

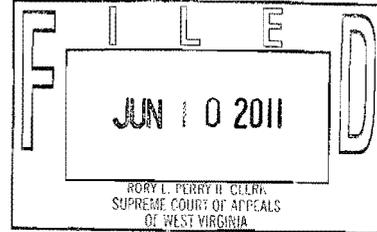
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

The Estate of Roger G. Fussell, deceased,  
and Andrea M. Simmons, Executrix of the  
Estate of Roger G. Fussell, Defendants Below,  
Petitioners.

vs.

Sup. Ct. No.: 11-0428  
(Randolph County Cir Ct. No.: 10-C-157)

Kristi Fortney and Chanda Collette,  
Plaintiffs Below, Respondents.



**PETITIONERS' BREIF**

Come now, Petitioners, by counsel, John J. Wallace, IV and Joseph A. Wallace, to file their Brief in accordance with the Court's Scheduling Order in this matter, and the *Rules of Appellate Procedure*. Petitioners Brief, in all of its subparts, follows this cover page.

A handwritten signature in black ink, appearing to be "John J. Wallace, IV", written over a horizontal line.

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## ASSIGNMENTS OF ERROR

- I. The Circuit Court erred in its construction of the “just debts” clause of the Will to including payment of mortgages on devised real estate, especially when the devise was all of the decedents “right, title and interest.” (discussed at).....8
- II. The Circuit Court erred in issuing a mandatory injunction without a bond, or meaningful security, and without finding good cause in its order. (discussed at).....12

## STATEMENT OF THE CASE

### Facts

This is a case of first impression in West Virginia. Roger G. Fussell died testate on December 21, 2009 a resident of Randolph County, West Virginia.<sup>1</sup> Mr. Fussell’s estate is comprised of numerous real and personal properties varied in type, quality and location. Mr. Fussell was survived by his wife and three daughters.<sup>2</sup> His daughters are the parties to this appeal.

Mr. Fussell’s Will first directs that “I desire that all of my just debts be paid as soon as conveniently possible after the date of my death.”<sup>3</sup> Mr. Fussell then devised “all [his] right, title and interest” in a certain house to his daughter Kristi Fortney, a Respondent.<sup>4</sup> Mr. Fussell also devised “all [his] right, title and interest” in another house to another daughter, Chandra Collette, the other Respondent.<sup>5</sup> The remainder of Mr. Fussell’s Will provides a statutory share to his wife, who is not a party herein, and

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<sup>1</sup> Appendix pg 1. ¶2

<sup>2</sup> Appendix pg 1. ¶2-3

<sup>3</sup> Appendix pg 8 or 17

<sup>4</sup> Appendix pg 8 or 17

<sup>5</sup> Appendix pg 8 or 17

all of the residuary estate to his third daughter and Executrix, Andrea Simmons, a Petitioner.<sup>6</sup>

It is undisputed that at the time of Mr. Fussell's death, the properties devised to Ms. Fortney and Ms. Collette were encumbered by a single deed of trust with a face value of \$223,000.00.<sup>7</sup> The amount owed at the time the suit was initiated was approximately \$120,000.00. The monthly payments are \$1,786.82.<sup>8</sup> It is further undisputed that Mr. Fussell's Estate made the first two payments after his death.<sup>9</sup> After which, the Estate ceased making payments as such payments were the responsibility of the devisees. The devisees acquired payment for six months in 2010 from decedent's widow Joann Fussell.<sup>10</sup> After which they initiated this action.

#### Procedural History

On August 20, 2010 Ms. Fortney and Ms. Collette, brought a *Complaint for Declaratory and Injunctive Relief*<sup>11</sup> in the Circuit Court of Randolph County. Plaintiffs below alleged that the "just debts" clause of the Will required the Estate to pay the deed of trust note on Plaintiff's houses.<sup>12</sup> Defendants below (Petitioners) responded to that *Complaint* on September 10, 2010.<sup>13</sup>

On September 14, 2010 the Circuit Court of Randolph County held a hearing and granted Respondents a mandatory injunction, without bond, requiring the Estate of

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<sup>6</sup> Appendix pg 8-9 or 17-18

<sup>7</sup> Appendix pg 2. ¶8

<sup>8</sup> Appendix pg 2. ¶8

<sup>9</sup> Appendix pg. 2. ¶9

<sup>10</sup> Appendix pg. 73. Ln.13-15

<sup>11</sup> Appendix pg. 1.

<sup>12</sup> Appendix pg. 3. ¶13

<sup>13</sup> Appendix pg. 12.

Mr. Fussell to make the monthly payments on the deed of trust.<sup>14</sup> At that hearing, the Circuit Court offered a personal recognizance bond, which was declined by Petitioners.<sup>15</sup>

On October 27<sup>th</sup>, 2010, a status hearing was held to determine whether this case contained factual issues requiring jury resolution, in advance of the Court's ruling.<sup>16</sup> Noting Respondents' counsel's objection, the Circuit Court found that there were no relevant factual issues, and set the case for final argument.<sup>17</sup>

The Court then undertook a final hearing on the *Complaint* on December 1, 2010.<sup>18</sup> On January 19, 2011 the Court sent a letter to counsel holding that: "the will directed that all [decedent's] just debts be paid after his death. This includes the debts on the property which Ms. Fortney and Ms. Collette inherited. Certainly my opinion would be different if the language in the will were different." The Circuit Court further directed counsel for Respondents to draft an order reflecting the Court's ruling.<sup>19</sup> On February 10, 2011, the Circuit Court entered its *Judgment Order*, from which this appeal arises.<sup>20</sup>

### SUMMARY OF ARGUMENT

This case presents novel issues for this Court. Its facts are devilishly simple, but its consequences are far reaching. The "just debts" clause at issue in this case is "stock" language, and should not create a duty for an estate to pay deeds of trust on devised real

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<sup>14</sup> Appendix pg. 26. (Oct. 4, 2010 Order)

<sup>15</sup> Appendix pg. 75-76. Ln. 14-3

<sup>16</sup> Appendix pg. 77. Ln. 10-13

<sup>17</sup> Appendix pg. 82. Ln. 16-20

<sup>18</sup> Appendix pg. 42. (Dec. 14, 2010 Order)

<sup>19</sup> Appendix pg. 44. (emphasis in original)

<sup>20</sup> Appendix pg. 45. Petitioners note that there was a subsequent *Motion for Stay*, *Opposition to that Motion* and *Order* granting a partial stay, which are found in the Appendix at pages 50, 55 and 53, respectively. Petitioners do not believe the issues raised thereby warrant discussion.

estate. Rather, that obligation falls to the devisees. The Circuit Court erred in its singular focus on the “just debts” clause, discounting the “right, title and interest” language of the actual devise. That “right, title and interest” language limits the devise and passes an encumbered interest to the Respondents.

From a policy perspective the Circuit Court’s ruling hangs a potential sword of Damocles over Wills drafted in this state, now tucked away in safety deposit boxes and desk drawers. When death draws those Wills out, devisees, widows and children will bear the burden of committing estate assets to the payment of deeds of trust left behind by their decedents.

The Circuit Court also failed to provide a bond upon issuance of its injunction. This practice runs afoul of settled law and common sense. It allows litigants to invoke emergency powers of our Courts without protection for the opposition. Bondless injunctions are especially dangerous in mandatory injunctions, where the *status quo* changes. A personal recognizance bond is no security at all.

All assignments of error in this appeal are subject to de novo review. The Circuit Court’s *Judgment Order* should be reversed and vacated.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This case embraces an issue of first impression, regarding construction of a “just debts” clause in the context of devised real estate. Furthermore, “just debts” clauses are common in Wills and the Circuit Court’s ruling represents a sea change in the allocation of secured debts to estates. This case also presents significant policy concerns which are of fundamental public importance, e.g. the impact of shifting the

burden for the payment of mortgage debt in pending, or soon to be pending, estates. Accordingly, this case is appropriate for a Rule 20 oral argument.

## ARGUMENT

I. The Circuit Court erred in its construction of the “just debts” clause of the Will to including payment of a deed of trust note on devised real estate, especially when the devise was all of the decedents “right, title and interest.”

The Will at issue in this case contains the language, “I desire that all of my just debts be paid as soon as conveniently possible after the date of my death.”<sup>21</sup> (hereinafter the “just debts clause”). Plaintiffs below, Respondents herein (hereinafter “Respondents”) allege this clause requires payment by the Estate of a deed of trust note on the real estate devised to them by the Will. The Circuit Court agreed.

### Standard of Review

This Assignment of Error addresses a Circuit Court’s conclusion of law in interpretation and construction of a will. The Court entered a declaratory judgment. “A circuit court's entry of a declaratory judgment is reviewed de novo.” Syl. Pt. 3 *Cox v. Amick*, 195 W.Va. 608; 466 S.E.2d 459 (1995). More specifically, de novo review is applied on the appeal of the construction of a Will by declaratory judgment. See *Hedrick v. Mosser*, 214 W.Va. 633; 591 S.E.2d 191 (2003). Petitioners note that “[i]n reviewing the judgment of a lower court [the West Virginia Supreme Court] does not accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law.” Syl. Pt. 1 *Burks v.*

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<sup>21</sup> Appendix pg 8 or 17

*McNeel*, 164 W.Va. 654; 264 S.E.2d 651 (1980). Accordingly, the standard of review is de novo.

### **Points and Authorities**

This Court has recognized that Wills can contain “stock language.” “A clause in a will which contains a general direction to the personal representative to pay debts, expenses and taxes, or similar ‘stock’ language, is not sufficient by itself to shift the liability for the former West Virginia inheritance tax from the specific devisees or legatees to the residuary estate. Syl. Pt. 2 *First Nat. Bank of Morgantown v. McGill*, 180 W.Va. 472; 377 S.E.2d 464 (1988). While the holding in *McGill* dealt with the West Virginia inheritance tax, its premise is equally useful in the instant case. Namely, that there is sometimes “stock” language in wills. The “just debts” clause in the Will at issue is just such language. It is often employed boilerplate language which is not license to pay every debt without regard to the other words and phrases in the Will. “The direction to the executor to pay funeral expenses, just debts, and taxes was entirely unnecessary since the law requires the executor to do all of those things.” *Hobbs' Estate v. Hardesty*, 167 W.Va. 239, 242; 282 S.E.2d 21, 23 (1981). West Virginia law is settled, “all just debts” does not literally mean “all just debts,” rather something less than that.

The only other West Virginia authority touching upon the issue of debts on devised real estate is *Citizens State Bank of Ripley v. McKown*, 106 W.Va. 626; 146 S.E. 876 (1929). *McKown* makes clear that a decedent’s real estate cannot be charged with his debts, absent explicit statement to that effect in the Will.

[T]he mere statement in a will of the desire of the testator that his debts be paid, is not sufficient to charge his real estate with his indebtedness. In order to so charge, the intention must be clearly expressed. In other words, there must be clear evidence of such intent in the will; the intention may not be presumed merely from the use of formal words or the presence of commonly employed phrases.

*Id.* at 628. *Mckown*, read together with *McGill*, clearly exhibit that “just debt” clauses do not mean each and every debt, regardless of source or security. *McKown* and *McGill* recognize that such clauses are not to be read as absolute and invincible direction to pay any and every debt. Rather, “just debt” clauses are commonly employed formal “stock” phrases which, in the words of *Hobbs*, are “entirely unnecessary.”

The analysis of the instant Will does not end at the “just debts” clause. “In construing a deed, Will, or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith.” Syl. Pt. 10, *Arnold v. Palmer*, 224 W. Va. 495; 686 S.E.2d 725 (2009) Citing *Hall v. Hartley*, 146 W.Va. 328; 119 S.E.2d 759 (1961). The other language of the Will clearly shows testator’s intent to devise an encumbered interest. The Circuit Court erred in its sole reliance on the “just debts” clause, disregarding the other language of the Will.

The Circuit Court discounted or ignored the “right, title and interest” language of the devise. “In ascertaining the testator’s intentions, a court must consider the will as a whole and not focus upon isolated clauses or sentences.” *Foster v. Foster*, 196 W.Va. 341, 344; 472 S.E.2d 678, 681 (1996) (per curiam). The Court’s singular focus on the “just debts” clause is evident from its letter to counsel, which makes no mention of the

“right, title and interest” language.<sup>22</sup> The *Judgment Order* likewise ignores the “right, title and interest” language of the Will. In fact, the *Judgment Order* omits the correct quotation of the Will in its findings, stating the “[t]he ‘third’ section of the will devises all of Mr. Fussell’s interest in and to my house . . . .”<sup>23</sup> In fact the will reads, “I give, devise and bequeath. . . .*all my right, title and interest* in and to my lot and house . . . .”<sup>24</sup> The omission of the “right, title and interest” language from the Court’s letter and Order shows a clear focus on an isolated clause, rather than consideration of the will as a whole.

The testator’s use of “right, title and interest” in his Will cannot be ignored. Mr. Fussell devised all of his “right, title and interest” to Respondents in these two specific properties.<sup>25</sup> Undoubtedly, a “right, title and interest” devise is limited. The limit is the interest, and title, that Mr. Fussell owned at the time of his death. His interest was encumbered, thus he devised an encumbered interest. Respondents argued below that the “right, title and interest” language is boilerplate and was not given any thought or meaning by the testator.<sup>26</sup> “In construing a will the inquiry is not what the testator may have intended to express but what do the words used express.” Syl. Pt. 3, *Wills v. Foltz*, 61 W.Va. 262; 56 S.E. 473 (1907). In this case, the words used by the testator clearly express a devise of what he had, i.e. his “right, title and interest.” Had Mr. Fussell died with an unencumbered fee simple, Respondents would be entitled to it. He did not. His

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<sup>22</sup> Appendix pg. 44

<sup>23</sup> Appendix pg. 46 ¶3. Petitioner notes that the same omission occurs in paragraph four of the *Judgment Order* though Petitioner does not cite it because it is unnecessarily repetitive.

<sup>24</sup> Appendix pg. 8 or 17 (emphasis supplied)

<sup>25</sup> Appendix pg. 8 or 17

<sup>26</sup> Appendix pg. 100

interest was an encumbered one, thus Respondents were devised an encumbered interest. The language of the will is clear.

There are significant policy concerns at issue in this case. Respondents' position would require all estates satisfy all deeds of trust. "Just debts" clauses are common in Wills. Petitioners will not invite this Court through each looming consequence of the Circuit Court's decision. However, it is easy to envision widows and widowers devoting their spouses' estates to the payment of deeds of trust, exhausting, or diminishing their assets. This problem that is compounded by the fact that Wills are already written and stored. Testators would be left unaware that a commonly employed "just debts" clause could invoke hardship, or commitment of their assets. Additionally, Respondents' position provides them with an unlawful preference, as a potential claimant, in violation of W.Va. Code §44-2-21. The Circuit Court has allowed Respondents to leapfrog from the lowest priority claimant to the highest.

II. The Circuit Court erred in issuing a mandatory injunction without a bond, or meaningful security, and without finding good cause in its order.

**Standard of Review**

"Questions of law are subject to a de novo review." Syl. Pt. 2, *Walker v. West Virginia Ethics Com'n*, 201 W.Va. 108; 492 S.E.2d 167 (1997). "Questions of law and statutory interpretation are subject to de novo review." Syl. Pt. 1, *Burnside v. Burnside*, 194 W.Va. 263; 460 S.E.2d 264 (1995). This assignment of error alleges that the Circuit Court issued a bondless injunction contrary to the West Virginia Code and settled law. The issue before this Court is one of statutory interpretation and law, and therefore subject to de novo review.

## Points and Authorities

In *Defendant's Response to Complaint for Declaratory Judgment and Injunctive Relief*,<sup>27</sup> filed below, Petitioners herein made a clear and written demand for a bond in the event the Court issued an injunction.<sup>28</sup> The Circuit Court denied the Defendants' motion for a bond, without recitation of good cause. The Court ruled: "[c]ounsel for Defendants having moved the Court to require the Plaintiffs to post bond, the Court DENIED the motion; should Defendants ultimately prevail, the Court will consider granting the appropriate relief."<sup>29</sup>

The failure of the Court to recite good cause, in its Order, for not requiring a bond renders the Injunction void. Any discussion of injunction bonds must begin with W.Va. Code §53-5-9 which states, in pertinent part,

An injunction (except in the case of any personal representative, or other person from whom, in the opinion of the court or judge awarding the same, it may be improper to require bond) shall not take effect until bond be given in such penalty as the court or judge awarding it may direct, with condition to pay the judgment or decree . . . and all such costs as may be awarded against the party obtaining the injunction, and also such damages as shall be incurred or sustained by the person enjoined, in case the injunction be dissolved, and with a further condition, if a forthcoming bond has been given under such judgment or decree, to indemnify and save harmless the sureties in such forthcoming bond and their representatives against all loss or damages in consequence of such suretyship; or, if the injunction be not to proceedings on a judgment or decree, with such condition as such court or judge may prescribe.

*Id.* A bond is mandatory. The only exceptions to this rule are in the case of a personal representative, which Respondents are not, and a person from whom it is improper to require bond. Plaintiffs presented no evidence that they were an improper person for a

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<sup>27</sup> Appendix pg. 12.

<sup>28</sup> Appendix pg. 15

<sup>29</sup> Appendix pg. 27. (emphasis original)

bond. West Virginia Rule of Civil Procedure 65(c) also requires “security.” Accordingly, it was plain error to issue an injunction without a bond.

The Court generally expressed the concern, on proffer and without evidence, that Respondents may not have the ability to post a bond.<sup>30</sup> The Court offered Petitioners a personal recognizance bond, which was refused as inadequate security.<sup>31</sup>

There is no mention of the Court’s concern regarding Respondents ability to pay in its order, and the order is therefore fatally defective. “An order of injunction is of no legal effect under Code, § 53-5-9, unless the court requires a bond, or recites in the order that no bond is required for good cause.” *State ex rel. Lloyd's Inc. v. Facemire*, 224 W.Va. 558; 687 S.E.2d 341 (2009)(per curiam)(emphasis supplied), citing Syl. Pt. 4, *Meyers v. Wash. Heights Land Co.*, 107 W.Va. 632; 149 S.E. 819 (1929). The failure of the Order to address any cause for the denial of the bond is plain error, rendering the injunction void. “In view of the clear language of West Virginia Code § 53-5-9 and our common law, we hold that the failure of the circuit court's order to require the posting of an injunction bond, or to specifically state why an injunction bond is not required, renders the injunction void.” *State ex rel. Lloyd's Inc. v. Facemire*, 224 W.Va. 558; 687 S.E.2d 341 (2009) (per curiam). The Court’s oral concern is of no moment, or effect, “[c]ourts of record must speak by their records. What is not thereby made to appear does not exist in law.” Syl. Pt. 1 *Bowles v. Mitchell*, 146 W.Va. 474; 120 S.E.2d 697 (1961). Citing Syl. Pt. 3 *Meyers v. Wash. Heights Land Co.*, 107 W.Va. 632, 643; 149 S.E. 819 (1929). Accordingly, the Injunction Order entered by the Circuit is invalid on its face, and Petitioners are entitled to vacation of that Order.

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<sup>30</sup> Appendix pg. 75. Ln. 15-16.

<sup>31</sup> *Id.* Ln. 20; Appendix pg. 75-76. Ln. 20-1.

Even assuming, *arguendo*, that the order was valid, a personal recognizance bond does not satisfy the requirements of W.Va. Code §53-5-9. “The intent and purpose of the [bond] statute is manifest, namely, that he who invokes the injunctive process of the court must give proper bond guarantee to make good to any person whose rights are prejudicially affected by such injunction all damages and injuries thus occasioned to him. “*Meyers v. Wash. Heights Land Co.*, 107 W.Va. 632, 643; 149 S.E. 819 (1929). A personal recognizance bond does not provide any guarantee or security to the Defendants. The obligation foisted upon the Estate by the Court’s Injunction Order is \$1,768.82 per month. Respondents have availed themselves of the emergency and extraordinary injunctive power of our courts without providing the protections required by law.

Petitioners emphasize that the bond at issue in this case is not a prohibitive or *status quo* bond. In other words, it requires affirmative, mandatory, cash payments by the Estate, not for the Estate to refrain from action in furtherance of the *status quo*. Thus there is real harm in the Circuit Court’s failure to give meaningful bond, namely \$1,768.82 per month. At the time of this filing those payments by, and harm to, the Estate, are in excess of \$14,000.00, and growing. The Estate is unprotected by the failure to issue a bond. The sums paid may not be recovered. The fact that this is a mandatory injunction case exacerbates the error of not providing a meaningful bond.

### CONCLUSION

Wherefore, Petitioners are entitled to reversal and vacation of the Circuit Court’s *Judgment Order*.<sup>32</sup> Specifically, a ruling that the “just debts” clause of a will

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<sup>32</sup> Appendix pg. 44

does not obligate the Estate for the payment of a deed of trust on devised real estate, especially when the decedent devised only his "right, title and interest" in that real estate. The Petitioners further request this Court vacate the injunction as void for lack of bond, and all such other relief as this Court deems appropriate.

Petitioners,  
By Counsel

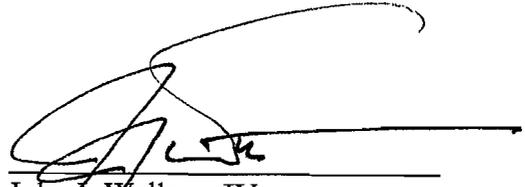
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**CERTIFICATE OF SERVICE**

I, John J. Wallace, IV counsel for Petitioners hereby certify that the foregoing *Petitioners' Brief* was served upon counsel of record on this 7<sup>th</sup> day of June, 2011 by hand delivery in an envelope addressed as follows:

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