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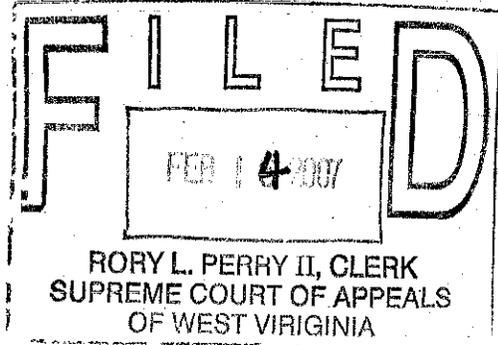
**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

In Re: The Marriage/Children of:

CHARLES D. WASHINGTON,  
APPELLANT/PETITIONER BELOW

AND

HEATHER C. WASHINGTON,  
APPELLEE/RESPONDENT BELOW



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**FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA  
CASE NUMBER 03-D-255-1**

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*By Appellee*  
**RESPONSE TO PETITION FOR APPEAL**

Pamela R. Folickman, Esq.  
Counsel for the Respondent  
WV State Bar No.: 7003  
The Law Offices of Pamela R. Folickman, PLLC

421 Fairmont Ave.  
Fairmont, WV 26554  
phone: (304) 363-4529  
facsimile: (304)366-1734  
**Counsel for Appellee, Heather C. Washington**

Holly Turkett  
Co-Counsel for Respondent  
W.V. State Bar No.: 9929  
The Law Offices of Pamela R.  
Folickman, PLLC  
421 Fairmont Avenue  
Fairmont, WV 26554  
phone: (304) 363-4529  
facsimile: (304) 366-1734  
**Co-Counsel for Appellee, Heather  
C. Washington**

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## **I. KIND OF PROCEEDING**

This is the Appellee's brief in response to the Appellant's letter (dated January 13, 2007) to the Supreme Court informing the Court that his previously filed Petition, with an additional paragraph, was in lieu of filing a Appellant Brief in this appeal. The letter indicated Appellee's counsel was "cc'ed" with the letter, but Appellee's counsel only became aware of the letter by the Clerk of the Supreme Court in a telephone call and then received from the Clerk, by facsimile, a copy of the letter on January 17, 2007. To date, the letter sent by the Appellant has yet to arrive at Appellee's counsel's office.

The Appellant in the Facts and in the Discussion of the Law and Facts uses the term "Petitioner" throughout to reference the Appellant, and "Respondent" to reference Appellee. In the Appellee's brief, we have tried to maintain consistency and avoid further confusion by use of Appellant's reference to "Petitioner" and "Respondent".

## **II. FACTS OF THE CASE**

### ***A. Respondent's response/corrections of the Petitioner's Procedural History***

1. The case was filed as an action for divorce on May 22, 2003. The Court then consolidated a Domestic Violence case (03-DV-269) into this action.
2. The initial hearing was set by the Court Order on the 21<sup>st</sup> day of July, 2003, for February 24, 2004, at 12:45 p.m.
3. On August 1<sup>st</sup>, 2003, the Petitioner (who in the Family Court proceedings was actually the Respondent) filed his financial information with the Court. The Petitioner did not file an answer to the Complaint for Divorce.
4. On August 20<sup>th</sup>, 2003 the Petitioner filed a Motion for Modification and a new financial statement.

5. The Court on the 4<sup>th</sup> day of March, 2004 filed a sealed copy of the entire file from the Domestic Violence 03-DV-269 case.
6. On the 5<sup>th</sup> day of March, 2004, an Order was entered scheduling Hearing and otherwise addressing "Petition for Modification of Child Support and Custody/Visitation"
7. Order entered setting Final Hearing for the 16<sup>th</sup> day of September, 2004 and other issues pending before the Court.
8. On the 6<sup>th</sup> day of December, 2004 the Final Divorce Order was entered.

The Petitioner stated that the Respondent was represented by counsel and the Petitioner was *pro se* throughout his *Petition for Appeal*. This was the choice of the Petitioner and his right under the Constitution as he indicates several times in his brief.

What the Petitioner failed to mention was that he did not always follow the procedures in Family Court. In particular, the Petitioner failed to answer discovery from the Respondent in any way. The Petitioner's counsel tries to portray the Petitioner as an uninformed *pro se* litigant in the legal system, but the Petitioner had knowledge of the legal system, more than the average lay-person, as he was the local bail bondsman, a business he held with his wife. The Petitioner was informed and savvy enough to submit a proposal on the equitable distribution of the parties assets and debts, he submitted his parent education certificate, and attempted to use criminal complaints filed against the Respondent on several occasions.

The Court took testimony from the parties on September 16, 2004 on all issues before the Court. The grounds for the divorce were found to be adultery on the part of the Petitioner. A request for a permanent restraining order on behalf of the Respondent was denied, the distribution of the property and the allocation of the custody and child support was decided. The Court also heard evidence on the Motions before the Court for sanctions, contempt and attorney fees. The Court heard on at least two prior occasions information from the Petitioner concerning

his financial situation for which he based the award of child support. The Court considered the evidence presented at the September 2004, hearing and addressed its findings in a letter dated October 4, 2004. This letter was sent to the Petitioner and the Respondent's counsel with a paragraph stating that if anything was left unaddressed or there was a need of further clarification, the Court was to be notified in writing. The letter further directed Respondent's Counsel to prepare the Decree.

9. Respondent's counsel prepared the Decree and submitted it to the Court with a copy sent to the Petitioner.
10. Respondent received said Decree and hired an Attorney to Appeal the Order to Circuit Court.
11. The Appeal to Circuit Court was denied due to the timeliness of filing.

### **III. ASSIGNMENT OF ERROR**

Each of Petitioner's points of error will be discussed in the Discussion of Law

### **IV. DISCUSSION OF LAW**

#### **A. STANDARD OF REVIEW**

Appellee agrees with the Appellant's rendition of the standard of review.

***B. The Petitioner misuses the holdings in Carr v. Carr 216 W.Va. 474, 607 S.E. 2d 803 and John P.W. ex rel. Adam W. v. Dawn D.O., 214 W.Va. 702, 591 S.E. 2d 260 (2003) to bolster his weak argument concerning the completeness of the record.***

In *Carr v. Carr*, 216 W.Va. 474, 607 S.E. 2d 803, a decision relied upon by the Petitioner but not adequately cited, this Court stated that the "parties have a duty to create a complete record." However, this Court refused to remand the case for additional hearings based upon that error. In *Carr*, this Court stated that in lieu of a complete record, "the petitioner shall set out in the petition a statement of all facts pertinent to the issues he raises." *Id.* In his petition to the

Circuit Court the Respondent did utilize this tool, however he made the mistake of doing so one day past the expiration of time in which to file his appeal.

In support of his argument that the Final Order prepared by the Respondent's attorney was not a final order, the Petitioner cites *John P.W. on behalf of Adam and Derek W Dawn DO*. Petitioner failed to properly cite this case in his brief, so after an independent search, the Respondent was able to determine that the Petitioner was referring to *John P.W. ex rel. Adam W. v. Dawn D.O.*, 214 W.Va. 702, 591 S.E. 2d 260 (2003), an opinion by this Court which deals with a domestic violence proceeding. In said opinion this Court states, "To avoid this problem in the future and to allow proper judicial review, we hold that a family court judge who issues a domestic violence protective order is required to make factual findings which describe the acts of domestic violence that have been established by the evidence presented and to identify which statutory definition of domestic violence such facts demonstrate." *Id.* As the instant case dealt with a final order for divorce and not a domestic violence petition, the Petitioner's use of said case was uncalled for and completely inapplicable.

Because the case law relied upon by the Petitioner is inapplicable to the case at hand and/or weakens his argument this Court is urged to dismiss his petition for appeal.

***C. The facts surrounding this case indicate that there was no injustice committed by the Family Court or the Respondent's attorney, only a misinterpretation of the deadline by the Petitioner which caused his petition to be untimely filed.***

The Petitioner's argument is an attempt to justify his inability to file a timely appeal, however the facts of the case, including those relied upon by the Petitioner indicate that his failure to timely file was based on his own fault and not that of the Court and/or Respondent.

The Petitioner fails to point out in his brief that he himself was in receipt of said letter, just as was the Respondent. Therefore, although a clerical error may have occurred in the actual

filing of the letter as part of the record, the Petitioner had adequate knowledge of the contents therein upon which he could have based his argument.

Additionally, even if the Petitioner did not have the letter at the time he retained counsel, in his petition for appeal the Petitioner reserved the right to supplement his appeal upon receipt of the letter. In his brief the Petitioner fails to explain why this remedy could not have been utilized one day prior to his filing the petition, which would have been within the statutory guidelines.

A third explanation for the untimely filing of the petition is the Petitioner's choice to wait until two days prior to the expiration of the deadline to retain counsel in this matter. Counsel was understandably placed on a time constraint in filing the petition, which is likely the reason the petition was filed one day after the statutory guideline.

Finally, the Petitioner's handling of this appeal is demonstrative of his lack of respect for deadlines in filing appeals. The Clerk of this Court began sending letters to the Petitioner in October, 2006 requesting he submit a brief in support of his argument to this court pursuant to the Rules of Appellate Procedure. The Petitioner waited nearly three months to respond to this Court and was therefore clearly outside of the deadlines imposed by this Court and the laws of the State of West Virginia once again.

Because the facts indicate that the real reason for the untimely filing of the appeal are due to mistake on behalf of Petitioner and his counsel, this Court is urged to dismiss his petition.

***D. The Petitioner's argument that he was discriminated upon by his choice to proceed pro se in this matter is unfounded and not an excuse for his or his attorney's inability to timely file his petition for appeal with the lower court.***

In his petition, the Petitioner continually alludes to the fact that he was *pro se* in the original litigation. However such arguments are unfounded and the Petitioner offers no factual or

legal basis which explains why the Petitioner's choice to proceed *pro se* in this matter prevented him from filing a timely appeal.

In support of his argument that the Petitioner was discriminated against because of his choice to proceed *pro se*, the Petitioner cites *State ex. rel Dillon v. Egnor*, 188 W. Va. 221, 423 S.E. 2d 624 (1992). While the Petitioner is correct in his recital of language from that decision, the Petitioner fails to state that in that case a *pro se* litigant had been asked to prepare an Order, a far cry from what occurred in the present circumstance. The Petitioner use of this case is inappropriate in that there has been nothing to suggest that the letter not being filed was intentional on behalf of the Respondent, other than the Petitioner's wild accusations. In fact the Petitioner states that he retained counsel late in the day on January 3, 2006. Counsel at that time discovered the missing letter and contacted opposing counsel on January 4, 2006, the letter was then entered into the court file on January 5, 2006. Opposing counsel's quick response and helpful suggestion that Petitioner contact the Family Court as a speedier avenue to filing the letter, indicate a cooperation on behalf of the Respondent, rather than a conspiracy to avoid appeal as suggested by the Petitioner.

***E.. The facts of the present case do not denote that the invited error doctrine is applicable.***

The Petitioner bases his final argument on this Court's decision in *Roberts v. Consolidated Coal Co.*, 208 W. Va. 218, 539 S.E. 2d 478 (2000), in which this Court discussed the doctrine of invited error:

Invited error is a cardinal rule of appellate review applied to a wide range of conduct. It is a branch of the doctrine of waiver which prevents a party from inducing an inappropriate or erroneous [ruling] and then later seeking to profit from that error. The idea of invited error is to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Having induced an error, a party in a normal case may not at a later stage of the [proceedings] use the error to set aside its immediate and adverse consequences. *Id* at 228, 428.

In *Maples v. West Virginia Department of Commerce*, 197 W. Va. 318, 475 S.E. 2d 410 (1996), Syllabus Pt 1, this Court held, "A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal." This language suggests an active participation in the error to invoke the doctrine of invited error.

In the present circumstance the Respondent may or may not have been responsible for the letter not being filed, as the Petitioner has provided no evidence to indicate one way or the other. Similarly, the Petitioner has provided no proof that the letter not being filed was not just a clerical mistake, in which case the Respondent's actions could clearly not be construed as active.

Finally, the Petitioner does not explain how his receipt of the letter plays into his conspiracy theory. The Petitioner and the Respondent were both in receipt of the letter that was inadvertently left out of the record, therefore, Petitioner already had full access to the contents of said letter, despite its absence in the court file.

Therefore, because the Petitioner offers no proof that the letter not being filed was even caused by the Respondent and offers no explanation as to why the copy in the Petitioner's receipt was inadequate from which to prepare his appeal, this Court is urged to dismiss the Petition for Appeal filed by the Petitioner in this matter, as he has offered no explanation for his lack of filing a timely appeal.

***F. Petitioner provides no support to his allegation that the time to file an appeal did not begin until the letter was made a part of the file.***

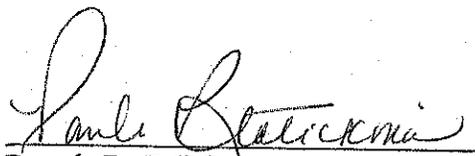
Although the Petitioner maintains that he timely filed his petition for appeal, because the time did not begin to run until the letter was made a part of the record, the Petitioner provides no support for this theory. In a letter dated January 11, 2007, sent to this Court, but never sent to the Respondent, the Petitioner refers the Court to "West Virginia Code §§ 51-2A-8(d) and 51-2A-14 regarding the record to be considered on appeal." West Virginia Code §51-2A-8(d) states, "The

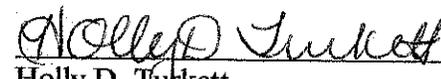
The Petitioner's inability to timely file his appeal renders the appeal void, and the lower court was correct in denying his petition for appeal. Therefore, this Court is urged to dismiss the Petitioner's Petition for Appeal.

#### V. PRAYER FOR RELIEF

Because the Petitioner has provided no legal or factual reason for his inability to timely file his appeal to the Circuit Court, the Respondent prays this Honorable Court deny the petition for appeal and affirm the final order based on the above stated grounds and reasoning and to award the Respondent her necessary attorney fees in defending against this action.

Respectfully Submitted,  
Heather C. Washington,  
By Counsel

  
Pamela R. Folickman, Esq.  
Counsel for the Respondent  
WV State Bar No.: 7003  
The Law Offices of Pamela R. Folickman, PLLC  
421 Fairmont Avenue  
Fairmont, WV  
phone: (304)363-4529  
facsimile: (304) 366-1734

  
Holly D. Turkett  
Co-Counsel for Respondent  
WV State Bar No.: 9929  
The Law Offices of Pamela R.  
Folickman, PLLC  
421 Fairmont Ave.  
Fairmont, WV 26554  
Phone: (304) 363-4529  
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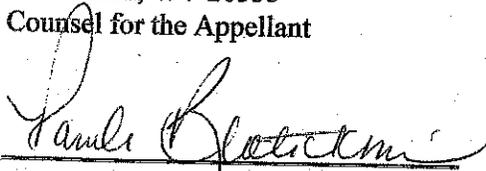
CERTIFICATE OF SERVICE

I, Pamela R. Folickman, Counsel for Heather C. Washington, Appellee, in the foregoing action, do hereby certify that a true copy of this document: Response to Petition for Appeal was served by the following methods:

<input checked="" type="checkbox"/>	United States Mail, postage prepaid - Original, 9 copies
<input type="checkbox"/>	Certified Mail, return receipt requested
<input type="checkbox"/>	Hand Delivered
<input checked="" type="checkbox"/>	FAX: 858-3815
<input type="checkbox"/>	Credible Person Service/Private Process Server

and I further certify that service was made this the 14<sup>th</sup> day of February, 2007, at the following address:

Michael F. Niggemyer  
PO Box 5057  
White Hall, WV 26555  
Counsel for the Appellant



Pamela R. Folickman, Esq.  
Counsel for the Appellee  
WV State Bar No.: 7003  
421 Fairmont Ave.  
Fairmont, WV 26554  
PHONE: (304) 363-4529  
FAX: (304) 366-1734