

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SAIRA AHMAD,

Appellant (Petitioner),

v.

ON PETITION FOR APPEAL  
DOCKET NO. 10105T 35741

SAED AFTAB AHMAD

Appellee (Respondent),

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APPELLANT'S BRIEF

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SAIRA AHMAD,

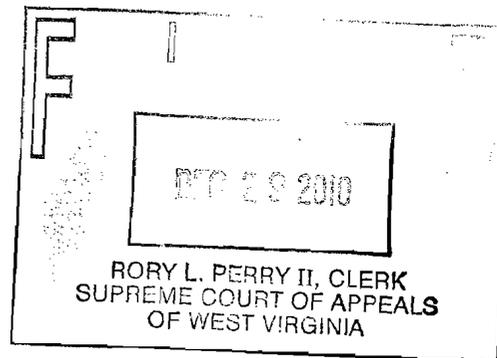
By Counsel,

Rosalee Juba-Plumley  
State Bar # 1938  
P. O. Box 380  
Eleanor, WV 25070  
(304) 586-1123  
(304) 586-1126 (facsimile)  
[eleanorlaw@teays.net](mailto:eleanorlaw@teays.net)

And

Elizabeth Crittenden Fountain  
7403 46<sup>th</sup> Avenue  
St. Petersburg, FL 33709  
D. C. State Bar # 417196  
(727) 321-3072  
[bethflorida@yahoo.com](mailto:bethflorida@yahoo.com)

December 29, 2010



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## ASSIGNMENT OF ERROR

**I. The Circuit Court erred in finding, that, because of insufficient service of process, the Family Court of Putnam County, West Virginia, did not have personal jurisdiction over the Respondent/Appellee, in so far as:**

**a. The Circuit Court erred in considering service of process to the Secretary of State as specified by the Long Arm Statute as the only service option available to Petitioner/Appellant.**

**b. The Circuit Court erred in ruling that the Respondent/Appellee never made a general appearance in the Family Court proceedings.**

**c. The Circuit Court erred in failing to find that Respondent/Appellee's general appearance in the Family Court, without raising the issue of personal jurisdiction, operated to waive and/or cure any issues or defects regarding service of process or other notices requisite to personal jurisdiction over the Respondent/Appellee.**

**II. Given the equities, the behavior of the Respondent/Appellee with the Courts and his failure to respond to the Family Court's prior Orders, the Family Court Orders remain in effect and should be upheld by the Court.**

## STATEMENT OF THE CASE

Respondent/Appellee is a citizen of Pakistan who trained as a doctor in his native country. He first came to the United States in 1997 to continue his medical training and obtain a U.S. specialty certification, which was important to the advancement of his professional career, including his future income and employability, either in the U.S. or Pakistan. He and Petitioner/Appellant were from the same city in Pakistan and entered into an arranged marriage in there in 2000. They then moved to West Virginia, and established residence there under proper US visas while he continued his training. Later, the couple had two children together who lived with them at the family home in Poca, Putnam County.

In April, 2008 Respondent/Appellee, without notice to his family, his medical practice, or the medical center he had contracted with, cashed out all family bank accounts and other

liquid assets, and abandoned his wife and children, returning to Pakistan. By his own statement, he was not certain at the time if the move was permanent or if he would be returning to the United States, as allowed by his visa. Respondent/Appellee filed a forwarding order with the United States Postal Service, and appointed a Richard Wright as his agent for delivery of mail. The Respondent/Appellee made no provision for the support of his wife, a stay at home mom, or his children when he left the U.S.

Other facts as enumerated by Petitioner/Appellant in her Petition for Appeal are undisputed. In summary, Petitioner/Appellant, uncertain of her husband's return, and left destitute with no source of income, filed a pro se Petition for Divorce on May 19, 2008 with the Clerk of the Putnam County Circuit Court (Clerk). An emergency hearing was held, and the Circuit Court of Putnam County entered an order on May 20, 2008, restraining Respondent/Appellee from removing the children from their home and awarding temporary support to Petitioner/Appellant. Various agencies were also ordered to cooperate in discovery by providing information about the Respondent/Appellee, including his whereabouts, financial information, etc. Petitioner/Appellant, by certified mail, served the Summons and Petition for Divorce on Respondent/Appellee's agent, Richard Wright, for which Mr. Wright signed the USPS receipt, on May 24, 2008. This proof of the agent's acceptance of the certified mail is contained in the record.

On June 11, 2008, the Putnam County Clerk's Office (Clerk) received the first of many communications, this one hand written and sent by facsimile, from the Respondent/Appellee, indicating that he had received actual notice of the divorce action. In the communication, Respondent/Appellee "reminded" the Court that "any legal issues" regarding the divorce "should be addressed and resolved in" Pakistan. Respondent/Appellee also provided his mailing address in Lahore, Pakistan, but specifically informed the Clerk that he preferred communication by email because of the time taken for delivery of mail. Two orders were filed promptly after the application for divorce was filed, aimed at facilitating discovery and

preserving the few assets Respondent/Appellee had not liquidated and taken when he left the U.S. Respondent/Appellee had notice of all hearings from at least September, 2008, forward.

On September 16, 2008, a properly noticed hearing was held in the Family Court, and a Temporary Order was filed on October 21, 2008, reaffirming the earlier orders in the case, and making findings based on the discovery ordered by the Court, and ordering support payments retroactive to April, 2008. On December 17, 2008, Respondent/Appellee filed with the Clerk a document styled similarly to a pleading titled "Temporary Order."

Respondent/Appellee characterized it as a "reply," apparently to the Temporary Order. This reply brought out a number of matters not addressed in the Temporary Order, including:

--that the Petitioner/Appellant "admitted on many occasions that she was raped in Pakistan at the age of 12 years."

--that the Petitioner/Appellant had been diagnosed with bi-polar disorder.

--that he had worked hard while in the U.S. and "spent almost all my earnings to take care of my family".

--that he was "very much willing to support my children and Saira in Pakistan".

--that he had liquidated his U.S. assets in order to repay his parents, both retired physicians, "in their hour of need."

--that "[i]f my practicing license and medical board certificates are suspended I will not be able to get a decent job anywhere in the world".

On January 12, 2009, Respondent/Appellee filed a Petition for Annulment of Marriage with the Family Court. The petition listed his address as Lahore, Pakistan, but also asserted that he had maintained residence in Putnam County for not less than 365 days immediately prior to the commencement of the proceeding for dissolution.

In addition to this Petition for Annulment and Respondent/Appellee's continuing communications with the Court regarding the divorce proceedings, a Pakistani attorney filed notice of his representation of the Respondent/Appellee. In May, 2009, the same attorney

filed a pleading, which was also signed by Respondent/Appellee, and included ten pages of attachments. By this pleading, he applied to overturn the Family Court's October 20, 2008 Temporary Order. At the same time, Respondent/Appellee filed another pleading, hundreds of pages thick, addressing all substantive issues in the case, as well as raising numerous other matters, including why he felt Pakistani law and venue should apply and questioning the moral character of his wife. The Family Court issued an Order Clarifying October 20, 2008 Temporary Order Granting Judgment, and Revoking License/Board Certification on June 16, 2009. (Clarifying Order)

In the summer of 2009, Charleston attorney Troy Giatras made an appearance for Respondent/Appellee before the Circuit Court, appealing the Family Court's Orders on the grounds of lack of personal jurisdiction. In its April 20, 2010, ruling, the Circuit Court found that the Family Court had *in rem* jurisdiction to grant the divorce under the "divisible divorce" doctrine of **Burnett v. Burnett, 208 W.Va. 748, 542 S.E.2d 911 (2000)**. But the Circuit Court agreed with the Respondent/Appellee that personal jurisdiction was lacking, and asserted that jurisdiction over "property interests arises from West Virginia Code §56-3-33 (2008), also known as the 'long-arm statute.'" Putnam Co. Cir.Ct., April 20, 2010, Order, p. 5.

The Circuit Court ruled that the *sin qua non* for obtaining personal jurisdiction over the Respondent/Appellee was service through the Secretary of State. In its Order, the Circuit Court allowed the Petitioner/Appellant to amend its service of process and held that, the personal jurisdiction question notwithstanding, the Family Court's Orders would remain in effect. April 20, 2008 Order, p. 6. The Circuit Court held that Respondent/Appellee would have sixty (60) days after service on the Secretary of State was accomplished to respond to the Family Court's prior Orders. Petitioner/Appellant accomplished such service within the thirty (30) days ordered by the Circuit Court. Respondent/Appellee never made an additional filing on the merits in response to the Family Court's Orders. Petitioner/Appellant filed this appeal

to the West Virginia Supreme Court of Appeals, asserting error in the Circuit Court's finding of insufficient service of process and requesting that the Family Court's Orders specifically be upheld.

### SUMMARY OF ARGUMENT

The Petitioner/Appellant respectfully asserts that the Circuit Court erred in its April 20, 2010, decision reversing in part the Family Court Order as to child support, spousal support, and suspension of respondent's license and board certification. Respondent/Appellee received the Summons and Complaint through his designated agent, who signed for the Respondent/Appellee. He did not object to service of process or assert lack of personal jurisdiction (until his appeal to the Circuit Court), and received notice of every hearing held and Order entered in this matter. He filed pleadings, both *pro se* and by his Pakistani attorney, responded on the issues, and otherwise fully participated in the proceedings as well as attempted to negotiate with the Family Court on more than one occasion. These actions by Respondent/Appellee constituted a general appearance on his part. Given his general appearance in this matter, any defect in service of process was cured, and personal jurisdiction was, indeed, established.

After winning his appeal in the Circuit Court, in spite of being directed to do so by the Circuit Court in its April ruling, the Respondent/Appellee did not respond, on the merits or otherwise, to the Family Court's prior orders within the sixty (60) day limit set, nor has he yet to do so. The Petitioner/Appellant respectfully asserts that this Court should find that, by failing to act during the sixty (60) days provided, the Respondent/Appellee, once again, has waived any right to object to the Family Court proceedings or rulings.

### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner/Appellant hereby requests oral argument of this case.

**ARGUMENT**

**I. The Circuit Court erred in finding that, because of insufficient service of process, the Family Court of Putnam County, West Virginia, did not have personal jurisdiction over the Respondent/Appellee, in so far as:**

**a. The Circuit Court erred in considering service of process to the Secretary of State as specified by the Long Arm Statute as the only service option available to Petitioner/Appellant.**

The two forms of jurisdiction involved in matrimonial cases are *in rem* jurisdiction over the marital status and *in personam* jurisdiction over the individual spouse. An action for divorce is generally *in rem* as to the status of parties, and a court does not need *in personam* jurisdiction to grant dissolution. 17 Am. Jur., *Divorce & Separation*, § 170, p. 374. A marriage dissolution action is an *in rem* proceeding and jurisdiction may be based on the domicile of just one spouse. **Snider v. Snider, 209 W. Va. 771, 551 S.E.2d 693 (2001)**. The Petitioner/Appellant had made her domicile in West Virginia for many years prior to filing the petition for divorce. The Circuit Court correctly found that the Family Court had *in rem* jurisdiction to grant the divorce under the “divisible divorce” doctrine of **Burnett v. Burnett, 208 W.Va. 748, 542 S.E.2d 911 (2000)**.

The central question on appeal is whether (or, perhaps, when) the Family Court obtained personal jurisdiction over the Respondent/Appellee. While, as far as anyone knows, Respondent/Appellee left the State of West Virginia when he abandoned his wife and children in April, there were several ways in which personal jurisdiction could be found in the Family Court in response to the Petitioner/Appellant’s pro se divorce filing. Examples of grounds for finding personal jurisdiction include: then respondent in a divorce action may be found within the borders of the

state; may give consent (express or implied) to a court's jurisdiction; may make a general appearance; service of process may be made through an appointed agent; or may be accomplished through a long-arm statute. Petitioner/Appellant filed a pro se Petition for Divorce on May 19, 2008, along with an Affidavit of Non Residency or Unknown Residency for the Respondent/Appellee, giving his whereabouts as "unknown." Pursuant to the Clerk's order, Petitioner/Appellant gave notice by publication on May 23<sup>rd</sup> and 30<sup>th</sup>, 2008. Before the first of these publication dates, the Circuit Court held an emergency hearing, resulting in awarding temporary custody and support to the Petitioner/Appellant, as well as directing various agencies to provide information on the Respondent/Appellee.

The U.S. Postal Service (USPS) allows an applicant to provide for mail delivery to an agent. The USPS, in responding to the Family Court's first Order, reported that Respondent/Appellee had designated Richard Wright as such an agent. Immediately upon learning that Respondent/Appellee had appointed an agent, the Petitioner/Appellant served the Summons and Petition by certified mail. Mr. Wright signed for the certified letter addressed to Respondent/Appellee containing the Summons and Petition in this case on May 24, 2008. As he indicated when he signed the USPS return receipt, Mr. Wright acted as the Respondent/Appellee's agent for the service of process. Although Respondent/Appellee, in his petition for appeal to the Circuit Court, stated, without substantiation or citation that, "No attorney or other recognized representative of Dr. Ahmad was served with notice of the hearing." Respondent/Appellee's Petition for Appeal to the Circuit Court, p. 2. The facts and established law are otherwise.

The creation of an agency relationship ultimately turns on the parties' intentions, as manifested by their agreements or actions. C.J.S. *Agency* § 33, p.326. Respondent/Appellee designated Mr. Wright as his agent with the USPS, and Mr. Wright informed the Respondent/Appellee as to the nature of the mail he received, as agreed between the two men. Respondent/Appellee cannot set up and take advantage of an agency relationship and then deny it for purposes of avoiding a finding of personal jurisdiction. A principal may be estopped to deny

the existence of an agency relationship of which the principal has taken advantage. Liability lies with the principal for the actions of the agent. Id. at §49, pp. 336-337. “An agent may accept service of process and preclude an objection to defects in the service”. *Am. Jur.2d Process* §101, p. 682. And when, as occurred here, the civil rules on service are followed, “there is a presumption of proper service”. Id. at §102, p. 683. (See also, for example, McClay v Mid-Atlantic Country Magazine, 190 W.Va. 42, 435 S.E.2d 180 (1993) a different portion of which was relied upon by the Circuit Court.)

When the Respondent/Appellee appointed Mr. Wright as his agent with the USPS, no limits were placed upon Mr. Wright’s agency to accept USPS mail in the Respondent/Appellee’s stead. The Respondent/Appellee has not, to date, claimed any such limitation of that designation. Of course, Respondent/Appellee went on to consent to the jurisdiction of the Family Court and made a general appearance before it by repeatedly arguing the merits of the case before that

Court.(These last two forms of submitting to personal jurisdiction are addressed below.) Beyond the Circuit Court's failure to acknowledge Respondent/Appellee's consent to jurisdiction and his general appearance, the Court improperly relied on McClay's interpretation of the long arm statute. That opinion did state that service of process by publication could not be substituted for service on the statutorily designated state official. However, the McClay court made this ruling in regard to a "foreign corporation not authorized to do business in" West Virginia, which situation was specifically addressed in the particular long arm statute in question in that case. (Note, also, that, under that long arm statute, proper service could also be accomplished by service on an agent within the state. McClay, 190 W.Va. at 45, 435 S.E.2d at 182. Based on McClay, the Circuit Court observed that McClay stood for the principle that "parties must 'strictly comply' with the requirements of the long-arm statute. McClay's rationale is actually that the court must be "especially exacting in reference to the service of process on a **corporation defendant**. A strict compliance with the statute is necessary to confer jurisdiction of the court over a corporation." [Emphasis added.] Citing Schweppes U.S.A. Ltd. V. Kiger, 158 W.Va.794, 800, 214 S.E.2d 867, 871 (1975).

Thus, the McClay rationale for strict compliance does not apply in this case, in which the Respondent/Appellee, as an individual, has had and continues to have numerous contacts with the State of West Virginia.<sup>1</sup> McClay goes on to observe that compliance with the long arm statute involving a corporation not authorized to do business in West Virginia should not "offend traditional notions of fair play and substantial justice." Citing, *inter alia*, Hill by Hill v. Showa Denko, K.K., 188 W.Va. 654, 425 S.E.2d 609 (1922), cert. denied, 508 U.S. 908, 113 S.Ct. 2338, 124 L.Ed.2d 249 (1993) . Such traditional notions are surely not offended by finding personal jurisdiction over Respondent/Appellee, with his many contacts with West Virginia, even given his flight and physical absence from the state. See Am. Jur.2d *Divorce & Separation* §

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<sup>1</sup> Such contacts, at the time of the Temporary Order, included the an interest in the family home in Poca, and possibly real estate in Sistersville, personal income tax liability (or asset) with the State of West Virginia, the remaining portion of the CAMC 401(k) plan administered by Fidelity Investments, and the \$8,993.04 check to Respondent/Appellee from CAMC.

170, p. 375. (Husband, a Palestinian, who was a Gaza resident, had sufficient “minimum contacts” to allow jurisdiction under the International Shoe standard. Ali v. Ali, 279 NJ Super. 154, 652 A.2d 253 (Ch. Div. 1994) (Rejected on other grounds, Invaldi v. Invaldi, 288 NJ Super. 575, 672 A.2d 1226 (App. Div. 1996). See also, In re Marriage of Tsarbopoulos, 125 Wash. App. 273, 104 P.3d 692 (Div. 3 2004). Indeed, interpreting the rules of jurisdiction so as to deprive the Family Court of personal jurisdiction over the Respondent/Appellee because service was accomplished outside the long-arm method would be illogical.

b. **The Circuit Court erred in ruling that the Respondent/Appellee never made a general appearance in the Family Court proceedings.**

The term ‘appearance’ . . . designate[s] the overt act by which [a party] submits himself to a court’s jurisdiction. . . . An appearance may be expressly made by formal written or oral declaration, or record entry, or **it may be implied from some act done with the intention of appearing and submitting to the court’s jurisdiction” [Emphasis added.]** 4 Am. Jur. 2d, *Appearance* §1, (1995). See also, Black’s Law Dictionary, 95 (7<sup>th</sup> ed. 1999). And, Rauch v. Day & Night Mfg. Corp., 576 F2d 697 (6<sup>th</sup> Cir 1978).

The Respondent/Appellee’s designated agent, Richard Wright, was served with notice of this action on May 24, 2008, and subsequent communications from Respondent/Appellee with the Family Court and Petitioner/Appellant’s counsel indicate that he had actual notice of the proceedings by June 11, 2008. The Family Court replied to Respondent/Appellee on June 17, 2008, explaining how he might more properly participate in the proceedings and assuring him that all future notices would be sent to him at the Lahore, Pakistan address he had provided to the Family Court. Respondent/Appellee chose not to file a formal answer to the petition at that time. He did, however send an email to Petitioner/Appellant’s counsel, declaring that he would “support [his] kids but only in exchange for time with them.” He then went on to remind Petitioner/Appellant’s counsel of his education and training, and observed that, unless his demand

for visitation were granted, "I guess the kids loose out, and your public funds may be required to support my kids."

The Respondent/Appellee, however, apparently had no difficulty responding in a more formal way after being properly noticed regarding the emergency Order of the Circuit Court. That Order, among other holdings, prohibited him from seizing the children to remove them from the jurisdiction and froze any funds he had remaining in West Virginia. After this ruling, the Respondent/Appellee filed a responsive pleading dated November 11, 2008, and received and filed by the Clerk on December 17, 2008, which addressed the issue of child support and vigorously plead for the reinstatement of his medical license and medical board certificates.

Perhaps beginning to question his ability to handle the case *pro se*, the Respondent/Appellee engaged a Pakistani attorney, Tariq Rahim, who sent a letter of appearance on behalf of the Respondent/Appellee. Also on December 17, 2008, Mr. Rahim filed another pleading, this one not only including the elements of a answer, but also requesting affirmative relief, asking that the Temporary Order dated October 20, 2008 be suspended or recalled. Once again, the wording or form may vary somewhat from other pleadings filed in West Virginia courts, but the fact that a trained legal advocate was engaged by the Respondent/Appellee, filed the pleading, requested affirmative relief, as well as the document's length (seven pages, accompanied by ten pages of attachments) and formality indicate that it was intended to engage the opposing party and the Family Court on the merits of the proceedings to date.

Even if this Court finds that there was no general appearance through the Respondent/Appellee's initial communications and filings up until December 17, 2008, it is the Petitioner/Appellant's contention that the filing of formal responsive pleadings constituted a general appearance by the Respondent/Appellee.

The general rule of pleading found in the West Virginia Rules of Civil Procedure (W. Va. R. Civ. P.) 8 provides that an Answer should contain denials of the allegations in the complaint

and/or new matters asserted as counterclaims or affirmative defenses.<sup>2</sup> The pleading filed by Respondent/Appellee and the filing by his legal advisor, meet any reasonable definition of an Answer and, thus, passes the test of the Respondent/Appellee's consenting to the personal jurisdiction of the West Virginia court.

“An appearance in an action involves some submission or presentation to the court, either formally . . . or informally, by actively litigating the merits of an issue. 4 Am. Jur.2d *Appearance* §1, pp. 614-615. “An appearance may arise by implication when a defendant takes, seeks, or agrees to some step in the proceedings that is beneficial to himself or herself or detrimental to the plaintiff.” Quoting Lexis-Nexis v. Travishan Corp., 155 NC App 205, 573 SE2d 547 (2002). There can be no doubt that the Respondent/Appellee made submissions and presentations to the court, even if they were less formally styled than most court filings. Respondent/Appellee did all he could to convince the Family Court to rule in ways favorable to him or detrimental to his wife, Petitioner/Appellant.

As stated in W. Va. R. Civ. P. 82, the rules of civil procedure “shall not be construed to extend or limit the jurisdiction of the courts.” [Emphasis added.] The fact that Respondent/Appellee's Answer was not labeled as such, or otherwise might have varied from normal pleading form in the U.S., is not a barrier to considering the pleading for what it is.

Courts have traditionally held *pro se* parties to a less stringent standard and construed their pleadings liberally. The Fourth Circuit Court of Appeals, in United States of America v Robert Jared Smith, *per curiam*, unpublished, No 07-6358 (2008), held that it “may, of course, construe [a] *pro se* filing liberally. See Hill v. Braxton, 277 F.3d 701, 707 (4<sup>th</sup> Cir. 2002) (“[T]he long-standing practice is to construe pro se pleadings liberally.’)” To ask this Court to

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<sup>2</sup> An Answer is also defined as a written pleading filed by a defendant to respond to a complaint in a lawsuit filed and served upon that defendant. An answer generally responds to each allegation in the complaint by denying or admitting it, or admitting in part and denying in part. The answer may also comprise “affirmative defenses” including allegations which contradict the complaint or contain legal theories (like “unclean hands,” “contributory negligence” or “anticipatory breach”) which are intended to derail the claims in the complaint.

rule that Respondent/Appellee's pleadings did not constitute his consent to jurisdiction and a general appearance in this case is to ask this Court to deny the obvious.

Under W. Va. R. Civ. P. 8(b), in a responsive pleading, the allegations of the petition are admitted unless they are specifically denied in the answer. "[T]he defendant is required to assert all defenses in the responsive pleading or they will be waived." U.S. Legal, Pleadings. <http://courts.uslegal.com/civil-procedure/federal-rules-of-civil-procedure-frcp/pleadings>.

Retrieved December 19, 2010. The Respondent/Appellee filed the pleadings detailed above, making various assertions and detailing numerous positions he presented as defenses. In his pleadings, Respondent/Appellee did not deny the following:

- the parties were married, and cohabited for more than a year in Putnam County, West Virginia, with their two children being born and raised there.
- prior to the separation, Petitioner/Appellant performed most, if not all of the caretaking and parenting functions for the children.
- Respondent/Appellee left his wife and children in West Virginia and moved to Pakistan for an indefinite period of time.
- respondent/Appellee liquidated his "personal assets," emptying the joint bank account.
- Petitioner/Appellant had \$4350 in regular monthly expenses when Respondent/Appellee emptied the bank account and left the United States.

It should be noted that all of the Respondent/Appellee's pleadings and most of his correspondence on the issues before the Family Court raised objection to the venue of the current action, averring that any such action should take place in Pakistan. In these statements, Respondent/Appellee objected to the Family Court's authority to dissolve the marriage, erroneously questioning the Court's *in rem* jurisdiction. Never did the Respondent/Appellee object to the Court's jurisdiction over his person.

Finally, in January of 2009, Respondent/Appellee filed a Petition for Annulment of Marriage with the Family Court, alleging, among other things, that the Petitioner/Appellant had

obtained the marriage by fraud because she did not reveal to him until after the marriage that she had been raped as a twelve year old. This Petition was yet another example that Respondent/Appellee had consented to personal jurisdiction, as the Petition presumed the power of the Family Court to annul the marriage.

**c. The Circuit Court erred in failing to find that Respondent/Appellee's general appearance in the Family Court, without raising the issue of personal jurisdiction, operated to waive and/or cure any issues or defects regarding service of process or other notices requisite to personal jurisdiction over the Respondent/Appellee.**

"A general appearance is a waiver of the want of notice." Blair v. Henderson, 49 W. Va. 282, 38 S.E. 552 (1901) . It is a matter of firmly established law that entering a general appearance waives the affirmative defense of lack of personal jurisdiction because of lack of service of process. Prince v. Pinnell, 4 W. Va. 298. A general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof. C.J.S. *Appearances* § 41. The defendant is precluded from thereafter taking advantage of the defect. Pender v. McKee, 266 Ark. 18, 582 S.W.2d 929 (1979). It is as if process had been executed on the defendant. Lumber Co. v. Lance, 50 W. Va. 636, 41 S.E. 128 (1902), State v. Thacker Coal & Coke Co. 49 W. Va. 140, 38 S.E. 539 (1901) Thorn v. Thorn, 47 W. Va. 4, 34 S.E. 759 (1899), Groves v. County Court, 42 W. Va. 587, 26 S.E. 460 (1896), Layne v. Ohio River R. Co., 35 W. Va. 438, 14 S.E. 123 (1891).

The West Virginia Rules of Civil Procedure are clear that "A defense of lack of jurisdiction over the person . . . or insufficiency of service of process is waived if omitted from a . . . responsive pleading." W. Va. R. Civ. P. 12(h)(1)(B). . A general appearance "waives defects in process, service, or return." Montague Mfg v. Ten Weeges, 297 F. 211 (CCA 4<sup>th</sup> Cir 1924). Quoted in C.J.S. *Appearance* § 41. We have already established that

Respondent/Appellee filed responsive pleadings with the Family Court.<sup>3</sup> Thus, the defense of lack of personal jurisdiction is waived by specific operation of Rule 12.

Case law is the same. "It is the settled rule that a defendant by appearing and pleading, waives all defects in the service of the process."<sup>4</sup> Further, Respondent/Appellee, having appeared and answered, may not first raise the issue on appeal. "A general appearance waives all question of the service of process. It is equivalent to personal service." Moore v. Green, 90 Va. 181, 17 S.E. 872 (1893); Atlantic & Danville RR Co. v. Peake, 87 Va. 130, 12 S.E. 348 (1890).

**II. Given the equities, the behavior of Respondent/Appellee with the Courts, and his failure to respond to the Family Court's prior Orders, the Family Court's Orders remain in effect and should be upheld by this Court.**

The Respondent/Appellee, throughout the course of these proceedings, made choices not to follow the Family Court's instructions that he should not now be allowed to benefit from. That Court directed the Respondent/Appellee to the Divorce forms available on this Court's web site. These forms and instructions give clear information which could be followed by most educated adults. There can be no doubt that Respondent/Appellee was able to read, understand, and follow this information if he so chose. In spite of the Family Court's suggestion, he declined to engage U. S. legal counsel in the divorce proceedings. The Respondent/Appellee decided at first to proceed pro se. This choice, just as his choice not to follow traditional form should not be allowed to work toward his advantage in claiming lack of personal jurisdiction. Similarly, later, the Respondent/Appellee chose to engage Pakistani, rather than West Virginia counsel. That

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<sup>3</sup> "The object of process is to secure the appearance of the defendants in court. When that is done by general appearance, the function of the process is accomplished . . . . A defendant can not voluntarily appear and demur to a petition, and waive his right to further plead or answer thereto, and then take advantage of the fact that no process issued against him." Root-Tea-Na-Herb Co. v. Rightmire, 48 W.Va. 222, 36 S.E. 359 (1900) See also, Totten v. Nightbert, 41 W.Va. 800, 24 S.E. 627 (1896)

<sup>4</sup> Atlantic & Danville RR Co v. Peake, 87 Va. 130, 12 S.E. 348 (1890); New River Mineral Co. v. Painter, 100 Va. 507, 42 S.E. 300 (1902); Bell v. Railroad Co., 91 Va. 99, 20 S.E. 942; Layne v. Ohio River R. Co., 35 W.Va. 438, 14 S.E. 123 (1891); Lumber Co. v. Lance, 50 W.Va. 636, 41 S.E. 128 (1902); Bank of the Valley v. Bank of Berkeley, 3 W. Va. 306 (1869); State v. Thacker Coal & Coke Co., 49 W.Va. 140, 38 S.E. 539 (1901); Thorn v. Thorn, 47 W.Va. 4, 34 S.E. 759.

counsel, acting for the Respondent/Appellee , fully addressed the merits of the case. The Respondent/Appellee's choice to use Pakistani counsel should not allow him to argue the submitted pleading, which the Respondent/Appellee signed, somehow "doesn't count."

The arrogance of the Respondent/Appellee shows in these choices, as well as the fact that he made many negotiating offers to the Family Court, and steadfastly failed to follow the Court's instructions as to form and format. He took advantage of the Family Court's willingness to grant him additional time, slowing down the proceedings below. He even had his father, an influential Pakistani official, write to the Family Court in hopes of influencing the Family Court and having that Court change its position. He only engaged his current counsel when it became clear to him that he was in danger of losing his medical license and board certifications, and that engagement was limited to the question of personal jurisdiction, not the merits of the case.

From the beginning of this action, the Respondent/Appellee had many contacts with the State of West Virginia, some of which remain even today. Indeed, when he first left, he was not certain that he was no longer going to be domiciled in West Virginia, reserving the option to return, which he is allowed to do on his visa. His children remain behind, a strong tie to the State. He left back pay, retirement savings, and, possibly, real estate interests in West Virginia. Of course, his license to practice medicine is a valuable tie to the State. He should not be heard now to argue that these contacts are insufficient to find personal jurisdiction.

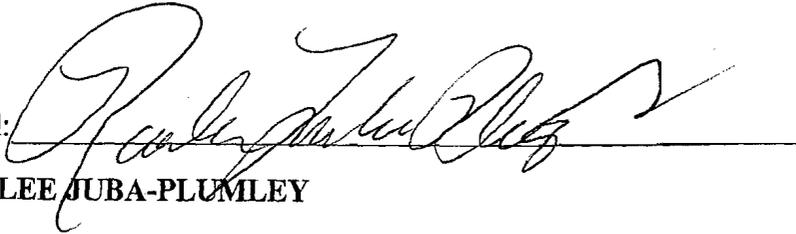
In its April 20<sup>th</sup> ruling, the Circuit Court granted Respondent/Appellee "sixty days following service to respond to the Family Court's prior orders". Petitioner/Appellant made service on the West Virginia Secretary of State within a week of the Circuit Court's Order. Yet the Respondent/Appellee has not filed a response to the Family Court's prior orders as directed.

Given the actions and behaviors of the Respondent/Appellee, the Family Court's orders remain in effect, and should be upheld by this Court

**CONCLUSION**

Based on the above, the Petitioner/Appellant respectfully submits that this Court (1) the Circuit Court's order reversing, in part, the Family's Court's Final Order should be reversed, (2) the Family Court's Orders should be upheld in their entirety, and (3) this Court provide such other and further relief as it may deem proper.

Signed:

A handwritten signature in black ink, appearing to read "Rosalee Juba-Plumley", written over a horizontal line.

**ROSALEE JUBA-PLUMLEY**

**ELIZABETH CRITTENDEN FOUNTAIN**

**COUNSEL FOR THE APPELLANT**

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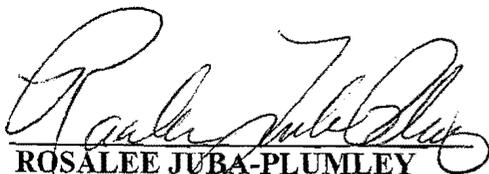
**CERTIFICATE OF SERVICE**

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I, ROSALEE JUBA-PLUMLEY, hereby certify that a true copy of the foregoing  
"Appellant's Brief" was served upon:

TROY GIATRAS, ESQUIRE  
118 CAPITOL STREET  
CHARLESTON, WV 25301

on the 29th day of December, 2010, by mailing the same within a properly stamped and  
addressed envelope deposited in the regular United States mail.

  
ROSALEE JUBA-PLUMLEY