Egnor, 423 S.E.2d 624 (W. Va. 1992)

State ex. rel. Skinner v. Dostert, 278 S.E.2d 624 (W. Va. 1981)

State ex. rel. Threese Elaine T. v. Wavey Glenn G., 557 S.E.2d 306 (W. Va. 2001)

WV DHHR Employees Federal Credit Union v. Tennant, 599 S.E.2d 810 (W. Va. 2004)

## ARGUMENT OPPOSITION TO APPELLANT'S ASSIGNMENTS OF ERROR

### I. Whether a Family Court Judge has a duty to raise and summarily apply a legal defense, such as a ten-year statute of limitations, on behalf of a pro se litigant.

The Constitution of the State of West Virginia assures the citizens of access to the court system. W. Va. Const. Art. III § 17 (2004). It does not guarantee legal representation in the courts at any point. Litigants have the right to represent themselves before our courts, and it is a well settled principle in West Virginia law that *pro se* litigants are to be given reasonable accommodation by the Courts to assist them in "negotiating the labyrinth of legal proceedings." State ex rel. Dillon v. Egnor, 423 S.E.2d 624 (W. Va. 1992); see also, Blair v. Maynard, 324 S.E.2d 391 (W. Va. 1984). Further, the Court has ruled that,

When a litigant chooses to represent himself, it is the duty of the trial court to insure fairness, allowing reasonable accommodations for the pro se litigant so long as no harm is done to an adverse party . . . . Most importantly, the trial court must "strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules."

State ex rel. Dillon v. Egnor, 423 S.E.2d at 630, quoting Blair v. Maynard, 324 S.E.2d 391 (W. Va. 1984).

West Virginia law does provide that courts should make **reasonable** accommodations to *pro se* litigants if such accommodations can be made without resultant prejudice to adverse parties. Blair v. Maynard, 324 S.E.2d 391, 396 (W. Va. 1984) (emphasis added). The purpose of these accommodations is to ensure that the diligent *pro se* litigant does not forfeit any substantial rights by inadvertent omission or mistake. Blair, 324 S.E.2d at 396. However, this does not mean that "judges should

become surrogate attorneys for pro se litigants.” *Id.* 2

Douglas Cottrill, however, may not be considered a “diligent” pro se litigant. He now seeks to assert the statute of limitation in West Virginia Code § 38-3-18 (2005), which is the ten-year statute applicable to child support judgments.<sup>3</sup> Upon its recent review of this statute, the *Shaffer* Court did not remove the status of the statute of limitations as an affirmative defense under West Virginia Rule of Civil Procedure, Rule 8. *Shaffer v. Stanley*, 593 S.E.2d 629 (W. Va. 2003). Mr. Stanley raised the affirmative defense before the Family Law Master while the arrearage was being litigated. The Court ruled that Mr. Stanley’s assertion of the defense in Family Court was timely and sufficient. The Court emphasized the fact that Mr. Stanley did not waive his right to assert the defense by failing to assert it in response to an administrative action.

In contrast, however, Douglas Cottrill did not file any pleadings in response to the judicial action of the BCSE in the filing of a contempt petition, and he failed to raise the affirmative defense of the statute of limitations in the Family Court. He took no action whatsoever to assert the statute of limitations as a defense. Now, Douglas Cottrill raises the issue for the first time and wants this Court to say that the Family Court should have asserted that defense for him.

Douglas Cottrill asserts that the case of *State ex. rel. Threese Elaine T. v. Wavey Glenn G.*, 557 S.E.2d 306 (W. Va. 2001), supports this proposition. *Wavey Glenn G.* did

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2 In *Blair v. Maynard*, Myrtle Blair was repeatedly advised by the court to seek counsel but she proceeded pro se. Then, after a somewhat stressful opening argument and its resulting mistrial, the lower court attempted to prevent the self-representation of Myrtle Blair. She successfully petitioned this Court for a writ of mandamus to enforce that right.

3 Under West Virginia Code § 48-1-204 (2004), all unpaid, matured installments of child support required to be paid by an order entered or modified by a court of competent jurisdiction shall become decretal judgments.

not answer or appear before the Family Law Master for the paternity hearing, despite proper service. He timely filed exceptions to the Recommended Decision, prior to the entry of that default order by the Circuit Court, claiming that he was denied genetic testing. Wavey Glenn G. failed to appear for the exceptions hearing and the default order was entered by the Circuit Court. Then, he filed an appeal to this Court. This Court reversed the default Order and remanded the case for genetic testing based upon West Virginia Code § 48A-6-3 (now § 48-24-103), which specifically permitted a court to order genetic testing *sua sponte*. Contrary to the instant case, there is no statutory authorization regarding the assertion of the statute of limitations *sua sponte*.<sup>4</sup>

A *sua sponte* assertion of an affirmative defense would take the Family Court Judge far beyond the accepted realm of “reasonable accommodations” and into the forbidden territory of “surrogate attorney.” Clearly, instead of giving reasonable accommodation to the *pro se* litigant on the evidentiary and procedural rules as permitted by law, the Court would be stepping into the litigation, providing legal advice, as well as quasi-representation of one party to the detriment of the others. A court is not permitted to assert affirmative defenses for *pro se* litigants. Department of Health and Human Resources, Child Advocate Office ex. rel. Robert Michael B. v. Robert Morris N., 466 S.E.2d 827 (W. Va. 1995).

If a judge participates as an adversary, the parties are denied the right to an unbiased tribunal, a fundamental element of due process. The judge is a referee, like an official of a ballgame. Their duty is to require fair play by the parties. State ex. rel. Skinner v. Dostert, 278 S.E.2d 624, 635 (W. Va. 1981). Moreover, the Code of Judicial

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<sup>4</sup> It is well-settled that the law abhors a default. Wavey Glenn G. can further be distinguished on this basis.

Conduct demands that the judge perform all duties without bias or prejudice, further demanding that, “[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice....” Code of Judicial Conduct, Canon 3 B. (5) (2004). The commentary to this canon explains that, “A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.” *Id.* This makes it clear that the judge cannot raise defenses for *pro se* litigants; that would be unfair and would defeat the objectives of the judicial system.

“[T]he court must not overlook the rules to the prejudice of any party.” *Id.* Ultimately, it is the *pro se* litigant who must bear the responsibility for and accept the consequences of any mistakes and errors made. *Id.* Correctly, in the case at bar, the Family Court did not assume the role of an adversary to the BCSE or to Patricia Fagan, who was also appearing *pro se*. If *pro se* litigants are to ultimately be responsible for the mistakes and errors they make in the course of litigation, they are accordingly responsible for the consequences when, as here, they fail to specifically plead an affirmative defense. Otherwise, the Court would be tangled in competing interests when both parties appear *pro se*.

The application of the statute of limitations is not the straightforward and automatic matter that Douglas Cottrill presumes. Numerous conditions, if properly met, will toll the limitation period. A few examples are stated in West Virginia Code §§ 38-3-18, 55-2-8, 55-2-17, and 55-2-22. It necessarily follows from Douglas Cottrill’s argument that, if the Court should have raised the statute of limitations on his behalf, the Court should also assert all valid counter-arguments that could be raised on behalf

of the *pro se* obligee. The result is that the Court becomes mired in a stew of factual discovery, conflicts of law, and competing public policies. For these reasons, this Court has repeatedly refused to require trial courts to provide extraordinary assistance to *pro se* litigants.

In WV DHHR Employees Federal Credit Union v. Tennant, 599 S.E.2d 810 (W. Va. 2004), the appellant, Ms. Tennant, was sued in magistrate court by the credit union for an alleged breach of her credit card contract. In her *pro se* Answer, she requested a jury trial in the magistrate court. She filed *pro se* to remove the matter to the Circuit Court and then failed to attend a scheduling conference which had been noticed by the Circuit Court. Ms. Tennant also filed other various *pro se* pleadings and motions. The Circuit Court set the matter for a bench trial. When Ms. Tennant lost the bench trial, she filed a *pro se* appeal to the Supreme Court of Appeals, alleging among other things that she had been prejudiced by not receiving a jury trial.

The Tennant Court evaluated the court rules for the procedure to request a jury trial, noting that a different set of rules applies in each court. Although Ms. Tennant had properly requested a jury trial in the magistrate court, she did not make the request for jury trial after the removal to circuit court. Because she failed to file a demand for jury trial in the circuit court pursuant to the trial court rules, the *pro se* appellant, Ms. Tennant, was deemed to have waived that right. Further, she failed to raise the issue during the bench trial.

The Court found that “[s]imply because Ms. Tennant is a *pro se* litigant, does not bestow upon her the authority to completely evade the procedural rules of the circuit court.” Tennant, 599 S.E.2d at 816, fn. 10. The Supreme Court found that since the

record showed Ms. Tennant was fully aware but did not participate in the scheduling conference, she had effectively waived her right to a jury trial. Tennant, 599 S.E.2d at 817. Regarding this “raise or waive rule”, the Court cited State v. LaRock, 470 S.E.2d 613, 635 (W. Va. 1996), to explain that such rule prevents a party from making a conscious decision not to object, then assign it as error if the case is unsuccessful or using the omission to ensure a bad result. Hence, the application of the rule prevents a “second bite at the apple”.

In this appeal, Douglas Cottrill seeks a reversal and remand of the Circuit Court Order affirming the Family Court’s judgment of the arrears. A remand would allow Douglas Cottrill a second chance to assert the defense of statute of limitations, thus, a “second bite at the apple.” Such would be inherently unfair to the other parties to this action.

In the case of Department of Health and Human Resources, Child Advocate Office ex. rel. Robert Michael B. v. Robert Morris N., 466 S.E.2d 827 (W. Va. 1995), the support obligor was found to have failed to properly assert a similar affirmative defense, laches. The lower court asserted the laches defense *sua sponte*. When calculating reimbursement child support for the nine-year old child, the family law master believed that the applicable law limited reimbursement to the service of the complaint. On appeal by the mother, the Court determined that, pursuant to Rule 8, the father should have raised laches in his answer to the complaint as an affirmative defense, but failed to do so. Furthermore, he did not properly raise or prove the elements of the defense during the hearing. In reversing the lower court’s decision, the Court, citing Young v. Young, 460 S.E.2d 651 (W. Va. 1995), refused to allow the issue of laches to be litigated

upon remand at the lower court because of “the need for judicial economy in family issues, as well as because of the fundamental unfairness.” Because the defense of laches was not properly plead or proven, the lower court was ordered to issue an order for reimbursement support owed from the birth of the child. To do otherwise would have given the obligor a “second bite at the apple”.

The case before the Court is similar, in that Douglas Cottrill failed to raise the affirmative defense of the statute of limitation, either by pleading or oral argument. By his inaction, Douglas Cottrill, being without authority to evade the procedural rules of the Court, thus waived the right to assert the affirmative defense of the statute of limitations.

As set forth in Rule 8 of the West Virginia Rules of Civil Procedure, the statute of limitations is an affirmative defense which must be properly asserted before it can be applied. W. Va. R. Civ. Pro. Rule 8 (2004). In this case, the affirmative defense of statute of limitations was not properly asserted by Douglas Cottrill. As such, the Family Court’s failure to apply the statute of limitations to the child support was correct and supported by the law. *See Shaffer v. Stanley, supra.*

At the October 27, 2004, hearing, the BCSE presented its case for contempt and testimony of both Patricia Fagan and Douglas Cottrill was given. According to the records of the BCSE, Douglas Cottrill owed a total of \$40,349.09 in child support arrears as of December 31, 2003. Because the testimony of the parties conflicted on the issue of payments, the Family Court applied its discretion and determined that the judgment should not begin in 1980 but would commence with the records of the BCSE on January 1, 1987; thereby relieving Douglas Cottrill of over six years of support

arrears.

The statute of limitations is an affirmative defense, applicable only when properly raised by a litigant in defense of his or her case. In this case, Douglas Cottrill did not raise this defense. Douglas Cottrill filed no response to the contempt petition. In fact, he raised no defenses. Not until the entry of the Final Order of the Family Court cited the “statute of limitations” was any defense raised.

It bears repeating that the Tennant Court placed the responsibility on Ms. Tennant, the *pro se* litigant, to properly request a jury trial in the circuit court, despite a proper request in the magistrate court pleadings of the same case. In making that decision, the Court quoted Blair v. Maynard’s holding that “[t]his ‘reasonable accommodation’ is purposed upon protecting the meaningful exercise of a litigant’s constitutional right of access to the courts. Therefore, ultimately, the *pro se* litigant must bear the responsibility and accept the consequences of any mistakes and errors. [citations omitted].” Tennant, 599 S.E.2d at 816, quoting Blair, 324 SE2d at 396.

**II. Whether the Bureau for Child Support Enforcement abused its discretion in attempting to collect delinquent support in this case.**

No such allegation was asserted below. Accordingly, the Circuit Court made no findings about the actions of the BCSE. Thus, the BCSE asserts that said assignment of error is not properly before this Court; however, the BCSE will address the alleged error in the event that the Court deems the question appropriate for review.

Douglas Cottrill asserts that the BCSE should not have filed an enforcement action in this case due to the “clear” bar of the statute of limitations. He further seeks

sanctions against the BCSE and to be awarded costs or attorney fees.

The duty of the BCSE is to enforce court orders and collect child support. 42 U.S.C.S. § 654 (2004); W. Va. Code § 48-18-105 (2004). Further, the West Virginia Legislature has granted wide latitude to the BCSE in such endeavors. The BCSE is limited only by the enforcement remedies codified by the Legislature at West Virginia Code § 48-14-101 et seq. (2004).

In the instant case, the BCSE properly filed the contempt petition as permitted by statute. W. Va. Code § 48-14-501 (2004). In response to a petition or motion by the BCSE, Douglas Cottrill could have asserted the statute of limitations. The case law above shows that the statute of limitations is an affirmative defense to be properly asserted by the obligor and ruled upon by a court of law. While the law permits the BCSE to file petitions for contempt, it is the Court that ultimately determines the appropriateness of that filing. W. Va. Code § 48-14-502 (2004). In the absence of the obligor's assertion of the defense and the Court's application, there is no prohibition to the BCSE. In the present case, even if the Circuit Court had applied the statute of limitation, unpaid support would still be due, albeit a smaller amount than demanded in the BCSE's petition.

Courts can intervene to control the official acts of a State agency, like the BCSE, only when the State agency seeks to exceed its power or fails to perform mandatory duties. Heavner v. State Road Comm'n, 118 W. Va. 630, 634 (1937), citing State v. Shawkey, 80 W. Va. 638 (1917) (citations omitted). Because wide power is vested in the BCSE to enforce support orders, the Court should not interfere so long as the actions of the BCSE are not arbitrary, capricious, or fraudulent. *Id.* Based upon the existing

statutory and case law, the BCSE took no action which would amount to an “abuse of power.”

Regarding Douglas Cottrill’s request for attorney fees, the West Virginia Rules of Civil Procedure Rule 54 (d) assesses the costs of the proceeding against the non-prevailing party, stating that “...costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State, its officers, and agencies shall be imposed only to the extent permitted by law.” W. Va. R. Civ. Pro. Rule 54 (d) (2004). The Bureau for Child Support Enforcement is an agency of the State. Further, West Virginia Code § 48-18-108 (d) (2004) states that “[n]o court may order the bureau for child support enforcement to pay attorney’s fees to any party in any action brought pursuant to this chapter.” Because domestic relations actions are established and effectuated pursuant to the provisions of Chapter 48, the BCSE cannot be ordered to pay attorney fees for Douglas Cottrill.

The West Virginia Legislature specifically addresses the expenditure of funds by the Bureau in West Virginia Code § 48-18-107. The Bureau’s monies “...shall be appropriated to the department and used exclusively, in accordance with appropriations by the Legislature, to pay costs, fees and expenses incurred, or to be incurred for the following purpose: The provision of child support services authorized pursuant to Title IV, Part D [42 USCS §§ 651 et seq.] of the Social Security Act and any further duty as set forth in this chapter....” W. Va. Code § 48-18-107 (b) (2004).

The Title IV-D services of the Bureau include the establishment of paternity and the establishment, collection, and disbursement of support. These requirements for the

State IV-D plan are found at 42 U.S.C.S. § 654 (2004).<sup>5</sup> Title IV-D activities are listed in detail at 45 C.F.R § 304.20 (2005). Payment of attorney fees is not included in the list. Because West Virginia Code § 48-18-107 (b) only allows expenditures by the Bureau for Title IV-D activities, the fees of Douglas Cottrill's attorney are not Title IV-D activities authorized by the Legislature to be paid by the Bureau.

### **Conclusion**

Would Douglas Cottrill assert that the judge should have asserted a mitigating defense for a driver if he was the injured party in a car accident personal injury suit? No, to assert such a defense for the driver would necessarily prejudice the case for the injured party. The request of Douglas Cottrill to require the Court to assert the statute of limitations *sua sponte* is no different. Simply, our legal system does not allow the judge to assert defenses for any litigant.

When dealing with *pro se* litigants, the judge has the duty "to supervise and control the proceedings to ensure fairness to all parties" while preserving the rights of the parties. Blair, 324 S.E.2d at 396. To assert the statute of limitations defense for a *pro se* litigant goes far beyond "reasonable accommodation" and would violate the Code of Judicial Conduct.

The assertion of the defense by the judge would greatly prejudice the other party and deprive the other party of the right to an unbiased tribunal. Based upon the decision of Tennant to require a *pro se* litigant to follow the trial court rules and request jury trial yet a second time, there seems no rationale for requiring a Court to assert

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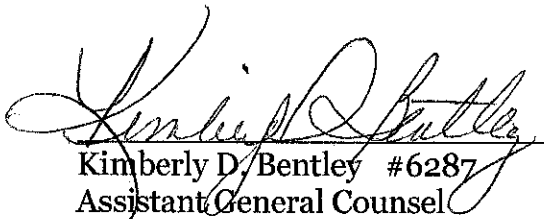
<sup>5</sup> West Virginia Code § 48-18-129 (2004) codifies the State's acceptance of the federal purpose and compliance with federal requirements and standards.

Douglas Cottrill's defense that was not mentioned even once in the Family Court. The rule requires the defense to be asserted and Douglas Cottrill did not. Further, the Court does not permit a "second bite at the apple". If the matter is not raised, then it is waived.

The BCSE believes the issue of attorney fees and sanctions is outside the scope of this appeal. Notwithstanding, the statutory and case law support the actions of the BCSE and prohibit the award of attorney fees.

WHEREFORE, the Bureau for Child Support Enforcement prays that the December 14, 2004, Order of the Circuit Court of Harrison County be AFFIRMED.

**Bureau for Child Support Enforcement,  
By Counsel**



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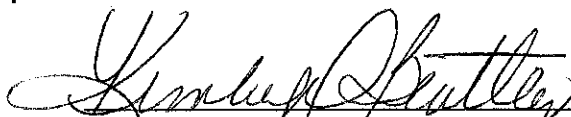
CERTIFICATE OF SERVICE

I, Kimberly D. Bentley, Assistant General Counsel, for the State of West Virginia Department of Health and Human Resources, Bureau for Child Support Enforcement, do hereby certify that a true copy of the hereto RESPONSE BRIEF OF APPELLEE, BUREAU FOR CHILD SUPPORT ENFORCEMENT was duly serviced upon the parties by delivering a true and correct copy of the same to them by REGULAR FIRST CLASS MAIL, postage prepaid, on this 1st day of September 2005, to the following addresses:

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