

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

ROBIN W. HAMMER

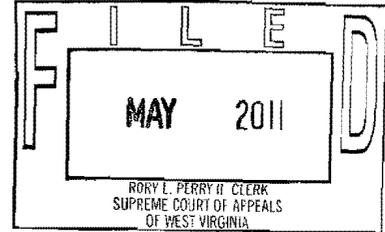
Appellant,

v.

Appeal No. 11-0075

THOMAS M. HAMMER, ROBERT B. HAMMER,
TERESA C. HAMMER LANG, MARK J. HAMMER,
AND SHARON M. HELMS,

Appellees.



BRIEF OF APPELLEES

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Statement of Facts 4

Statement of the Case 5

Standard of Review 6

Argument 6

A **The lower Court’s entry of Declaratory Judgment in favor of Appellees was appropriate in consideration of the pleadings, facts and circumstances, as well as the posture of the case at the time of the decision....** 6

B. **Appellant’s argument, as expressed in paragraphs A-H and J, fails to raise any issue which would provide a basis for the requested relief...** 8

C. **Appellant raises for the first time on appeal the issue of the recusal of the lower court judge...** 10

Conclusion 12

Certificate of Service 14

TABLE OF AUTHORITIES

CASES

Phillips v. Fox,
193 W. Va. 657, 458 S. E. 2d 327 (W. Va. 1995). 6

Carvey v. W. Va. State Bd. Of Ed. ,
527 S. E. 2d 831, 206 W. Va. 720. 7

Cox v. Amick,
195 W. Va. 608, 466 S. E. 2d 459 (1995) 7

Keffer v. Prudential Ins. Co. Of America,
153 W. Va. 813, 172 S. E. 2d 714 8

Hall v. Hartley,
146 W. Va. 328, 119 S. E. 2d 759 (W. Va. 1961) 8

Zaleski v. West Virginia Mutual Insurance Company,
687 S. E. 2d 123, (W. Va. 2009) (*per curiam*) 11

Clint Hurt & Assoc. V. Rare Earth Energy, Inc.,
198 W. Va. 320, 480 S. E. 2d 529, 12

Crain v. Lightner,
178 W. Va. 765, 364 S. E. 2d 778) 12

STATUTES

W. Va. Code §55-13-1 et. seq 4, 6

W. Va. Code §55-13-2 7

W. Va. Code §55-13-5 7

OTHER

Rule 57 *W. Va. R. C. P.* 4

Rule 56 *W. Va. R. C. P.* 7

Rule 12 *W. Va. R. C. P.* 7

STATEMENT OF FACTS

Appellees, petitioners below, on or about June 8, 2010, filed a petition for Declaratory Judgment (*Appendix Record* p. 1) in the Circuit Court of Randolph County, West Virginia, pursuant to Rule 57 *W. Va. R. C. P.*, and *W. Va. Code* §55-13-1 et. seq., seeking a ruling from the Circuit Court of Randolph County, West Virginia, as to the validity of two separate power of attorney appointments executed by Ethel M. Hammer, the mother of all of the parties. Appellees sought determination of the validity of a power of attorney executed November 27, 2002, and simultaneously sought determination as to the invalidity of a power of attorney executed September 22, 2008.

The power of attorney dated November 27, 2002, (the first power of attorney) , (*Appendix Record* p. 6) appointed two of the appellees, namely Thomas M. Hammer and Sharon M. Helms, acting jointly, as attorneys in fact for Ethel M. Hammer, a now 87 year old invalid resident of a local nursing facility. The power of attorney dated September 22, 2008, (the second power of attorney), (*Appendix Record* p. 10) appointed the five remaining children of the principal; and purported to grant any one of them authority to act, subject to a right of reversal by three of the five appointees. At the time of execution of the second power of attorney, three of the appointed agents, namely Robert B. Hammer, Teresa Caroldeen Hammer Lang, and Mark J. Hammer were unaware of its execution, contents, provisions, or their appointment.

Upon learning of the existence of this second power of attorney, Tom, Sharon, Robert, Teresa, and Mark attempted to resolve this problem through discussion with Respondents below. Reaching no agreement as to which power of attorney was an enforceable and valid document, Robert, Teresa and Mark executed a document entitled "Notice of Objection

to Action”, (*Appendix Record* p. 14), and provided a copy to Davis Trust Company, the local financial institution where Mrs. Hammer’s bank accounts were maintained. Further, fearing that this action alone was insufficient to protect the principal’s assets and provide for her best interest, and not knowing when, where, to whom, or how often Respondents may have in the past, or would in the future, present the second document, appellees brought the declaratory judgment action in order to prevent respondents’ misuse and/or abuse of the power allegedly granted, and also to resolve any dispute with respondents by obtaining an official and enforceable decision regarding the second document.

Appellees in their petition asserted that the second power of attorney was not a valid expression of Mrs. Hammer’s wishes and desires, and did not definitively and reliably identify any individual having the authority to act on her behalf. Appellees further asserted that the first document was the only valid and enforceable expression of the principal’s wishes. In Answer to the petition, Respondents below raised the issue of Mrs. Hammer’s competency at the time of the execution of the second document.

The lower court appointed a guardian *ad litem* for Mrs. Hammer, and after several hearings, and upon receipt of the report of the guardian *ad litem*, granted Appellees’ request for declaratory judgment, (*Appendix Record* p. 407), finding that the second document was invalid due to its contents, and further finding that based upon the findings and report of the guardian, Mrs. Hammer was incompetent at the time the second document was executed.

STATEMENT OF THE CASE

In June, 2010, Appellees sought declaratory judgment from the lower court

interpreting the validity and enforceability of two separate power of attorney appointments executed by Ethel M. Hammer. In December, 2010, following several hearings below, the lower Court entered an Order declaring a November, 2002, power of attorney appointment executed by Mrs. Hammer as the only reliable and enforceable expression of her wishes. This Order also declared a September, 2008, power of attorney appointment invalid, due to its contents as well as the incompetency of the principal at the time of its execution.

Thereafter, appellant sought a stay of that order, pending appeal, from the lower court, which request was denied. Subsequent thereto, appellant petitioned this Court for a stay of that decision, which also was denied. This appeal followed.

STANDARD OF REVIEW

When reviewing decisions rendered in a declaratory judgment action, the Court applies the de novo standard of review to questions of law, and a clearly erroneous standard of review to findings of fact made by the lower court. (See *Phillips v. Fox*, 193 W. Va. 657, 458 S. E. 2d 327 (W. Va. 1995).

ARGUMENT

The lower Court's entry of Declaratory Judgment in favor of Appellees was appropriate in consideration of the pleadings, facts and circumstances, as well as the posture of the case at the time of the decision.

A. Consistent with the provisions of the Uniform Declaratory Judgments Act, codified at *W. Va. Code* §55-13-1, et. seq., the lower court appropriately and judiciously resolved the issue before it, i.e., which power of attorney executed by Ethel M. Hammer was a valid and effective expression of her wishes. The cited statute permits that

“...any person interested... may have determined any question of construction or validity

under the instrument... and obtain a declaration of rights, status or other legal relations thereunder.” *W. Va. Code §55-13-2.*

The statute further provides that the general powers of the circuit court are not restricted in any proceeding where

“... declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty”. *W. Va. Code 55-13-5.*

Appellees, as petitioners below, sought and received the lower court’s ruling as a declaratory judgment, not through a motion for summary judgment pursuant to Rule 56, *W. Va. R. C. P.*, nor as a judgment on the pleadings, pursuant to Rule 12 *W. Va. R. C. P.* (See October 27, 2010, Hearing Transcript, *Appendix Record* p. 205-206; and Court Order dated December 14, 2010, *Appendix Record* p. 407).

The aim of a declaratory judgment action is to swiftly resolve controversies without significant expense or delay. A declaratory judgment petition allows the parties to “... avoid the expense and delay which might otherwise result, and ... [secure] in advance a determination of legal questions which, if pursued, can be given the force and effect of a judgment or decree without the long and tedious delay which might accompany other types of litigation”. (See *Carvey v. W. Va. State Bd. Of Ed.* 527 S. E. 2d 831, 206 W. Va. 720, citing *Cox v. Amick*, 195 W. Va. 608, 466 S. E. 2d 459 (1995). In the instant case, petitioners below merely requested the lower court render a decision on the issue of the validity of two documents.

The sole question presented to the lower court was the validity of two separate appointments of power of attorney. In the pleadings, the two documents were presented and the lower court was asked to review their content and rule upon the issue. The lower court investigated this matter through the appointment of a guardian *ad litem*, as requested by

appellant, to determine the competency of the principal at the time the documents were executed. Having exercised its discretion in the matter the Court entered a ruling on the efficacy of the documents presented. There being no factual dispute between the parties, it was merely left to the lower court to interpret the language of the documents, in particular the second power of attorney. It is useful to compare this matter to one in which interpretation of an insurance contract is at issue. In such an instance, this Court has held that “Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning” (See *Keffer v. Prudential Ins. Co. Of America* 153 W. Va. 813, 172 S. E. 2d 714). In the instant case, giving plain meaning to the language of the documents presented, the lower court determined that the second power of attorney was not an effective expression of the principal’s wishes.

Additionally, this Court has previously held that the lower court has discretion to determine whether it will take jurisdiction over a matter presented, and also the manner in which it is done. Absent an abuse of that discretion, the manner will generally will not be reviewed (See *Hall v. Hartley* 146 W. Va. 328, 119 S. E. 2d 759 (W. Va. 1961). In the instant case it was entirely appropriate for the lower court to review the documents, compare their content, ascertain the competency of the principal and render a decision. It is clear from the opinion stated on the record that the lower court was well informed and had considered all matters before rendering that decision (See October 27, 2010, Hearing Transcript, p. 21 line 8-page 22 line 22, *Appendix Record* p. 220-221).

B. Appellant’s argument, as expressed in paragraphs A-H and J, fails to raise any issue which would provide a basis for the requested relief.

Motion for More Definite Statement

To begin, the pending Motion for a More Definite Statement requested that the Court require petitioners below to state their position as to the competence of Mrs. Hammer. While it is argued that the lower court never ruled upon nor addressed this issue, it was at the request of appellant during a hearing on August 19, 2010, that a guardian *ad litem* was appointed to represent the best interests of Mrs. Hammer. This appointment was a direct result of appellant seeking more information in regard to the issue of Mrs. Hammer's competency. (See August 19, 2010, Hearing Transcript, p. 4 line 8- p. 6 line 5, *Appendix Record* p. 76-78). As a result of that investigation and report, (the guardian *ad litem* determined that Mrs. Hammer was not competent at the time she executed the September, 2008, power of attorney, see *Appendix Record* p. 198), the purpose of the Motion for More Definite Statement was satisfied.

Motion for Summary Judgment

No Order granting Summary Judgment was entered in this matter, nor was a Motion for Summary Judgment filed. Instead, during the October 27, 2010, hearing, the lower court reviewed the exhibits to the petition and heard from the guardian *ad litem*, then issued a ruling as to the pending Petition for Declaratory Judgment (Hearing Transcript p. 21 line 8- page 22 line 22, *Appendix Record* p. 220- 221). Thereafter, the Court afforded yet another opportunity to the parties to substantiate their respective positions. Only after the lower court's receipt and review of these documents was a written order entered granting Declaratory Judgment in favor of appellees.

The lower court chose not to grant appellant the opportunity to present witnesses as appellant failed to present any argument related to witnesses or their anticipated testimony

which the Court considered relevant to its determination of the issues before it (See October 27, 2010, Hearing Transcript, p. 26 line 13-21, *Appendix Record* p. 225). Clearly the evidence and issues relied upon by appellant in his argument were not relevant to the determination of either the competency of Mrs. Hammer, nor the validity of the September, 2002, power of attorney. Indeed, given the opportunity to submit further evidence in the form of a written argument, appellant failed to produce any evidence which altered the original decision of the court.

Formal Decision and Objections

The lower court clearly issued a formal decision, both in the form of stating its opinion on the record, and by entry of an Order dated December 14, 2010. Additionally, the Court responded to appellant's objections by indicating that objections were noted and could be taken up on appeal (See October 27, 2010 Hearing Transcript p. 27 line 10-14, *Appendix Record* p. 226).

C. Appellant raises for the first time on appeal the issue of the recusal of the lower court judge.

Appellant asks this Court to find plain error in the lower court hearing this matter due to a purported appearance of impropriety. This is the first time the issue of impropriety or recusal is raised in this matter. To support this claim, appellant cites a business transaction between one of the appellees and a local mobile home dealer that occurred nearly a decade ago. For several reasons, this argument has no merit. First, appellant presents no evidence that the current judge was even aware of the purchase which occurred so long ago, and before she took office. Second, the allegation that the judge's spouse was employed by the dealer at the time of the transaction is untrue. Third, appellant failed to raise this issue even though, according to

appellant's brief, he was aware of its existence as early as July, 2010, and no later than October, 2010 (See page 37 of Appellant's Brief).

Notwithstanding these facts, appellant failed to include, or even attempt to include in the record below, facts, evidence, or argument which supports the claim. Instead, appellant now chooses to cast aspersions on the integrity of the lower court, reaching conclusions by conjecture and speculation, without basis in fact or reality, in hope of tainting the decision making process merely because the outcome was not favorable. It is important to note that Commentary to Canon 2.A states:

“The test for appearance of impropriety is whether the conduct would create in *reasonable minds* a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.” (Emphasis added).

Appellant provides no evidence or argument which would lead a reasonable mind to conclude that the lower Court's decision was in any manner influenced by a ten year old business transaction of which the lower court was neither aware, nor received benefit from.

The progression of this issue is similar to the bias issue raised before this Court in *Zaleski v. West Virginia Mutual Insurance Company*, 687 S. E. 2d 123, (W. Va. 2009) (*per curiam*). In *Zaleski* the appellant argued extensively in its appeal brief that the lower court exhibited bias in the handling of the matter, yet at no time raised that issue with the lower court. The *Zaleski* Court found that the issue had been waived, as it was not raised below. The Court's reasoning was explained as follows:

“Because this argument is now being raised for the first time on appeal, we must necessarily find that the argument as to this record has been waived. The Appellant was required to bring any issue of possible bias before the circuit court so that it could evaluate its actions to determine the credibility of the

allegations and respond to them accordingly. This Court has ‘long held that theories raised for the first time on appeal are not considered’ (citations omitted) This Court will not consider nonjurisdictional questions that have not been considered by the trial court.” *Zaleski* at page 129.

While the opinion in *Zaleski* was rendered *per curiam*, it relied upon prior decisions of the Court in regard to the treatment of issues raised for the first time on appeal, (see *Clint Hurt & Assoc. V. Rare Earth Energy, Inc.*, 198 W. Va. 320, 480 S. E. 2d 529, and *Crain v. Lightner*, 178 W. Va. 765, 364 S. E. 2d 778). Clearly, the issue of bias or conflict cannot and should not be raised for the first time at the appellate level. Such being the case, it is appropriate that this issue be determined to have been waived.

CONCLUSION

For the foregoing reasons, the appeal of this matter should be denied, and the decision of the lower court should be affirmed. Appellant has failed to raise any issues which provide a basis for the relief requested. Appellant’s arguments are misplaced, and are the result of misinterpretation and misinformation regarding the posture of this matter. Appellant’s argument relies wholly upon innuendo and supposition in support of his claims, and there is no evidence contained in the lower court record which merits an award of the request for relief.

Respectfully submitted,

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Mark J. Hammer, and
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CERTIFICATE OF SERVICE

I, David H. Wilmoth, counsel for Appellees do hereby certify that on this date I served a true copy of the foregoing ***BRIEF OF APPELLEES*** upon Robin W. Hammer, Appellant, by depositing a true copy of same in the United States mail, postage prepaid, addressed as follows:

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Dated this 27 day of May, 2011.



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