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**November 22, 2002**  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RELEASED**

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Davis, C.J., dissenting:

In this proceeding, the majority opinion concluded that the circuit court had no personal jurisdiction over Gary Dean Ellithorp, for the purpose of granting his spouse, Nancy L. Ellithorp, a divorce on May 11, 1995. The majority opinion found that a divorce decree granted to Mr. Ellithorp, by a Texas court on January 13, 1995, was valid and controlling. Consequently, the majority opinion found that the circuit court could not enforce a 1997 agreed order by the parties, which incorporated the divorce, alimony and child support provisions of the West Virginia divorce decree. As I explain below, the majority opinion reached the wrong result by incorrectly analyzing the personal jurisdiction issue. Therefore, I dissent.

***A. The Circuit Court Had Personal Jurisdiction to Award Alimony and Child Support***

Because he was living in Texas, the majority opinion determined that the circuit court had no personal jurisdiction over Mr. Ellithorp when Ms. Ellithorp filed for divorce on July 21, 1994. Consequently, the majority reasoned that the circuit court could not award alimony and child support in its 1995 divorce decree. I disagree.

In Syllabus point 3 of *Shaw v. Shaw*, 155 W. Va. 712, 187 S.E.2d 124 (1972) we held that “[a] change in residence for convenience in working conditions does not, without more, indicate a change in domicile.” We have explained that “[d]omicile is a place a person intends to retain as a permanent residence and go back to ultimately after moving away.” Syl. pt. 2, in part, *Shaw*, *id.* In Syllabus point 8, in part, of *White v. Manchin*, 173 W. Va. 526, 318 S.E.2d 470 (1984) we held “[i]f domicile has once existed, mere temporary absence will not destroy it, however long continued.” (quoting Syl. pt. 2, *Lotz v. Atamaniuk*, 172 W. Va. 116, 304 S.E.2d 20 (1983)).

In the recent opinion of *Snider v. Snider*, 209 W. Va. 771, 551 S.E.2d 693 (2001), we addressed the issue of the authority of courts in West Virginia to award alimony when only one party is physically present in the state.<sup>1</sup> The family law master ruled that West

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<sup>1</sup>In *Snider*, the parties were married on January 20, 1973, in Garrett County, Maryland. At the time of the divorce, the parties had two emancipated children. During the marriage, Mr. Snider was employed by five different glass companies and was required to move from West Virginia to Pennsylvania, back to West Virginia, and again to Pennsylvania. Between the period 1987 until 1993, Mr. Snider was employed by a glass company in New Jersey. In January 1994, the parties traveled to West Virginia to visit with Ms. Snider’s family. While in West Virginia, the parties agreed that they would buy a townhouse that was being offered for sale in Bridgeport, West Virginia, and that they would live in the home when Mr. Snider retired. After several weeks, the parties returned to New Jersey and placed their New Jersey home on the market. The parties also made an offer to purchase the townhouse in West Virginia. In March 1994, Mr. Snider began working as a consultant for a glass company in Elgin, Illinois. Three months later, the parties purchased the townhouse in Bridgeport. The parties sold their house in New Jersey in January 1995, and moved to the townhouse in West Virginia in March 1995. After moving to West Virginia, Mr. Snider returned to the contract job in Illinois. Although Mr. Snider spent most of his time in Illinois, he would periodically visit his home in West Virginia. Mr. Snider filed for divorce in Illinois on October 3, 1997, alleging that the

Virginia courts had personal jurisdiction over Mr. Snider due to his numerous contacts with the state. In an order dated January 28, 2000, the circuit court ordered equitable distribution of the marital assets of the parties. The circuit court also required Mr. Snider to pay Ms. Snider \$2,500.00 per month in spousal support, and to pay her attorney's fees.<sup>2</sup>

Mr. Snider appealed the circuit court's ruling on the grounds that he did not have sufficient minimum contacts in West Virginia for the circuit court to exercise personal jurisdiction over him. This Court rejected the argument. In addressing the issue of minimum contacts in *Snider*, we relied upon the principles of law set out in *Pries v. Watt*, 186 W. Va. 49, 410 S.E.2d 285 (1991). In *Pries* it was said that:

In order to obtain personal jurisdiction over a nonresident defendant, reasonable notice of the suit must be given the defendant. There also must be a sufficient connection or minimum contacts between the defendant and the forum state so that it will be fair and just to require a defense to be mounted in the forum state.

Syl. pt. 2, *Pries*, 186 W. Va. 49, 410 S.E.2d 285. The decision in *Pries* also noted that

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parties had been separated on a continuous basis since March 1994. Ms. Snider countered by filing a divorce action in West Virginia on October 24, 1997.

The Illinois court granted a divorce on April 1, 1998. Mr. Snider then moved to dismiss the West Virginia divorce action on the grounds that, because of the Illinois judgment, the West Virginia courts lacked personal jurisdiction over him. On August 8, 1998, the family law master entered an order rejecting Mr. Snider's motion.

<sup>2</sup>The circuit court gave full faith and credit to the Illinois divorce and therefore only decided property issues and alimony.

[t]o what extent a nonresident defendant has minimum contacts with the forum state depends upon the facts of the individual case. One essential inquiry is whether the defendant has purposefully acted to obtain benefits or privileges in the forum state.

Syl. pt. 3, *Pries, id.* After applying the principles of *Pries* to the facts presented in *Snider*, we held that sufficient minimum contacts were made in West Virginia by Mr. Snider to give the circuit court personal jurisdiction over him.

Here, Ms. Ellithorp presented evidence during the divorce proceeding which showed that, from 1990 to 1993, the parties lived in West Virginia with their two children. In June of 1993, Mr. Ellithorp joined the Army and was stationed in El Paso, Texas. Mr. Ellithorp left his wife and children in West Virginia and made no plans to take them to Texas. While in Texas, Mr. Ellithorp continued to claim West Virginia as his legal residence. Ms. Ellithorp proved this fact by presenting documents showing that, in 1994 Mr. Ellithorp listed West Virginia as his legal residence for tax purposes. In view of this evidence, it is patently illogical and legally wrong to conclude that personal jurisdiction over Mr. Ellithorp did not exist when he (1) left West Virginia solely for the purposes of his job, (2) allowed his family to remain in the state and enjoy the benefits from residency in the state, including having their children attend the state's public schools and (3) accepted the benefits of West Virginia's state tax laws. Clearly, this un rebutted evidence established minimum contacts in West Virginia by Mr. Ellithorp. Therefore, the trial court had personal jurisdiction over Mr. Ellithorp for the purpose of awarding alimony and child support.

### ***B. The Circuit Court Had Jurisdiction to Grant a Divorce***

In addition to finding that the circuit court had no jurisdiction to award alimony and child support, the majority opinion also erroneously concluded that the circuit court had no jurisdiction to grant a divorce.

As previously indicated, Ms. Ellithorp filed for divorce on July 21, 1994. Service of process was attempted through the Secretary of State's office. Mr. Ellithorp refused to accept process. *See State v. Robertson*, 124 W. Va. 648, 652, 22 S.E.2d 287, 290 (1942) ("Parties may not refuse service of processes of any court, and the efforts of these parties to escape service of process by refusing to accept and read the same did not destroy the effectiveness of the service thereof."). Instead, Mr. Ellithorp filed for a divorce in Texas on July 26, 1994, and had process served on Ms. Ellithorp. Through counsel, Ms. Ellithorp informed the Texas court that a divorce proceeding was pending in West Virginia, that the Texas courts had no jurisdiction over Ms. Ellithorp and that Mr. Ellithorp's tax information indicated that his domicile was in West Virginia. Moreover, on October 5, 1994, the family law master contacted the Texas court and apprised it of the pending case in West Virginia. The Texas court ignored the family law master's request that it refrain from proceeding with the case. Instead, on January 13, 1995, the Texas court granted Mr. Ellithorp a divorce and required him to pay \$400 a month in child support. On May 11, 1995, the West Virginia circuit court issued an order awarding a divorce, awarded \$591.67 a month for child support, and awarded to Ms. Ellithorp alimony in the amount of \$400.00 per month.

This Court concluded that the circuit court's divorce decree was invalid and that the Texas divorce decree was valid. The majority opinion reached its conclusion through convoluted reasoning. The majority's reasoning, as best I can discern, is because the Texas divorce was granted "first in time," it should prevail, or alternatively, the circuit court had no jurisdiction over Mr. Ellithorp. Therefore, the Texas divorce should prevail. Both positions are wrong.

The "first in time" divorce argument was presented and rejected in *Rash v. Rash*, 173 F.3d 1376 (11th Cir. 1999).<sup>3</sup> *Rash* involved "a dispute in federal court between a former husband and wife over the priority to be accorded to two competing state court [divorce] judgments entered in the courts of different states." *Rash*, 173 F.3d at 1378. The couple in *Rash* were residents of New Jersey. They moved to Florida for two years before the wife returned to their home in New Jersey. After the wife left Florida, the husband sued for divorce in Florida on February 25, 1994. The wife filed for divorce in New Jersey on March 21, 1994. On October 21, 1994 the Florida court granted a divorce to the husband. On June 19, 1995

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<sup>3</sup>In our decision in *Snider*, this Court rejected a "first in time" argument couched in a different context. In *Snider*, the husband argued that because "the Illinois court issued an order dissolving the parties' marriage first, the Illinois court deprived our courts of all authority to adjudge Ms. Snider's personal rights." *Snider*, 209 W. Va. at 777, 551 S.E.2d at 699. In our rejection of this argument we stated "[t]he consequence of accepting Mr. Snider's position would be that our State, where Ms. Snider is domiciled and where the parties ostensibly maintained their marriage, would be forced by a foreign jurisdiction to abdicate its interest in protecting its own residents--married or otherwise." *Snider*, 209 W. Va. at 777, 551 S.E.2d at 699.

New Jersey granted a divorce to the wife.

The husband in *Rash* argued “that the Florida judgment controls because it was first in time and that the Florida court had in personam jurisdiction over the wife[.]” *Rash*, 173 F.3d at 1381. The Eleventh Circuit rejected this argument. It did so after finding that the New Jersey court was the only court to expressly address the personal jurisdiction issue. Consequently, the Florida judgment was “not entitled to full faith and credit[.]” *Rash*, 173 F.3d at 1381.

In the instant proceeding, *Rash* controls. It is undisputed that Ms. Ellithorp never visited Texas. Through counsel, Ms. Ellithorp informed Texas authorities that they had no jurisdiction of the matter. The only record showing a court meaningfully addressing the issue of jurisdiction over both parties was the proceeding held before the West Virginia circuit court. The circuit court held a hearing and took evidence on the issue of jurisdiction over Mr. Ellithorp, before concluding that jurisdiction existed. Consequently, under *Rash*, the Texas divorce should not be accorded full faith and credit merely because it was first in time.<sup>4</sup>

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<sup>4</sup>Assuming, for the sake of argument, that the ruling in *Rash* is not dispositive, the Texas divorce decree should still not be accorded full faith and credit. Our law is clear in holding that “[u]nder Article IV, Section 1, of the Constitution of the United States, a valid judgment of a court of another state is entitled to full faith and credit in the courts of this State.” Syl. pt. 1, *State ex rel. Lynn v. Eddy*, 152 W. Va. 345, 163 S.E.2d 472 (1968). Full faith and credit may only be accorded to a “valid” judgment of another jurisdiction. The record in this case is clear in showing that the Texas divorce decree was invalid, because it sought not only to grant a divorce, but also to award child support without having jurisdiction over Ms. Ellithorp or the

The majority opinion also suggested that, regardless of the first in time issue, the circuit court had no jurisdiction over Mr. Ellithorp. The majority opinion states that “the dismissal of the Texas divorce decree arguably would have placed the parties in the precarious position of no longer being divorced.”<sup>5</sup> In other words, the majority opinion concluded that the circuit court’s divorce decree was invalid. Therefore, were the Texas divorce decree not honored, the parties would not be divorced. Such reasoning is simply wrong. This Court has long held that “[t]he jurisdiction over both parties to a marriage may be established in West Virginia upon a showing that one spouse is domiciled in West Virginia.” *Snider*, 209 W. Va. at 776, 551 S.E.2d at 698 (citing *Carty v. Carty*, 70 W. Va. 146, 73 S.E. 310 (1911)).

The record is clear. Both parties lived as husband and wife in West Virginia prior to Mr. Ellithorp being sent to Texas by the Army. Ms. Ellithorp and her children never went to Texas. They remained in West Virginia. Disregarding the overwhelming evidence of West Virginia domiciliary by Ms. Ellithorp (and Mr. Ellithorp), the majority opinion ruled that the Texas divorce was valid even though Texas had no jurisdiction over Ms. Ellithorp. The majority further erroneously ruled that the West Virginia circuit court’s divorce was invalid because it

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parties’ children. *See* Syl. pt. 4, *Eddy*, 152 W. Va. 345, 163 S.E.2d 472 (“A judgment rendered by a court of another state or by a court of this State is subject to attack for lack of jurisdiction to render such judgment or for fraud in its procurement.”). The invalidity of the child support ruling nullified the legitimacy of the Texas divorce decree.

<sup>5</sup>In footnote 26 of the majority opinion it further states that “the parties should realize that they would find themselves in a precarious position if the Texas divorce decree was dismissed.”



purportedly had no jurisdiction over Mr. Ellithorp. The only conclusion to be reached from this absurdity is that jurisdiction is grounded in the husband, not the wife. That is, under the majority's version of the facts, neither state had jurisdiction over both parties, but since Texas had jurisdiction over Mr. Ellithorp, only the Texas divorce is valid. *This line of reasoning is unsupported by any case law in the country!*

In the final analysis, West Virginia had jurisdiction over Ms. Ellithorp and her children, and, based on un rebutted evidence, it had jurisdiction over Mr. Ellithorp. Consequently, the West Virginia divorce was valid and enforceable.

### ***C. The Circuit Court's Disposition was Determined after Agreement of the Parties***

Mr. Ellithorp sought to challenge the 1997 agreed order entered by the circuit court. The agreed order was the result of Mr. Ellithorp's challenge to the enforcement of the child support order entered by the circuit court in its 1995 divorce decree. During the proceedings contesting child support, the parties reached a compromise. The parties agreed that the Texas divorce decree would not be binding and enforceable.<sup>6</sup> The parties also agreed

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<sup>6</sup>The 1997 agreed order purported to dismiss the Texas divorce decree. I agree with the majority opinion that the circuit court did not have authority to dismiss a decree entered by a Texas court. However, this point did not invalidate the 1997 agreed order. The language

that the provisions of the West Virginia divorce decree would be binding and enforceable. However, under the joint agreement, Mr. Ellithorp's obligations for child support and alimony under the divorce decree were deemed temporary until further order of the court. In 1997, the circuit court approved the agreed order submitted by both parties.

Nevertheless, in 2000, Mr. Ellithorp sought to invalidate the 1997 agreement after the West Virginia Bureau for Child Support Enforcement began efforts to collect child support arrearages. Mr. Ellithorp argued that the 1997 agreement was invalid because the West Virginia circuit court had no jurisdiction over him when the 1995 divorce decree was entered. The West Virginia circuit court rejected the argument. As previously indicated, the majority opinion has agreed with Mr. Ellithorp that the circuit court lacked jurisdiction over him when the divorce was granted. I have already labored to show that the majority was absolutely wrong in finding that the circuit court lacked personal jurisdiction over Mr. Ellithorp. I will not retread my position on this issue. However, assuming *arguendo*, that the majority opinion was correct in concluding that, in 1995 the West Virginia circuit court had no jurisdiction over Mr. Ellithorp, such grounds still do not support the disturbance of the 1997 agreed order.

As an initial matter, it is well-established law in this state that “[a] party cannot invite the court to commit an error, and then complain of it.” *Lambert v. Goodman*, 147

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attempting to dismiss the Texas decree was merely harmless and superfluous.

W. Va. 513, 519, 129 S.E.2d 138, 142 (1963). *See Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 599, 396 S.E.2d 766, 780 (1990) (“[T]he appellant cannot benefit from the consequences of error it invited.”). Consequently, Mr. Ellithorp cannot complain to this Court about the 1997 agreed order because he helped formulate the order and submitted it to the court. *See* Syl. pt. 2, *Young v. Young*, 194 W. Va. 405, 460 S.E.2d 651 (1995) (“A judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal.”).

The sole basis for Mr. Ellithorp’s challenge to the 1997 agreed order was that the circuit court had no personal jurisdiction over him in 1995 when the divorce decree was entered. Therefore, the provisions of the 1995 decree could not be imposed upon him in 1997. The majority opinion agreed with this contention. However, one of the fluid points about personal jurisdiction that the majority opinion overlooked is that personal jurisdiction may be consented to or waived. That is “[j]urisdiction of the person may be conferred by consent of the parties or the lack of such jurisdiction may be waived.” *Kessel v. Leavitt*, 204 W. Va. 95, 117, 511 S.E.2d 720, 742 (1998) (quoting Syl. pt. 4, in part, *West Virginia Secondary Sch. Activities Comm’n v. Wagner*, 143 W. Va. 508, 102 S.E.2d 901 (1958)). In this case, Mr. Ellithorp consented to the jurisdiction of the circuit court in 1997, retroactive to the 1995 divorce proceeding that he failed to attend. Consequently, even if I accepted the majority’s erroneous position that the circuit court did not have jurisdiction over Mr. Ellithorp in 1995, Mr. Ellithorp affirmatively consented to such jurisdiction in 1997. I know of no case law that

would preclude a party from consenting to jurisdiction in a later proceeding involving the same parties and issues.

Based upon the foregoing, I respectfully dissent.