

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

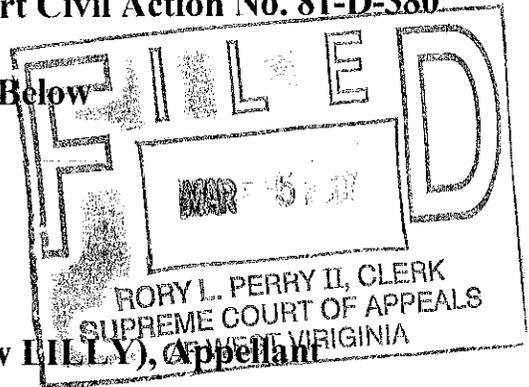
**No. 33301**

**SANDRA LYNN FOSTER (now LILLY), Plaintiff Below,**

**v.**

**Circuit Court Civil Action No. 81-D-380**

**JAMES TYRONNE FOSTER, Defendant Below**



**SANDRA LYNN FOSTER (now LILLY), Appellant**

**BRIEF OF THE APPELLANT**

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**KIND OF PROCEEDING AND NATURE  
OF RULING IN LOWER TRIBUNAL**

This is an appeal from an Order Granting Defendant's Petition for Recovery of Overpayment of Child Support entered by the Family Court of Raleigh County, West Virginia ("Family Court") on December 9, 2005 and affirmed by the Circuit Court of Raleigh County, West Virginia ("Circuit Court") on May 22, 2006. In its December 9 Order, the Family Court found that Mr. Foster had overpaid child support in the amount three thousand four hundred sixty-six dollars and sixty-five cents (\$3,466.65) as a result of the Family Court's prior application of the ten-year statute of limitations to bar the appellant, Sandra Lynn Lilly's attempts to collect unpaid child support installments that were due and owing from the appellee, James Tyrone Foster, all pursuant to this Court's holding in Robinson v. McKinney, 189 W.Va. 459, 432 S.E.2d 543 (1993).

On December 23, 1982, the appellant, Sandra Lynn Lilly, and the appellee, James Tyrone Foster, were divorced from one another. At the time of the divorce, Mrs. Lilly was awarded primary custody of the parties' son and Mr. Foster was ordered to pay child support in the amount of two hundred fifty dollars (\$250.00) per month. Between the time of the parties' divorce and the time that the parties' child was emancipated in 1997, Mr. Foster fell substantially behind in the payment of his court-ordered child support. Although decretal judgments accrued to Mrs. Lilly, no action was taken to enforce those judgments, either by Mrs. Lilly or by the West Virginia Bureau of Child Support Enforcement, until 1997, when Mrs. Lilly and the West Virginia Bureau for Child Support Enforcement sought to collect on the unpaid child support in response to a petition filed by Mr. Foster to have his child support obligation terminated based upon the parties' child's emancipation. Pursuant to this Court's holding in Robinson, the Circuit Court held that Mrs. Lilly was barred from

collecting any child support payment that was due prior to 1987, barring Mrs. Lilly from collecting in excess of thirty thousand dollars (\$30,000.00) in unpaid child support and statutory interest.

During the lower court proceedings that began in 1997 and continued for in excess of three years, the West Virginia Bureau for Child Support Enforcement continued to withhold money from Mr. Foster's income toward the collection of unpaid support. The substantial portion of those child support collections were paid to Mrs. Lilly by the West Virginia Bureau for Child Support Enforcement. After the Circuit Court concluded that the statute of limitations barred collection of a substantial portion of the claimed arrearages, an accounting was conducted by the West Virginia Bureau for Child Support Enforcement in April 2000, showing that Mr. Foster had paid to Mrs. Lilly, through income withholdings, more child support than she was legally entitled to collect. A copy of this accounting was mailed to Mr. Foster. Mr. Foster admitted during the proceedings below that he was aware of the overpayment no later than June 2000 and had even called the West Virginia Bureau for Child Support Enforcement to discuss collection of the claimed overpayment. In spite of this knowledge, however, Mr. Foster then waited three years to file a petition seeking the repayment of the child support that had been paid to Mrs. Lilly above the amount that she was legally entitled to collect.

In response to Mr. Foster's petition to collect the claimed overpayment, Mrs. Lilly asserted that Mr. Foster's petition was barred by the statute of limitations because he had waited more than two years after his right to collect the overpayment had accrued to file his petition. After the Family Court initially held that Mr. Foster's petition was time barred, the Circuit Court overturned the Family Court's ruling on appeal and remanded the matter with

instructions to determine the amount of the overpayment and to enter a judgment for Mr. Foster against Mrs. Lilly in that amount. In its ruling, the Circuit Court concluded that the present action was merely a continuation of the collection action begun by Mrs. Lilly in 1997 in response to Mr. Foster's petition to terminate his child support. On remand and pursuant to the Circuit Court's instructions, the Family Court concluded that Mr. Foster had overpaid child support in the amount three thousand four hundred sixty-six dollars and sixty-five cents (\$3,466.65) and entered a judgment against Mrs. Lilly and the West Virginia Bureau for Child Support Enforcement in that amount. It is from that judgment that Mrs. Lilly now appeals.

#### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

This action is before this Court as the result of the entry of an Order Granting Defendant's Petition for Recovery of Overpayment of Child Support on December 9, 2005 by the Family Court. (See Order Granting Defendant's Petition.) In his petition for recovery of overpayment of child support, filed on September 9, 2003, Mr. Foster sought the repayment of child support that he claims to have overpaid as a result of previous Circuit Court rulings in which a large portion of child support arrearages owed to Mrs. Lilly by Mr. Foster could not be collected by Mrs. Lilly as the result of the lapse of the statute of limitations. (See Order Dismissing Defendant's Petition for Recovery of Overpayment of Child Support.) Mrs. Lilly defended by asserting that Mr. Foster's petition to recover the overpayment, which resulted from the Circuit Court's determination that the collection of the substantial portion of Mr. Foster's child support arrearages was barred by the statute of limitations, was likewise barred by the statute of limitations because Mr. Foster waited in excess of three years to assert his claim for the recovery of the overpayment of child support

after the right to bring his petition accrued. (See Order Dismissing Defendant's Petition for Recovery of Overpayment of Child Support.) It is from the Family Court's Order granting Mr. Foster's petition and the Circuit Court's Order upholding that Family Court Order that Mrs. Lilly now appeals.

The child support obligation at issue in this matter arose, initially, from a Final Order of Divorce that was entered in the Circuit Court of Raleigh County, West Virginia on December 23, 1982, terminating the parties' marriage. (See Final Order of Divorce.) As a result of the entry of the Final Order, Mr. Foster was ordered to pay child support to Mrs. Lilly for the benefit of the parties' son in the monthly amount of two hundred fifty dollars (\$250.00). (See id.) The monthly child support obligation established by the Final Order of Divorce continued in effect, subject to modifications, until it was terminated on June 1, 1997 based upon the child's emancipation.<sup>1</sup> (See Order, August 20, 1997).

At some point between the time of the parties' divorce and the termination of Mr. Foster's child support obligation in June 1997, Mr. Foster became substantially in arrears in his payment of child support and Mrs. Lilly began to take steps to collect the child support arrearages that had accumulated. (See Order Establishing Child Support Arrearages.) Mr. Foster defended against these collection attempts by arguing that Mrs. Lilly had failed to appropriately pursue the decretal judgments for unpaid support that had accrued in the ten years after the unpaid support payments were due, and that she was barred from collecting on any such decretal judgments that were over ten years old based upon the statute of limitations. (See id.)

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<sup>1</sup> The Order terminating Mr. Foster's child support obligation was entered by the Circuit Court of Raleigh County, West Virginia on August 20, 1997, but was retroactively effective to the first day of the first month after the child attained the age of majority. (See Order, August 20, 1997.)

After substantial litigation, including two separate Circuit Court appeals, the Circuit Court concluded that attempts to collect any child support installments that were due and owing prior to April 22, 1987 (a date ten years prior to the filing of Mrs. Lilly's petition to collect the arrearages) were barred by the statute of limitations.<sup>2</sup> (See id.) As a result of the entry of the Order Establishing Child Support Arrearages, Mr. Foster escaped the payment of in excess of thirty thousand dollars (\$30,000.00) in child support that was due and owing under the terms of the parties' Final Order of Divorce. This Court then fixed the amount of child support arrearages that were owed by and could be collected from Mr. Foster at two thousand twenty-seven dollars and sixteen cents (\$2,027.16), and granted Mrs. Lilly a decretal judgment against Mr. Foster for unpaid medical expenses incurred for the benefit of the parties' child in the amount of four thousand four hundred fifteen dollars and seventy-eight cents (\$4,415.78). (See id.) The effective date for the child support arrearages and unpaid medical expenses established in the Order Establishing Child Support Arrearages was January 31, 1999, and this Court directed the West Virginia Bureau for Child Support Enforcement to compile an accounting to reflect Mr. Foster's payment history between that date and the time of the entry of the Order Establishing Child Support Arrearages to determine the status of the parties' child support account with the West Virginia Bureau for Child Support Enforcement. (See id.)

According to testimony provided to the Family Court by Susan S. Perry, Commissioner for the West Virginia Bureau for Child Support Enforcement, during the final hearing on Mr. Foster's petition for recovery of overpayment of child support, the West

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<sup>2</sup> The Order Establishing Child Support Arrearages was appealed by the West Virginia Bureau for Child Support Enforcement to this Court. By Order entered in January 2001, the West Virginia Bureau for Child Support Enforcement's petition for appeal was denied. (See Order Denying Petition for Appeal.)

Virginia Bureau for Child Support Enforcement prepared an accounting reflecting the rulings made by the Circuit Court in its Order Establishing Child Support Arrearages on April 18, 2000. (See Final Hearing, 32:50 to 35:38.)<sup>3</sup> Ms. Perry further testified that a copy of this accounting was mailed to each of the parties on April 25, 2000. (See id. at 1:09:30.) By the time the accounting had been performed, the West Virginia Bureau for Child Support Enforcement had collected three thousand four hundred sixty-six dollars and sixty-five cents (\$3,466.65) more from Mr. Foster than it was legally permitted to collect and paid those excess collections to Mrs. Lilly. (See Order Granting Defendant's Petition for Recovery of Overpayment of Child Support.) During the final hearing on Mr. Foster's petition, Mr. Foster admitted that he had received a copy of the accounting reflecting this excess collection no later than June 2000 and that he understood the accounting to indicate that the West Virginia Bureau for Child Support Enforcement had collected more money from him than it was legally entitled to collect. (See Final Hearing, 46:50 to 49:30.) After waiting over three years after learning of the overpayment, Mr. Foster filed his petition to recover the amount of child support that he claimed to have overpaid. (See id.) In response, Mrs. Lilly asserted that Mr. Foster's petition was likewise barred by the applicable statute of limitations. (See id.)

Following the final hearing on the Mr. Foster's petition, the Family Court entered an Order denying Mr. Foster's petition and holding that Mr. Foster's petition was barred because he had failed to bring the action within two years of the time that his right to bring the action had accrued. (See Order Dismissing Defendant's Petition for Recovery of

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<sup>3</sup> All citations to the record of the final hearing on Mr. Foster's petition for recovery of overpayment of child support refer to the minute and second provided on the video recording of the final hearing made by the Family Court.

Overpayment of Child Support.) Following an appeal to the Circuit Court, the Family Court's initial Order was reversed and remanded to the Family Court with instructions for the entry of an Order calculating the amount of the overpayment. Without citation to the record or any pertinent legal authority, the Circuit Court concluded that the Mr. Foster's petition was not time barred based upon the fact that he had filed a petition for modification in 1997 (which was granted by Order entered in August 1997) and that there had been additional litigation as a result of Mrs. Lilly's attempt to collect child support arrearages owed by Mr. Foster (which concluded in April 2000). (See Memorandum, July 27, 2005.) As a result of those circumstances, the Circuit Court reasoned that the statute of limitations that might otherwise apply to Mr. Foster's petition was indefinitely tolled until he filed the petition for recovery of the overpayment in September 2003. (See id.) Following the remand and consistent with the Circuit Court's Order of July 27, 2005, the Family Court entered an Order in which it found that Mr. Foster had overpaid child support in the amount three thousand four hundred sixty-six dollars and sixty-five cents (\$3,466.65). (See Order Granting Defendant's Petition for Recovery of Overpayment of Child Support.) The Family Court went on to hold that Mr. Foster could collect this overpayment from either Mrs. Lilly or from the West Virginia Bureau for Child Support Enforcement, but that no such collection could be made until the parties had an opportunity to exhaust their opportunities for appeal. (See id.) After a second appeal to the Circuit Court, the Circuit Court upheld the Family Court's Order Granting Defendant's Petition for Recovery of Overpayment of Child Support in its entirety.<sup>4</sup> (See Order Affirming in Part and Denying in Part the Family

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<sup>4</sup> The Circuit Court also directed the Family Court to award appropriate statutory interest on the overpayment to Mr. Foster. (See Order Affirming in Part and Denying in Part the Family Court's Order of December 9, 2005.)

Court's Order of December 9, 2005.) It is from the Family Court's Order Granting Defendant's Petition for Recovery of Overpayment of Child Support that Mrs. Lilly now appeals.

### ASSIGNMENTS OF ERROR

**Did the lower courts err in holding that the respondent's petition for recovery of overpayment of child support, which was filed more than three years after the right to bring the petition accrued and more than three years after the respondent became aware of his right to petition for recovery of the alleged overpayment, was not barred by the applicable statute of limitation set forth in West Virginia Code § 55-2-12?**

### DISCUSSION OF LAW AND RELIEF PRAYED FOR

#### I. Standard of review.

This Court held in syllabus point 1 of May v. May, 214 W.Va. 394, 589 S.E.2d 536 (2003), that, "[i]n reviewing a final order of a family court judge that is appealed directly to this Court, we review findings of fact by a family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*." This Court has further held that the standard of review for an appeal from a circuit court that reviewed a family court's final order, or refused to consider a petition for appeal to review a family court's final order, is the same. See Carr v. Hancock, 216 W.Va. 474, 475-476, 607 S.E.2d 803, 804-805 (2004). In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, this Court reviews the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. See id. Questions of law are reviewed *de novo*. See id.

This case involves a question of law. The resolution of that question of law turns completely on facts that were established by findings made in the lower courts that are not substantially disputed between the parties. The sole issue for this Court to resolve as part of this appeal is whether Mr. Foster's petition for the recovery of overpayment of child support is barred by an appropriate statute of limitations. Mrs. Lilly contends that, based upon the Circuit Court's ruling that she was barred from collecting decretal judgments for unpaid child support that were more than ten years old at the time she began her support collection action in 1997 and based upon the fact that Mr. Foster had paid more in child support to her than she was legally entitled to collect based upon the lower court's application of the statute of limitations to Mrs. Lilly's recovery action in April 2000, Mr. Foster had a period of two years from April 2000 in which to file an action for the collection of any child support that he claims to have overpaid. Based upon his failure to file a petition seeking such a recovery of any overpayment for more than three years after his right to file the same accrued, Mr. Foster's petition was barred by the applicable statute of limitations. Mr. Foster contended below, and the Circuit Court ultimately held, that Mr. Foster's petition for recovery of overpayment of child support was merely a continuation of a proceeding he began in 1997 by filing a petition to terminate his child support obligation based upon the emancipation of the child for whom an obligation of support was owed. Whether Mr. Foster's petition is barred by an appropriate statute of limitations is purely a legal question and the Court must review the rulings of the lower courts *de novo*.

**II. The respondent's petition for the recovery of overpayment of child support is barred by the appropriate statute of limitations.**

The initial issue now before this Court is whether Mr. Foster's failure to pursue the alleged overpayment of child support to Mrs. Lilly within the three years that followed the

entry of the Circuit Court's Order Establishing Child Support Arrearages now bars his petition under an applicable statute of limitations. The general purpose of a statute of limitations is to encourage the presentation of legal claims within a reasonable time. See Donley v. Bracken, 192 W.Va. 383, 387, 482 S.E.2d 699, 703 (1994). A statute of limitation does not otherwise affect a valid obligation, except to render it legally unenforceable after the passage of a specified period of time. See Syl. pt. 1, Cook v. Eastern Gas & Fuel Assoc., 192 W.Va. 146, 39 S.E.2d 341 (1946). Hence, just as Mrs. Lilly was barred by a statute of limitations from enforcing unpaid child support payments that came due prior to April 22, 1987, Mr. Foster's petition to recover claimed overpayments of child support will be barred if he failed to file that action within the appropriate time period, in spite of the validity of his claimed legal right to collect the debt.

The first step in analyzing any statute of limitations question is to determine the applicable statute. See Kesecker v. Bird, 200 W.Va. 667, 682, 490 S.E.2d 754, 769 (1997). A thorough review of West Virginia law relating to domestic relations and child support actions reveals no statute of limitation that would apply to the type of overpayment of child support alleged by Mr. Foster in his petition. Without any specific domestic relations statute of limitation that would govern this action, the Court must look to the general provisions of Chapter 55, Article 2 of the West Virginia Code, which govern the limitation of actions. A similar review of Chapter 55, Article 2 finds that there is no specific statutory provision within that chapter governing child support or other domestic relations actions, and that this action would, as a result, be covered by the general statute of limitation set forth in West Virginia Code § 55-2-12, which provides a statute of limitations for all personal actions that are not otherwise provided for under West Virginia law:

"Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative."

W.Va. Code § 55-2-12 (1959). It is clear from a review of Mr. Foster's petition that he does not allege any damages for personal injuries and that West Virginia Code § 55-2-12(b) would not apply to this action. Consequently, Mr. Foster's petition would be governed by either subsection (a) or (c) of West Virginia Code § 55-2-12. Because the longer of those two limitation periods is only two years, however, Mr. Foster's petition would have been filed outside the appropriate period of limitation and would be statutorily barred under either subsection.

By his own admissions, Mr. Foster believed that he had, as a result of the entry of the Order Establishing Child Support Arrearages by the Circuit Court, been subjected to child support withholdings by the West Virginia Bureau for Child Support Enforcement in excess of the amount that Mrs. Lilly could lawfully collect in April 2000. His knowledge of this claimed overpayment was further cemented when he received a copy of the accounting performed by the West Virginia Bureau for Child Support Enforcement, prior to June 2000, which indicated an overpayment by Mr. Foster that exceeded three thousand dollars. Despite his knowledge of his legal right to request reimbursement from either Mrs. Lilly or

the West Virginia Bureau for Child Support Enforcement,<sup>5</sup> Mr. Foster did not assert any claim for the recovery of the alleged overpayment for over three years after he became aware of his right to assert such a claim.

As someone who enjoyed the benefit of the elimination of in excess of fifteen thousand dollars in child support arrearages (plus over a decade of accrued statutory interest) based upon a statute of limitations defense, Mr. Foster should have known that his duty was to assert his rights as to any repayment in a timely manner. In spite of his knowledge of the sometimes draconian effects of the application of a statute of limitation and his right to reimbursement, Mr. Foster failed to properly assert a legal claim against Mrs. Lilly for over three years. No provision of West Virginia law allows Mr. Foster to wait for such a length of time and still enforce his claim for recovery of his claimed overpayment against Mrs. Lilly. Based upon his failure, Mr. Foster cannot now enforce his claim that he has overpaid child support against Mrs. Lilly (or the West Virginia Bureau for Child Support Enforcement, should he later attempt to do so).

**III. The petitioner's March 31, 1997 petition for "modification" and his subsequent request that the Court make a definite determination as to the amount of any child support arrearages that could be collected by Mrs. Lilly ended with the entry of the Order Establishing Child Support Arrearages in April 2000, and this proceeding is not a continuation of those earlier proceedings.**

According to Mr. Foster's self-serving recount of the history of this case set forth in prior lower court filings, which was adopted during the subsequent appeals of this action by

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<sup>5</sup> In 2003, the West Virginia Supreme Court of Appeals held, on nearly identical facts, in Shaffer v. Stanley, 215 W.Va. 58, 593 S.E.2d 629 (2003), that the West Virginia Bureau for Child Support Enforcement must refund the amount of any child support that was improperly withheld from a support obligor "*for whatever reason [the] amount was improperly withheld from the obligor's income[.]*" Shaffer v. Stanley, 215 W.Va. 58, 69, 593 S.E.2d 629, 640 (2003)(emphasis in original). Hence, Mr. Foster clearly had a claim against the West Virginia Bureau for Child Support Enforcement for the return of any alleged overpayment, although he has failed to properly assert that claim.

the Circuit Court, this entire litigation is merely a continuation of a process that was set into motion by Mr. Foster when he filed a pro se petition for "modification" on March 31, 1997 to "modify" his child support obligation and to determine what his obligation was to Mrs. Lilly with regard to child support that had not been paid since the parties divorced. Since the litigation has been ongoing since 1997, Mr. Foster argues that no statute of limitation ever began to run on his right to collect the child support he claims to have overpaid and that any invocation of the statute of limitations to bar his collection of that claimed overpayment would be improper. As with many of the claims asserted by Mr. Foster during this litigation, Mr. Foster and the Circuit Court simply ignored the actual facts surrounding the litigation of his prior petition for "modification" to arrive at this conclusion.

First, the earlier round of litigation that culminated in the entry of this Court's Order Establishing Child Support Arrearages on April 7, 2000 did not begin with the filing of Mr. Foster's petition for "modification" on March 31, 1997. Rather, Mrs. Lilly initiated this litigation when she filed her own petition for modification, with the assistance of the West Virginia Bureau for Child Support Enforcement, on March 21, 1996. (See Pl.'s Petition to Modify.) While that request for modification was pending, Mr. Foster filed his own petition for "modification" on March 31, 1997. (See Def.'s Pet. to Modify.) Although Mr. Foster's pleading was styled a petition to modify child support, Mr. Foster actually sought the termination of his child support obligation based upon the fact that the child for whom the obligation of support was owed had turned eighteen on March 8, 1997. (See id.) Contrary to Mr. Foster's assertion that his petition for "modification" was still awaiting a proper adjudication until the resolution of his most recent claims by the Circuit Court, however, his petition to terminate his child support obligation was granted by Order entered in the Circuit

Court of Raleigh County on August 18, 1997. (See Order, August 18, 1997.) Under the terms of that Order, Mr. Foster's child support obligation was terminated effective June 1, 1997.<sup>6</sup> (See id.) The West Virginia Bureau for Child Support Enforcement was further instructed to prepare an audit reflecting the current amount of child support arrearages that were owed by Mr. Foster and to only continue to make collections of support from Mr. Foster to satisfy child support arrearages that had accumulated prior to the filing of his petition for "modification." (See id.)

After the entry of the Order terminating his child support obligation on August 18, 1997, Mr. Foster moved the Court to order the West Virginia Bureau for Child Support Enforcement to reduce the amount it was withholding from his income to satisfy his child support arrearages and to make a determination about the amount of arrearages that could lawfully be collected from Mr. Foster. (See Temporary Order, September 23, 1997; Temporary Order, February 27, 1998.) After protracted litigation, the Circuit Court ultimately held that Mrs. Lilly was barred from collecting any unpaid support installments that accrued prior to April 22, 1987. (See Order Establishing Child Support Arrearages.) Based upon the Court's ruling and a claim for reimbursement of medical expenses incurred on behalf of the parties' son, the Court granted Mrs. Lilly a decretal judgment of six thousand four hundred forty-two dollars and ninety-four cents (\$6,442.94) for unpaid child support and medical support through January 31, 1999. (See id.) The West Virginia Bureau for Child Support Enforcement was then directed to prepare an accounting reflecting the

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<sup>6</sup> Although Mr. Foster initially asserted that his child support obligation should have been terminated when his son turned eighteen years old, the obligation was not terminated until June 1, 1997 because the initial support order was to continue until the child reached his eighteenth birthday or completed high school, whichever occurred last. (See Order, August 18, 1997.) The parties' son completed high school in May 1997. (See id.)

Court of Raleigh County on August 18, 1997. (See Order, August 18, 1997.) Under the terms of that Order, Mr. Foster's child support obligation was terminated effective June 1, 1997.<sup>6</sup> (See id.) The West Virginia Bureau for Child Support Enforcement was further instructed to prepare an audit reflecting the current amount of child support arrearages that were owed by Mr. Foster and to only continue to make collections of support from Mr. Foster to satisfy child support arrearages that had accumulated prior to the filing of his petition for "modification." (See id.)

After the entry of the Order terminating his child support obligation on August 18, 1997, Mr. Foster moved the Court to order the West Virginia Bureau for Child Support Enforcement to reduce the amount it was withholding from his income to satisfy his child support arrearages and to make a determination about the amount of arrearages that could lawfully be collected from Mr. Foster. (See Temporary Order, September 23, 1997; Temporary Order, February 27, 1998.) After protracted litigation, the Circuit Court ultimately held that Mrs. Lilly was barred from collecting any unpaid support installments that accrued prior to April 22, 1987. (See Order Establishing Child Support Arrearages.) Based upon the Court's ruling and a claim for reimbursement of medical expenses incurred on behalf of the parties' son, the Court granted Mrs. Lilly a decretal judgment of six thousand four hundred forty-two dollars and ninety-four cents (\$6,442.94) for unpaid child support and medical support through January 31, 1999. (See id.) The West Virginia Bureau for Child Support Enforcement was then directed to prepare an accounting reflecting the

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amount of the decretal judgment and payments that were made by Mr. Foster after January 31, 1999, and to release the results to the parties within ten days. (See id.) No further action was required under the terms of the Order Establishing Child Support Arrearages because the Order resolved all of the issues that had been raised up to that point, i.e. what amount of child arrearages could be collected from Mr. Foster by Mrs. Lilly. (See id.)

Although it does not govern the resolution of the instant case, a review of the procedural history of the proceedings that resulted in the Order Establishing Child Support Arrearages is necessary to appreciate the inadequacy of Mr. Foster's claim that the Family Court intended to grant him a decretal judgment for any overpayment at the time it recommended the decision that was adopted in the Circuit Court's Order Establishing Child Support Arrearages, hence causing this case to continue uninterrupted until the ultimate resolution of the petition for the recovery of the claimed overpayment. The recommended ruling of the Family Court that was embodied in the Order Establishing Child Support Arrearages was made in a memorandum issued on January 8, 1999. (See Memorandum, January 8, 1999.) That memorandum ruling essentially adopted the accounting set forth by the West Virginia Bureau for Child Support Enforcement, subject to a minor modification, to govern the arrearages owed by Mr. Foster for unpaid child support and medical support. (See id.) After the ruling was recommended to the Circuit Court and petitions for review were filed, the matter was remanded to the Family Court for a determination as to whether any of the collection efforts made by the West Virginia Bureau for Child Support Enforcement would have operated to extend the period in which Mrs. Lilly could collect child support arrearages that had accrued prior to April 22, 1987. (See Memorandum, July 23, 1999.) Upon reconsideration, the Family Court held that the collection efforts did not

extend the period in which those child support arrearages could be collected and again recommended the amounts contained in the West Virginia Bureau for Child Support Enforcement's prior audit as the amount of the decretal judgment to be awarded to Mrs. Lilly through January 31, 1999. (See Memorandum, September 27, 1999.)

Hence, although it took over a year to have a final order entered that established the appropriate amount of child support arrearages owed by Mr. Foster, the Order Establishing Child Support Arrearages embodied a ruling that had been recommended to the Circuit Court in January 1999. (See id.) Based upon this procedural history, there was no intention by the Family Court to intend to grant a decretal judgment to Mr. Foster for the amount of his overpayment because no overpayment occurred until well after the Family Court recommended its ruling to the Circuit Court in January 1999. (See Def.'s Exh. 2.) In fact, Mr. Foster did not, according to the evidence he presented below, completely satisfy the decretal judgment awarded to Mrs. Lilly in the Order Establishing Child Support Arrearages until October 1999, after the matter had been remanded to the Family Court and re-recommended to the Circuit Court. (See id.) While Mr. Foster's filings below repeatedly assert that he requested a decretal judgment for the amount of the overpayment from the Family Court prior to filing his petition for recovery of the overpayment, these assertions are undercut by the fact that no written motion requesting such a judgment is contained in the record, the fact that Mr. Foster can cite no point in the transcript of the proceedings below where such a request was made and the fact that Mr. Foster had not yet overpaid child support at the time Family Court concluded its substantive consideration of the issues that were resolved by the Order Establishing Child Support Arrearages in September 1999.

Finally, Mr. Foster has claimed below that the failure of the Family Court to order that he receive a decretal judgment for any overpayment was merely an oversight by the lower courts. It should be pointed out that merely characterizing the failure to grant Mr. Foster a judgment for the amounts he claims to have overpaid as child support in the Order Establishing Child Support Arrearages as a judicial oversight is not helpful to Mr. Foster's petition for appeal. The Order Establishing Child Support Arrearages is a final, appealable Order that was entered over seven years ago. (See Order Establishing Child Support Arrearages.) Although the period in which an appeal to this Court could have been filed has expired, Mr. Foster did not seek relief in this Court or in the Circuit Court based upon his claim that the Order did not properly grant him a judgment for his claimed overpayment. Mr. Foster has likewise sought no relief from the Order Establishing Child Support Arrearages through the filing of a motion under Rule 60 of the West Virginia Rules of Civil Procedure. If it is true, as Mr. Foster asserted throughout the appeals below, that a judgment for claimed overpayments should have been included in the Order Establishing Child Support Arrearages (an order that was prepared by Mr. Foster's own counsel), the failure to address that overpayment in the Order Establishing Child Support Arrearages would now bar Mr. Foster from litigating that issue through his petition for recovery of overpayment of child support based upon res judicata. See Syl. pt. 1, Conley v. Spillers, 171 W.Va. 584, 301 S.E.2d 216 (1983) ("An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the

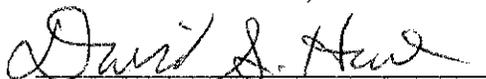
*status* of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata.*")(citations omitted).

### CONCLUSION

As stated by Mrs. Lilly in her petition for appeal, few people should have been more cognizant of the statute of limitations issues that were raised by the filing of the petition for the recovery of overpayment of child support than James Tyrone Foster. A statute of limitations defense has allowed him to escape payment of in excess of thirty thousand dollars in child support that he owed to Mrs. Lilly for the support of the parties' child. Mr. Foster waited more than three years from the time he became aware of the overpayment to file a petition to recover his claimed overpayment. No provision of West Virginia law provides for the filing of a petition for recovery of such an overpayment after the passage of two years from the accrual of the right to file the action. Mr. Foster failed to file his petition within that time period. Accordingly, this Court should reverse the Family Court's Order Granting Defendant's Petition for Recovery of Overpayment of Child Support, with instructions for the entry of an Order dismissing Mr. Foster's petition based upon the statute of limitations and requiring that Mr. Foster reimburse Mrs. Lilly for any costs associated with this proceeding.

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By Counsel

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**CERTIFICATE OF SERVICE**

I, David S. Hart, hereby certify that I have served a true and correct copy of the foregoing Brief of the Appellant upon the following parties or their counsel by United States mail, first-class, postage prepaid, on the 1st day of March, 2007 to the following:

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A handwritten signature in cursive script that reads "David S. Hart". The signature is written in black ink and is positioned above a horizontal line.

David S. Hart