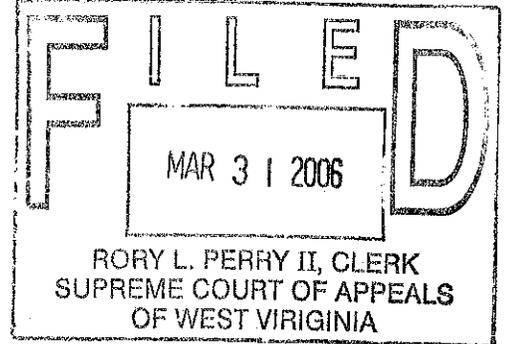


**IN THE SUPREME COURT OF APPEALS OF WEST  
VIRGINIA**

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**NO. 33005**

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**KATHERINE BOWMAN TWYMAN,**  
Petitioner,

V.

**SALLY G. JACKSON,**  
JUDGE OF THE FAMILY COURT OF  
JEFFERSON COUNTY, WEST VIRGINIA  
Respondent.

**RICHARD BOWMAN,**  
Respondent/Petitioner Below

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**APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY,  
WEST VIRGINIA  
HONORABLE THOMAS W. STEPTOE, JR., JUDGE  
CIVIL ACTION NO. 05-C-108**

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**BRIEF OF APPELLANT  
KATHERINE TWYMAN**

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## **I. PROCEEDING AND RULING BELOW**

This petition seeks an appeal of an order denying a writ of prohibition against the Family Court of Jefferson County, West Virginia entered on the 29<sup>th</sup> day of June, 2005 by Judge Thomas W. Steptoe, Jr.

## **II. STATEMENT OF FACTS**

On December 30, 2004 the Appellant called the police after her son, Richard Bowman, Jr., then fifteen (15) years of age, destroyed property in Appellant's home and left the house after being denied permission to go to the home of his girlfriend. The police directed the infant to return to his home. On December 31, 2004, the infant, Richard Bowman, Jr. filed a Domestic Violence Petition in the Magistrate Court of Jefferson County, West Virginia alleging that his mother provoked him, came after him, choked him and punched him in the face. Magistrate Rissler granted an Emergency Protective Order and allowed the infant to go to the home of his adult sister in Glen Burnie, Maryland. No adult filed the petition on behalf of the infant, no guardian ad litem was appointed nor was the suspected abuse reported to the Department of Health and Human Resources. On January 11, 2005, a hearing on the Domestic Violence Petition was held in the Family Court of Jefferson County, West Virginia where again no guardian ad litem was appointed for the infant. The judge of the Family Court, Sally G. Jackson, made a finding of abuse by the Appellant and issued a 180 day protective order. The court placed the infant in the custody of his sister and granted her leave to place the child with a Mr. (C. Randall) Williams who also appeared at the hearing and hired a lawyer for the infant. Mr. Williams also lived in Maryland. The Appellant objected to the placement of the infant with Mr. Williams who had entered the child's life on the day

of his father's funeral and had pursued a relationship with the child which the Appellant had come to feel was inappropriate. The family court refused to hear testimony from witnesses for the Appellant which included the Pastor of the Appellant and Infant's church and close family friends who knew Mr. Williams and who felt the infant should not be placed in his care. Lisa Carper, the infant's school counselor where he was a special education student, also appeared for the Appellant but was not allowed to testify. The Appellant was prohibited from contacting the infant or going to his school.

The Appellant filed a Motion to Modify the Protective Order on January 26, 2005 to have supervised or unsupervised contact with her son. The Appellant was concerned that Mr. Williams was not allowing anyone to contact the infant including his sister in whose custody he had been placed. Mr. Williams again hired counsel for the infant and the Family Court denied any contact with the Appellant unless the infant desired the contact. The infant also charged the Appellant with contempt based on allegations that she had made phone calls to Mr. Williams' home. The Appellant testified that she did not make the calls but that her husband and friends of her and the infant had made calls independently of her but, without taking of any evidence, the court found the Appellant in contempt.

While in Mr. Williams physical custody, the Appellant learned that the infant had been suspended from school in Maryland for three (3) days and then had never gone back, had attacked Mr. Williams and been involved with the juvenile justice system and had been treated as an in-patient at a psychiatric hospital. Due to not being in her custody, Appellant was unable to get records from any of the agencies involved or the hospital. At that point, the Appellant hired counsel who on the 9<sup>th</sup> day of March, 2005

filed with the Family Court a Motion to Dismiss based on the lack of capacity of the infant to file the Domestic Violence Petition on his own behalf. On April 12, 2005 the Family Court denied the Motion to Dismiss finding, *inter alia*, that a child of fourteen has an absolute right to choose his custodian. The Appellant filed a Petition for a Writ of Prohibition in the Circuit Court of Jefferson County, West Virginia on or about the 13<sup>th</sup> day of April, 2005 asking that Judge Jackson be prohibited from enforcing the Domestic Violence Protective Order of January 11, 2005 and/or the Order denying the Motion to Dismiss of April 12, 2005 based on the fact that the Petitioner was fifteen (15) years of age and lacked capacity to file an action on his own behalf, that Judge Jackson failed to report the suspected abuse to the Department of Health and Human Resources as required by statute, and that the Family Court had made no findings of fact that the custodians approved by the court were fit and proper persons to have custody and that the placing of custody of the child with his sister and, de facto, with Mr. Williams was not in the best interest of the child. The Circuit Court held a pre-Show Cause Hearing on the 12<sup>th</sup> day of May, 2005, at which Judge Jackson did not answer or appear, and on the 29<sup>th</sup> day of June, 2005 issued an order denying the writ of prohibition finding that a child under 18 who has the "gumption" to do so may file a Domestic Violence Petition on his own behalf. The order did not address the failure of the judge to report the suspected abuse to the Department of Health and Human Resources. Nor did the Circuit Court report the suspected abuse to the Department of Health and Human Resources.

Mr. Williams, represented by the same attorney as he hired to represent the infant, has, since the expiration of the Order of Protection on or about July 10, 2005, filed a

Petition for Custody of the said minor child and has been granted temporary custody over the objection of the Appellant and without making any showing of fitness.

**III. ASSIGNMENTS OF ERROR**

1. It was reversible error for the Circuit Court to fail to find that the Judge of the Family Court judge had exceeded her legitimate authority where she had failed to dismiss a Domestic Violence Petition filed by a minor on his own behalf.

2. It was reversible error for the Circuit Court to fail to find that the Judge of the Family Court had abused her discretion where she failed to comply with the law requiring that she report suspected abuse of a minor to the Department of Health and Human Resources.

**IV. POINTS AND AUTHORITIES RELIED UPON**

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## V. DISCUSSION OF THE LAW

A. Due to the fact that the Protective Order originally granted by the Family Court has terminated, the Appellant first addresses the issue of mootness of this appeal.

In syllabus point 1 of *Israel v. West Virginia Secondary Schools Activities Commission*, 182 W.Va. 454, 388 S.E.2d 480 (1989), this Court set out the basis for addressing **moot issues** as follows:

Three factors to be considered in deciding whether to address technically **moot issues** are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically **moot** in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, **issues** which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.

In the present case all three factors are at play. The Appellant and the infant Respondent have and continue to suffer collateral consequences from the failure of the family court judge to deny jurisdiction based on incapacity of the minor to bring the Domestic Violence Petition and report the case to the Department of Health and Human Resources. The minor, who is and was, under the influence of a non-related adult, who was not a party to the domestic violence action, has lost all protection of the state of West Virginia and has been sent out of state where neither the state nor the Appellant can monitor his well being and ensure his safety nor has there been any effort at reunification of the infant and his mother as would have been the focus of an investigation and petition, if any were found justified, by the Department of Health and Human Resources. There are collateral consequences for other minors who may fall under the influence of

persons who would prey on the vulnerable and use that influence to defeat the legitimate authority and protection of the minor's parents, e.g. internet sexual predators. Under the courts' rulings in this case, minors who are lured away from their parents with promises of love, material possessions or other things that make that child feel special, can then make claims of abuse by their parents and ask to be placed with the predator because they are over the age of 14. Allowing minors to file Domestic Violence Petitions simply because they have the "gumption" to do so, at the very least, starts eroding the legitimate interests and authority of parents and the interest of the state in protecting children. Such aberration under the law is not necessary because the legislature has set up a complete and desirable remedy for the child alleging abuse at home, the Abuse and Neglect statute of the West Virginia Code. Many children who are adjudicated status offenders by the state have plenty of "gumption" but that does not ensure that they are able or willing to act in their own best interest or that of society.

As to the second factor, as stated above, the issue of taking children out from under the protection of both parents and the state once they turn 14 years of age is of great public interest and the court needs to address this issue to give guidance to the public and the bar. Under no other circumstance is a minor allowed to file an action in his or her own behalf. If minors 14 years old and up are going to be allowed to do so in the context of an accusation of domestic violence, the public should be informed so that those who feel this is an abdication of responsibility for children by the state and a threat to the authority of parents and the integrity of the family can take that ruling to their lawmakers to seek more protective legislation. There can be no doubt that in this country, "family values" are sacrosanct.

This case meets the requirements of the third factor to be considered since Protective Orders under the Domestic Violence statute are time limited and with the initial appeal being to circuit court, the order could easily expire under its own terms before the matter could come before this court. Unfortunately, by the time this court can review a case, a child and his or her family may be irreparably harmed or a child from a truly abusive situation may have to return to that situation with no intervention having occurred because the abuse and neglect provisions of the law were improvidently circumvented.

For the reasons stated herein, Appellant argues that the issue is not moot.

**B. It was reversible error for the Circuit Court to fail to find that the Judge of the Family Court had exceeded her legitimate authority where she had failed to dismiss a Domestic Violence Petition filed by a minor on his own behalf.**

In its decision, the Circuit Court undertakes to interpret who may bring a domestic violence petition and cites the following as the relevant subsection of West Virginia Code § 48-27-305:

(2) An adult family or household member for the protection of the victim or for any family or household member who is a minor child or physically or mentally incapacitated to the extent that he or she cannot file on his or her own behalf[.]

The court goes on to acknowledge that under the usual circumstance, a child or incapacitated adult will are not able to defend themselves but then reasons that the present case presents an exception that was not contemplated by the legislature and therefore, it is lawful to depart from the plain meaning of the domestic violence statute. Although not discussed by the circuit court, the court must also depart from the plain language of West Virginia Code § 56-4-9 which states that any minor entitled to sue may

do so by his next friend or guardian, the plain language of West Virginia Code §50-5-3 which states that no infant shall proceed or be proceeded against in a civil action in magistrate court unless the action is brought by a duly authorized representative, next friend or guardian, and the plain language of Rule 17(c) of the West Virginia Rules of Civil Procedure which states that an infant who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem and that the court or clerk shall appoint a discreet and competent attorney at law as guardian ad litem for an infant not otherwise represented in an action, or shall make such other order as it deems proper for the protection of the infant. Also ignored by the circuit court was the requirement that a circuit court judge or family law master is a mandated reporter of suspected abuse under WV Code §49-6A-2.

**C. It was reversible error for the Circuit Court to fail to find that the Judge of the Family Court had abused her discretion where she failed to comply with the law requiring that she report suspected abuse of a minor to the Department of Health and Human Resources.**

By ignoring all of these rules and statutes the family court judge and circuit court judge ignored, by-passed and disabled, to the detriment of the minor child and other minor children, the scheme of protection put in place by the legislature to make sure that children are adequately protected, families are not needlessly destroyed and children do not become pawns of adults who do not have their best interest at heart.

In *Boarman v. Boarman*, 190 W.Va. 533, 538, 438 S.E.2d 876, 880, (1993). this court had occasion to speak to the responsibility of family law masters and circuit court judges in referring cases of suspected child abuse to the Department of Health and Human Resources and said as follows:

With regard to our request for intervention of the department, we remind the circuit courts and family law masters that Rule 34(b) of the West Virginia Rules of Practice and Procedure for Family Law (effective October 1993) provides that where there have been allegations of abuse or neglect, "the family law master or circuit judge may, sua sponte or on motion of either party, order an investigation or home study of one or both of the parties." Further, Rule 34(b) provides that "[w]hen a family law master or circuit judge finds that a child has been neglected or abused, the family law master or circuit judge shall report the abuse in accordance with the provisions of chapter 49, article 6A, section 2 of the Code of West Virginia." Id at 537-38, 880-881.

The Court went on to say:

Where serious allegations of abuse or neglect are made in a child custody case, the family law master and circuit judge should direct the Department of Health and Human Resources to intervene and conduct home studies, and the court should make full inquiry into these allegations; furthermore, where serious allegations of abuse and neglect arise, protections afforded children under abuse and neglect law should apply. Family Court Rule 34(b). Id at 538, 880.

Since the decision in *Boarman, supra*, we now have family courts which are governed by the Rules of Practice and Procedure for Family Court under which Rule 47 requires that :

(a)...if a family court judge has reasonable cause to suspect any minor child involved in family court proceedings has been abused or neglected, that family court judge shall immediately report to the state child protective services agency and the circuit court.

In the present case, the family judge surely found serious allegations of abuse to so completely cut the Appellant out of the child's life by disallowing all contact and placing the child out-of-state in the physical custody of a non-party, non-family member such that the Appellant has been unable to even obtain information and records about the child from his school, hospital, doctors, counselors, juvenile court or any other information of any kind. Even though this case was filed as a domestic violence petition the child sought and was granted a

change of custody which continues to this day and is, de facto, a custody case. Since expiration of the Domestic Violence Protective Order, Mr. Williams has filed for and been granted temporary custody of the child by the same family judge.

One of the main reasons it is so important that cases of suspected abuse and/or neglect be referred to the Department of Health and Human Resources is the recognition by the legislature, through the Abuse and Neglect statute and the Rules of Procedure for Abuse and Neglect Cases, of the fundamental constitutional rights of parents to the care and custody of their children. The statute and rules of procedure are crafted so as to provide the required due process for such an important constitutionally protected right.

In the recent case of *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000), which dealt with the issue of grandparent visitation, the United States Supreme Court thoroughly reviewed the historical development of the court's analysis and protection of parents' constitutional rights under the 14<sup>th</sup> Amendment to the Constitution:

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.*, at 720, 117 S.Ct. 2258; see also *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed.

1070 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*, at 535, 45 S.Ct. 571. We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, at 166, 64 S.Ct. 438. *Id.* at 2060

The court went on to say:

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham v. J. R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg, supra*, at 720, 117 S.Ct. 2258 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, "[a]ny person may petition the court for visitation rights at any time," and the court may grant such visitation rights whenever "visitation may serve the best interest of the child." § 26.10.160(3) (emphases added). That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed

before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. The Washington Supreme Court had the opportunity to give § 26.10.160(3) a narrower reading, but it declined to do so. See, e.g., 137 Wash.2d, at 5, 969 P.2d, at 23 ("[The statute] allow[s] any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm"); id., at 20, 969 P.2d, at 30 ("[The statute] allow[s] 'any person' to petition for forced visitation of a child at 'any time' with the only requirement being that the visitation serve the best interest of the child"). *Id.* at 2060-2061

It seems clear from the language of the U. S. Supreme Court, that parents must be provided with more than "fair process" before interfering with their constitutionally protected interest in the care, custody and control of their children. They are entitled to "heightened protection" against governmental interference with their parental rights. In the present case, the Appellant was not even allowed to present witnesses at the hearing on the Domestic Violence Petition before her custodial rights and, for all intents and purposes, her parental rights were terminated. No inquiry whatsoever was made into the "best interest of the child" or the fitness for custody of the child's sister or Mr. Williams. Certainly no analysis was undertaken of whether or not the child might be harmed by his removal from his mother's care and custody or his placement with a non-family third party who had "groomed" the child and his family, including his sister, in the same manner as pedophiles are known to groom children and families. Although the Appellant brought numerous witnesses including his school counselor, where he was a special education student, and his church pastor and family friends who knew both the child and Mr. Williams she was denied her right to present any witnesses. All of these witnesses

would have testified that they believed that the child would be harmed by the child's removal and placement with Mr. Williams. These same witnesses appeared at every hearing held in the domestic violence proceeding but were never allowed to testify. Although it became known to the court during the period of custody under the Protective Order that the child was not going to school, had been subjected to juvenile proceedings in Maryland for attacking Mr. Williams and had been hospitalized at a psychiatric hospital, the court refused to undertake any inquiry into the best interest of the child or whether or not he was being harmed by the placement with Mr. Williams. The court gave to this 15 year old troubled minor the sole discretion as to whether or not he even had any contact with the Appellant to the extent of holding the Appellant in contempt because the child's stepfather and family friends from his church attempted to contact him to ascertain his well being. This contempt petition was instituted by the attorney hired by Mr. Williams supposedly on the child's behalf although the child always maintained that he desired to have contact with his mother.

The summary and cavalier manner and language afforded this case by the family court and the circuit court boggles the mind in contrast to the substantial interest and protection afforded to parental rights by the U. S. Supreme Court and the Constitution and illustrates the very essence of why minors should not be allowed to file such actions on their own behalf and why courts should not be allowed to give short shrift to the important "family values" of care, custody and control of one's children. Appellant can't help but question these courts' understanding of and respect for their grave responsibility in protecting both the rights and interests of parents and the health, safety and welfare of children.

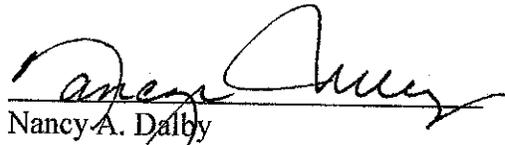
## **VI. CONCLUSION AND RELIEF REQUESTED**

This matter is not moot although the domestic violence protective order a issue herein has expired under its own terms because it has collateral consequences, deals with an issue of serious public concern, and is capable of escaping review because of the time limited nature of domestic violence protective orders. The circuit court clearly erred in failing to find that the family court judge had not exceeded her authority by allowing an action to be maintained by a minor child and that she had abused her discretion by not reporting the abuse she found to the Department of Health and Human Resources.

It is requested that this court reverse the decision of the Circuit Court of Jefferson County, West Virginia entered on June 29, 2005 and enter a decision finding the Family Court Judge, Sally J. Jackson exceeded her authority and abused her discretion in allowing a 15 year old minor standing to file a domestic violence petition and in failing to report the matter to the Department of Health and Human Resources where she found that the said child had been the victim of abuse. It is further requested that this court enter a decision that finds that the legislature has through the abuse and neglect statute, the rules of civil procedure and the rules of practice and procedure for family courts devised a system of protection for children and that the failure to abide by that scheme of protection by family and circuit judges endangers children. It is also requested that this court issue an opinion in which it clarifies the language of West Virginia Code § 48-7-305 finding that such language does not permit the filing domestic violence petitions by persons under the age of 18 years in their own right.

Appellant further believes that the best interest of her child would be served by the return of her son to the State of West Virginia and the investigation of his needs by the Department of Health and Human Resources and therefore requests that this court order such relief. And for such other relief as this court may determine is just from the facts and circumstances herein.

KATHERINE BOWMAN TWYMAN  
By Counsel

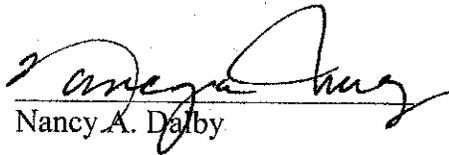


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CERTIFICATE OF SERVICE

I, Nancy A. Dalby, counsel for the Appellant do hereby certify that I have served a true copy of the attached **BRIEF OF APPELLANT KATHERINE TWYMAN** upon Respondent Richard Bowman, Jr. by transmitting the same to the address listed below by postage pre-paid, United States Postal Service, first class mail, on this the 30<sup>th</sup> day of March, 2005:

Robert D. Aitcheson, Esq.  
P.O. Box 750  
Charles Town, WV 25414

  
Nancy A. Dalby