

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

In re: **SHELDA JEAN ROBINETTE**

No. 32668

No. 04-G-2

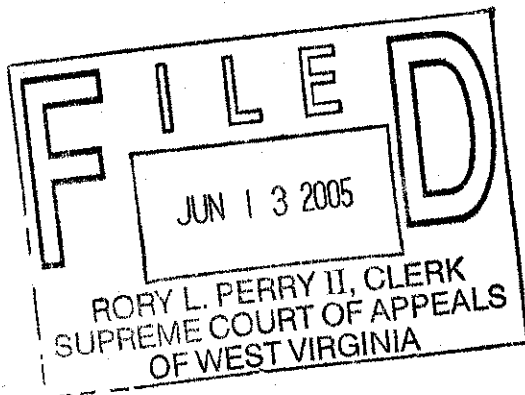
TYPE OF PLEADING:

**PETITIONER'S BRIEF IN SUPPORT
OF PETITION FOR APPEAL**

FILED ON BEHALF OF:

**Kathy R. Robinette,
Petitioner**

Timothy N. Logan, Esquire
WV ID No. 5421



Timothy N. Logan, Esq.
54 N. Richhill Street
Waynesburg, Pennsylvania, 15370
(724) 627-6026

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

In re: SHELDA JEAN ROBINETTE

No. 32668

No. 04-G-2

**PETITIONER'S BRIEF IN
SUPPORT OF PETITION FOR APPEAL**

COMES NOW, Appellant Kathy Robinette, by counsel, Timothy N. Logan, Esquire, and files the herein Brief in Support of Petition for Appeal, and in support thereof, avers the following:

Nature of Ruling in Lower Tribunal

By Order dated August 23, 2004, the Circuit Court of Tucker County found Shelda Jean Robinette to be a "protected person" as the same is defined under West Virginia Code § 44A-1-4 (Copy attached as Exhibit A). The Circuit Court of Tucker County also issued an Order dated November 17, 2004 and entered November 30, 2004 denying Petitioner Kathy Robinette's Petition to Revoke Guardianship/Conservatorship and Petition to Modify. (Copy attached as Exhibit B)

Statement of Facts

1. Appellant, Kathy Robinette, is the daughter of the protected person, Shelda Jean Robinette, and resides at 4870 Quarry Lane, Richmond, Ohio, 44143.
2. Shelda Jean Robinette had been deemed incompetent by Cuyahoga County Common Pleas Court in Case No. 2003 GDN 71928 B, on September 17, 2003. (Copy of the

Timothy N. Logan, Esq.
54 N. Richhill Street
Waynesburg, Pennsylvania, 15370
(724) 627-6026

Magistrate's Decision is attached as Exhibit C) Elizabeth Goodwin, Esq. was appointed the guardian of the person and the guardian of the estate of Shelda Jean Robinette in the State of Ohio.

3. Subsequent to the appointment of Elizabeth Goodwin, Esq. as guardian of the person and estate of Shelda Jean Robinette, Carla Robinette, sister of Appellant, moved Shelda Jean Robinette to Tucker County, West Virginia and filed a Petition to be Appointed Guardian and Conservator for Shelda Jean Robinette to which was attached an Evaluation Report of Licensed Physician/Psychologist dated August 25, 2003 by Ed. L. Rader, M.D. (Copy attached as Exhibit D1). A hearing was held on Carla Robinette's Petition on August 23, 2004.

4. At the time Carla Robinette moved Shelda Jean Robinette to Tucker County, West Virginia, she also transferred Twenty-Five Thousand Dollars (\$25,000.00) from Shelda Jean Robinette's account by having Shelda Jean Robinette sign a check for said amount without consulting with the Ohio guardian. (Trans., 8/23/2004, pp. 19-20) This action was fraudulent since Shelda Jean Robinette did not have the capacity or competency to sign a check on her own behalf.

5. Pursuant to the West Virginia Guardianship and Conservatorship Act, W.Va. Code § 44A-4-6, Appellant Kathy Robinette filed a Petition to revoke the appointment of Carla Robinette as guardian and conservator of Shelda Jean Robinette in West Virginia, that was heard by the Circuit Court of Tucker County on November 17, 2004.

6. Appellant sought to have Carla Robinette removed as guardian and conservator with said Petition because she had a felony record and because a guardian of the person

and guardian of the estate had already been appointed in Ohio, or/alternatively to have her bond increased to protect the entirety of Shelda Jean Robinette's estate, valued in excess of \$120,000.00 as per the testimony of Christopher W. Cooper, Esquire, Guardian ad Litem for Protected Person, Shelda Jean Robinette, Trans., August 23, 2004, p. 40.

7. Carla Jean Robinette's Thirty Thousand Dollar (\$30,000.00) cash bond was approved by the Court by Order dated October 22, 2004, which is sixty (60) days after the hearing on Carla Jean Robinette's petition. (Copy attached as Exhibit D)

8. At the time of the hearing, a Petition for Modification was filed by Appellant in light of the Thirty Thousand Dollar (\$30,000.00) bond that had been filed by Carla Robinette.

9. During the hearing held on Appellant Kathy Robinette's Petition for Revocation and Petition for Modification on November 17, 2004, the Hon. Andrew N. Frye responded to an inquiry by Timothy N. Logan, Esquire, counsel for Appellant, that he did not find Shelda Jean Robinette incompetent and specifically found her to be competent to testify at the prior proceeding held on August 23, 2004 .

MR. LOGAN: First of all, Your Honor, was I mistaken when you said that you didn't find Shelda Jean Robinette incompetent?

THE COURT: I did not. She was a competent witness. She even testified that she wanted this daughter right here to be her guardian and conservator. (*Referencing Carla Jean Robinette*)

MR. LOGAN: But doesn't a person have to be deemed incompetent before a guardian can be appointed?

THE COURT: No.

(Trans., November 17, 2004, p. 17).

10. The Court's Order also denied Appellant's Petition to Revoke the order appointing Carla Jean Robinette or to modify the Order to increase the bond.

Assignments of Error

1. The first basis for appeal is the statement made by Hon. Andrew N. Frye, Jr. during the hearing held on November 17, 2004 that the court did not find Shelda Jean Robinette to be incompetent and that she was competent to testify at the prior hearing held on August 23, 2004.
2. The second basis for appeal is the Circuit Court's failure to acknowledge the existence of an incompetent estate for Shelda Jean Robinette that had been created in Ohio by the Court of Common Pleas of Cuyahoga County, Ohio.
3. The third basis for appeal is the inadequacy of the Thirty Thousand Dollar (\$30,000.00) cash bond instead of a surety bond and the failure of Carla Jean Robinette to post said bond in a timely fashion.

Points of Authority

W.Va. Code § 27-11-1 (1992) (repealed)
W.Va. Code § 44A-1-4
W. Va. Code § 44A-1-7
W. Va. Code § 44A-1-12
W. Va. Code 44A-1-4(13)
W.Va. Code § 44A-1-9(b), (c)
W.Va. Code 44A-2-3
W.Va. Code 44A-2-4
W.Va. Code 44A-2-9(d), (e)
W.VA. Code 44A-4-6
Carr v. Carr, 180 W.Va. 12, 375 S.E.2d 190 (1988)
LeSueur, Admx v. Robinson, et al., 53 Ohio App. 3d 9, 557 N.E. 2d 796, 1988
Ohio App. LEXIS 2987
State ex rel. Ravitz v. Fox, 166 W.Va. 194, 273 S.E.2d 370 (1980)
State ex rel. Shamblin v. Collier, 191 W.Va. 349, 445 S.E.2d 736 (1994)

Argument

1. **The first basis for appeal is the statement made by Hon. Andrew N. Frye, Jr. during the hearing held on November 17, 2004 that the court did not find Shelda Jean Robinette to be incompetent and that she was competent to testify at the prior hearing held on August 23, 2004.**

Appellant Kathy Robinette contends that the Court was in error by denying the request to revoke the appointment of Carla Jean Robinette as guardian of the person and conservator for Shelda Jean Robinette. The first basis for appeal is the statement made by Hon. Andrew N. Frye, Jr. during the hearing held on November 17, 2004 that the court did not find Shelda Jean Robinette to be incompetent and that she was competent to testify at the prior hearing held on August 23, 2004 at which time Judge Frye issued an order finding Shelda Jean Robinette to be a "protected person" under the statutory definition. (Trans., 11/17/2004, p. 17) "Protected person" is defined as

an adult individual, eighteen years of age or older, who has been found by a court, because of mental impairment, to be unable to receive and evaluate information effectively or to respond to people, events, and environments to such an extent that the individual lacks the capacity: (A) To meet the essential requirements for his or her health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian; or (B) to manage property or financial affairs or to provide for his or her support or for the support of legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment, alone, will not be considered sufficient evidence that the individual is a protected person within the meaning of this subsection.

W. Va. Code § 44A-1-4(13).

If the Court did not find Shelda Jean Robinette to be incompetent, it is questionable whether the finding that she met the definition of a "protected person" would be valid. In order to find Shelda Jean Robinette to be a "protected person", she must be found, because of a mental impairment, "to be unable to receive and evaluate information effectively or to respond to people, events and environments to such an extent that the [she] lacks the capacity: (A) To meet the essential requirements for...her health, care, safety, habilitation, or therapeutic needs without the assistance or protections of a guardian; or (B) to manage property or financial affairs or to provide for...her support...without the assistance or protection of a conservator." W. Va. Code § 44A-1-4(13).

Appellant argues that such a finding of "protected person" status is equivalent to a finding of incompetency and as such, the Court's statement that it did not find Shelda Jean Robinette to be incompetent voids the Court's finding Shelda Jean Robinette to be a "protected person" under the Act. In *State ex rel. Shamblin v. Collier*, 191 W.Va. 349, 445 S.E.2d 736 (1994), this Court examined what is required in order to make a finding of incompetency under W.Va. Code § 27-11-1 (1992). The Court recognized that said section was repealed by the passage of H.B. 4508 on March 12, 1994 which became effective June 10, 1994. Said statute is entitled the West Virginia Guardianship and Conservatorship Act. Nevertheless, the reasoning remains the same that there must be a finding of incompetency in order to deem a person a "protected person" under W. Va. Code § 44A-1-4(13).

In its determination, the lower Court failed to make adequate inquiry into the competency of Shelda Jean Robinette. The Court questioned Christopher W. Cooper, Esquire, Guardian ad

Litem, as to whether Mrs. Robinette wanted Carla Robinette to be her guardian and conservator, to which Mr. Cooper answered in the affirmative. (Trans., 11/17/2004, p. 39) Furthermore, the Court noted that no objection had been filed and that the report of Dr. Rader "indicates that Mrs. Robinette suffers from mild dementia but that it is in her best interest for a guardian and conservator to be appointed..." (Trans., 11/17/2004, p. 40). No further inquiry was made in regard to the adequacy or timeliness of Dr. Rader's report. As previously noted, said report was dated August 25, 2003, a full year prior to the hearing. West Virginia Code § 44A-2-3 lists the factors that must be included in the Evaluation Report of a licensed physician. Included in that list is

- (8) The date or dates of the assessments and examinations upon which the report is based.

W.Va. Code § 44A-2-3.

The Court was bound to make a finding whether Shelda Jean Robinette was a protected person for whom a guardian or conservator should be appointed based upon clear and convincing evidence.

- (d) The standard of proof to be applied in determining whether the alleged protected person is a person for whom a guardian or conservator should be appointed is clear and convincing evidence.

W.Va. Code § 44A-2-9(d). This Court has held that "because a finding of incompetency involves deprivation of an individual's exercise of liberty and property rights, a determination of incompetency under West Virginia Code § 27-11-1 cannot be summarily made; such a finding must be established though clear and convincing evidence. *State ex rel. Shamblin v. Collier*, 191 W.Va. 349, 354, 445 S.E.2d 736, ____ (1994). Said conclusion likewise should apply to a determination

of finding a person to be a "protected person" for whom a guardian or conservator should be appointed.

It is apparent that the inquiry into the mental status of Shelda Jean Robinette was summarily made and that the court did not make the required specific findings of fact and conclusions or law in support of said order as required by West Virginia Code § 44A-2-9(e). In light of the foregoing, and the Court of Common Pleas of Cuyahoga County, Ohio's Order dated September 12, 2003 finding Shelda Jean Robinette incompetent and appointing the applicant, Elizabeth A. Goodwin, Esquire as guardian of the person and estate of Shelda Jean Robinette, the Circuit Court of Tucker County's Order of November 30, 2004 Order denying Appellant's Petition for Revocation and Petition for Modification should be reversed and the August 25, 2004 Order finding Shelda Jean Robinette a protected person and appointing Carla Jean Robinette guardian and conservator should be revoked.

- 2. The second basis for appeal is the Circuit Court's failure to acknowledge the existence of an incompetent estate for Shelda Jean Robinette that had been created in Ohio by the Court of Common Pleas of Cuyahoga County, Ohio.**

The second basis for appeal is the Circuit Court's failure to acknowledge the existence of an incompetent estate for Shelda Jean Robinette that had been created in Ohio by the Court of Common Pleas of Cuyahoga County, Ohio. Under West Virginia Code § 44A-1-12, the Court should have appointed Elizabeth Goodwin, Esq. to serve as guardian and conservator as proffered to the Court by Ms. Goodwin during the August 23, 2004 hearing. Appointing a competing guardian and conservator in West Virginia when a guardian existed in Ohio serves no purpose. Additionally, the questionable actions of Carla Robinette (i.e., transferring the Twenty-five

Thousand Dollars (\$25,000.00) from Shelda Jean Robinette's account) and her felony record, support the argument that Elizabeth Goodwin, Esq. should have been appointed as guardian and conservator in West Virginia as well.

Moreover, the effectiveness of the Ohio order remains in spite of the entry of the Tucker County Circuit Court Order appointing Carla Robinette as guardian and conservator. Elizabeth Goodwin, Esq., as Ohio guardian of the estate, maintains possession and control of the assets of Shelda Jean Robinette as a fiduciary in Ohio. Carla Robinette, as West Virginia conservator for Shelda Jean Robinette, does not have any access to Shelda's assets absent seeking a Court order in Ohio directing Elizabeth Goodwin, Esq. to release said funds. Ms. Goodwin has made it clear that she believes it not to be in Shelda's best interests for Carla Robinette to have custody or control of Shelda's assets.

In light of the foregoing, The Circuit Court of Tucker County should have deferred acting on this matter until a resolution had been reached regarding the custody and control of Shelda's assets. To permit a family member to move an incapacitated person from one state to another and to seek a new finding of incompetency and guardianship without addressing an already existing order from the resident state of the incompetent is equivalent to forum shopping and should be barred by this Court as contrary to public policy.

Appellant could not find any caselaw in West Virginia on point with this issue. However, West Virginia Code § 44A-1-7 makes provision for the transfer of venue in the event circumstances dictate:

Timothy N. Logan, Esq.
54 N. Richhill Street
Waynesburg, Pennsylvania, 15370
(724) 627-6026

Following the appointment of a full or limited guardian or conservator or committee, the court with jurisdiction over the proceeding may, upon petition, order the transfer of jurisdiction to another circuit court in this state or to an appropriate tribunal in another state if it appears to the court that the interests of the protected person will be best served by such transfer. Upon the transfer, the court shall appoint a new guardian or conservator in the county assuming jurisdiction and shall discharge the original appointee.

West Virginia Code § 44A-1-7. While this provision addresses the situation where the proceeding is initiated in West Virginia, public policy would dictate that proceedings initiated in other states should be honored under full faith and credit principles and petitioners should be required to go to the state with initial jurisdiction to seek transfer to West Virginia.

An analogous argument can be made by referring to cases dealing with alimony, child support, and custody. In *Carr v. Carr*, 180 W.Va. 12, 375 S.E.2d 190 (1988), parents of a minor child were divorced in the state of California and the order directed father to pay child support in a specified amount. Thereafter, mother and child moved to West Virginia at which time the mother filed a petition seeking to modify the California child support order in the Circuit Court of Cabell County, West Virginia. Personal jurisdiction was obtained over father by serving him with the petition when he was in West Virginia visiting family.

The relevant issue before the Court in *Carr* was whether West Virginia had authority to exercise jurisdiction over the action for support. The West Virginia Supreme Court discussed the holding in *State ex rel. Ravitz v. Fox*, 166 W.Va. 194, 273 S.E.2d 370 (1980). Under that case and the conflicts of law doctrine of *lex loci delicti*, this Court held that the California court would be the proper forum to modify the California support decree.

Applying similar reasoning in this matter, Appellant argues that the doctrine of *lex loci delicti* and the holding in *State ex rel. Ravitz v. Fox*, supra, dictate that the Ohio court decree finding Shelda Jean Robinette incompetent and appointing Elizabeth Goodwin, Esq. guardian of the person and guardian of the estate and Ohio law should control in this situation and that the Tucker County Circuit Court's Order of August 23, 2004 finding Shelda Jean Robinette a protected person pursuant to W.Va. Code § 44A-1-4 and appointing Carla Robinette as guardian and conservator should be reversed. Even if a West Virginia court considered the mental capacity of Shelda Jean Robinette and a petition to appoint another individual guardian or conservator, Ohio law should apply. Ohio law provides that the court where the proposed ward was a resident at the time the guardianship proceedings were instituted is the court that has sole and exclusive jurisdiction in said guardianship proceeding. *LeSueur, Admx v. Robinson, et al.*, 53 Ohio App. 3d 9, 557 N.E. 2d 796, 1988 Ohio App. LEXIS 2987. (Copy attached hereto as Exhibit E)

The West Virginia legislature has provided a mechanism for out of state guardians or conservators to be appointed in West Virginia. W.Va. Code § 44A-1-12 provides:

- (a) A guardian, conservator or like fiduciary appointed in another state may be appointed to serve as a guardian or conservator in this state upon presentation of a petition therefore, proof of appointment, and a certified copy of such portion of the court record in the other state as the court in this state may require.
- (b) Upon proper notice of hearing to all persons entitled to such notice under section six, articles two of this chapter, a hearing shall be held, at which the court may, in its discretion, determine that the appointment in another state has sufficiently fulfilled the requirements of this chapter. Upon such determination, appointment will be ordered forthwith, and the guardian/conservator shall immediately assume all responsibilities and duties required under the provisions of this chapter.

Hence, Elizabeth Goodwin, Esq. is eligible to be appointed by the Tucker County Circuit Court and the health, safety and welfare of Shelda Jean Robinette would not be compromised. In light of the foregoing, the Circuit Court of Tucker County's Order of November 30, 2004 Order denying Appellant's Petition for Revocation and Petition for Modification should be reversed and the August 25, 2004 Order finding Shelda Jean Robinette a protected person and appointing Carla Jean Robinette guardian and conservator should be revoked.

- 3. The third basis for appeal is the inadequacy of the Thirty Thousand Dollar (\$30,000.00) cash bond instead of a surety bond and the failure of Carla Jean Robinette to post said bond in a timely fashion.**

The Order entered August 25, 2004 appointing Carla Jean Robinette the guardian and conservator for Shelda Jean Robinette was conditioned upon Carla Jean Robinette posting a Thirty Thousand Dollar (\$30,000.00) cash or surety bond. Carla Jean Robinette posted a \$10,000.00 cash bond on October 1, 2004 and then posted a \$20,000.00 cash bond on October 15, 2004. The Circuit Court approved the bond by Order dated October 22, 2004. (Exhibit D)

Petitioner contends that the bond filed by Carla Jean Robinette is defective on several grounds. The West Virginia legislature has placed very specific requirements in regard to such bonds.

Any required bond shall be with a surety and in an amount and form as the court may order, and the court may order additional bond or reduce the bond whenever the court finds that a modification is in the best interests of the protected person or of the estate. The court may allow a property bond in lieu of a cash bond. Proof of bonding must be submitted to the court within thirty days of appointment.

W.Va. Code § 44A-1-9(c).

Timothy N. Logan, Esq.
54 N. Richhill Street
Waynesburg, Pennsylvania, 15370
(724) 627-6026

Initially, it is noted that the statute requires that the bond be with a surety. The bond filed by Carla Robinette is not with a surety and is therefore not compliant with the statute and is defective.

Furthermore, § 44A-1-9(c) mandates that proof of bonding be submitted to the court within thirty days of appointment. In this case, the appointment was pursuant to the Order dated August 23, 2004 and filed on August 25, 2004. Hence, Carla Robinette should have filed proof of bonding by September 24, 2004. The delay of Carla Robinette's filing of proof of bonding is a violation of the Act and makes said bond defective.

Finally, Petitioner Kathy Robinette argues that the Circuit Court abused its discretion by setting the amount of the bond at Thirty Thousand Dollars (\$30,000.00) when the factors are considered as set forth in W.Va. Code § 44A-1-9(b), however, the relevant factor is the first factor:

- (a) The court shall require the posting of a bond by a conservator upon appointment except where the conservator is excused from posting bond under the provisions of section eighteen, article four, chapter thirty-one-a of this code. In determining the amount or type of a conservator's bond, the court shall consider:
 - a. The value of the personal estate and annual gross income and other receipts within the conservator's control;

....

W.Va. Code § 44A-1-9(b). This criteria was difficult to assess since the Petitioner, Carla Jean Robinette, failed to submit a statement of the financial resources of Shelda Jean Robinette prior to the hearing for a conservatorship as mandated by West Virginia Code § 44A-2-4.

Prior to a hearing for a conservatorship, the petitioner shall file a statement of the financial resources of the alleged protected person which shall to the extent known list the person's social security

number, list with reasonable detail the approximate value of the person's real and personal property, and the person's anticipated annual gross income and other receipts.

W.Va. Code § 44A-2-4.

The only evidence presented to the Court in regard to the personal assets of Shelda Jean Robinette was the testimony of the Guardian ad Litem, Christopher W. Cooper, Esq. He testified that the assets were in excess of One Hundred Twenty Thousand Dollars (\$120,000.00). (Trans. 8/23/2004, p. 40). In light of the evidence showing that Carla Robinette has a criminal record for a felony and the testimony of Elizabeth Goodwin that Carla had effectively "stolen" Twenty-five Thousand Dollars (\$25,000.00) from the account of Shelda Jean Robinette by using a check signed by Shelda Jean Robinette to withdraw said amount after Shelda Jean Robinette had been declared incompetent in the Ohio proceeding, the Tucker County Circuit Court abused its discretion by requiring only a Thirty Thousand Dollar (\$30,000.00) cash bond.

In light of the foregoing, the Circuit Court of Tucker County's Order of November 30, 2004 Order denying Appellant's Petition for Revocation and Petition for Modification should be reversed and the August 25, 2004 Order finding Shelda Jean Robinette a protected person and appointing Carla Jean Robinette guardian and conservator should be revoked.

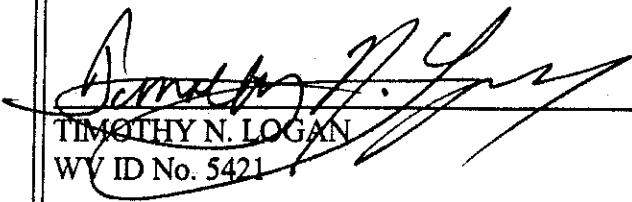
Prayer for Relief

Based upon the foregoing, Appellant Kathy Robinette, by counsel, Timothy N. Logan, Esq., requests that this Honorable Court reverse the ruling of the Tucker County Circuit Court of November 30, 2004 that denied Appellant's Petition for Revocation and Petition for Modification on the following bases:

- a. That the Court's finding of competency of Shelda Jean Robinette dictates against a finding that she is a "protected person";
- b. That the existence of an Ohio order finding Shelda Jean Robinette incompetent and appointing Elizabeth Goodwin, Esq. guardian of her person and estate controls and bars any proceeding in West Virginia absent consideration of said Order; and
- c. That the Tucker County Circuit Court abused its discretion by permitting Carla Jean Robinette to file a cash bond of only Thirty Thousand Dollars (\$30,000.00) and by failing to require her to file the bond in a timely fashion.

In effect, Appellant seeks a revocation of the Tucker County Circuit Court's Order of August 23, 2004, finding Shelda Jean Robinette a "protected person" and appointing Carla Jean Robinette as guardian and conservator.

KATHY ROBINETTE
Petitioner
BY COUNSEL


TIMOTHY N. LOGAN
WV ID No. 5421

Timothy N. Logan, Esq.
54 N. Richhill Street
Waynesburg, Pennsylvania, 15370
(724) 627-6026

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

In re: SHELDA JEAN ROBINETTE

No. 32668

No. 04-G-2

CERTIFICATE OF SERVICE

I, Timothy N. Logan, Esq., hereby certify that I served the foregoing **BRIEF IN SUPPORT OF PETITION FOR APPEAL** upon the West Virginia Supreme Court of Appeals and the parties, this 10th day of June, 2005, by mailing a true copy thereof by United States mail, postage prepaid, to the following addresses:

Clerk of the West Virginia Supreme Court of Appeals
1900 Kanawha Boulevard
Building 1, Room E317
Charleston, WV 25305

Elizabeth A. Goodwin, Esq.
Goodwin, Bryan, Schill, LLP
22050 Mastick Road
Fairview Park, OH 44126

Carla Robinette
c/o James F. Cain, Esq.
P.O. Box 728
Elkins, WV 26241

Shelda Jean Robinette
c/o Christopher Cooper, Esq.
Cooper, Preston & Douglas, PLLC
333 Second Street, P.O. Box 365
Parsons, WV 26287


Timothy N. Logan, Esq.