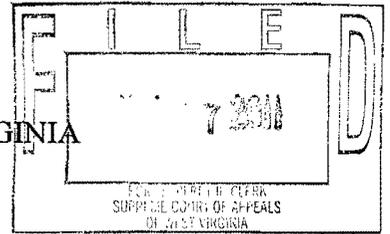


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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' REPLY BRIEF

Come now, Petitioners, by counsel, John J. Wallace, IV and Joseph A. Wallace, to file their Reply 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. This reply brief does not exceed five pages, and is therefore consistent with R.A.P. 10(c)(1) and 10(c)(2).

A large, stylized handwritten signature in black ink, appearing to be "John J. Wallace, IV".

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STATEMENT REGARDING ORAL ARGUMENT

This is a novel case of first impression. It also involves questions of fundamental public importance, and oral argument is therefore appropriate pursuant to R.A.P. 20(a). Adoption of Respondents' position, that an estate must pay a devisee's mortgage, represents a significant change in law. For that reason alone this case deserves oral argument.

ARGUMENT

I. The Circuit Court Erred in its Interpretation of the Will

"Just debts" is a common clause inserted in West Virginia Wills and has been for decades. Although there has not been a specific decision by this Court, the common practice has been that liens, defects in title, and debts and mortgages of record pass with the property to the devisee and are not an obligation of the estate. It is noteworthy that Respondents cite no case or statute for their proposition that Estates are responsible for secured debt on devised real estate.

Respondents do not, and cannot, rebut Petitioners' assertion that there is sometimes "stock" language in Wills. This Court made it clear that "stock" language could exist in Wills, in *First Nat. Bank of Morgantown v. McGill*, 377 S.E.2d 464; 180 W.Va. 472 (1988). While Respondents attempt to distinguish *McGill*, they do not address the issue of "stock" language in Wills and the impact the use of such nugatory language has on the case at bar. Petitioners reassert their position that the "just debts" clause of the instant Will means something less than "all just debts," a position which is supported by the existing case law.

Respondents argue that the “right title and interest” language of the Will should be disregarded by this Court. Respondents allege that “[Right, title and interest] language is used to make it clear that what is being conveyed may be a fee interest, may be less than a fee interest, may be an undivided interest, or may be nothing at all.¹” *Respondent’s Brief* then embarks on what cannot be inferred, and what must be implied from the language of the Will. However, “the true inquiry is not what the testat[or] meant to express, but what the language [he] has used does express.” *Dilmore v. Heflin*, 159 W.Va. 46, 53; 218 S.E.2d 888, 892 (1975).

Respondents’ argument to ignore the “right title and interest” language of the Will centers entirely on the “ifs” of hypothetical draftsmanship. It ignores the fact that the language is in the Will, and that the testator put it there.

In construing a will, effect must be given to every word of the will, if any sensible meaning can be assigned to it not inconsistent with the general intention of the whole will taken together. Words are not to be changed or rejected unless they manifestly conflict with the plain intention of the testator, or unless they are absurd, unintelligible or unmeaning, for want of any subject to which they can be applied.

Syl. Pt. 6, *Painter v. Coleman*, 211 W.Va. 451; 566 S.E.2d 588 (2002)(emphasis supplied). Every lawsuit based on a Will contest would differ if the Will differed. Respondents argue that the Court should simply ignore the “right, title, and interest” language of the Will, because the testator *could* have written a different Will. In fact, he did not write a different Will and the Circuit Court erred in adopting a position which wholly ignored the existing “right, title and interest” language of his Will.

¹ *Respondents’ Brief* pg. 9.

The Testator devised all of his “right, title and interest in and to”² two properties to his daughters. The “right” that he had at the time of his death was subject to a note and Deed of Trust. The “title” Mr. Fussell had was legal title, subject to the bank’s equitable title. The “interest” of the testator was an encumbered one. By all accounts, there is at least one hundred thousand dollars in equity in the properties devised.³ Thus, the testator’s devise of his encumbered interest is meaningful, and bolstered by the language of the Will.

The ramifications of adopting Respondents’ theory of the case are widespread. *Respondents’ Brief* focuses on the ultimate ownership of a decedent’s property. They argue that because widows, or others, will gain the property outside of the probate estate that there is no harm. However, the ownership of the decedent’s property is not at issue in this case. Respondents argue that “just debt” clauses foist the obligation to pay secured debts onto the probate Estate. This burden is not relieved by how the beneficiary or joint tenant received the property. Respondents assert that the probate estate of a decedent will bear the burden of satisfying debts under a “just debts” clause.

For example, in the “burdened widow” scenario Respondents argue that “a widow is her own adversary and forced to pay off her own mortgage to acquire her domicile, a bizarre and wholly unrealistic scenario.” The issue is not who will own the home, just as that is not the issue in the case at bar. The issue is that the widow will be required to commit the assets of her husband’s probate estate to payment of the mortgage, rather than simply making the payments herself. In other words, his assets require liquidation to pay

² Appendix pg. 8 and 17.

³ Appendix pg. 2 ¶ 8.

the mortgage. This requirement would truly be bizarre, but that “unrealistic scenario” is precisely the one the Respondents ask this Court to make law.

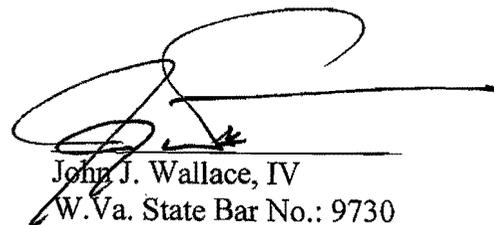
II. The Circuit Erred by Failing to Require an Injunction Bond

Respondents argue, without citation, that the Circuit Court’s plain error in refusing an injunction bond is now moot. Respondents seem to assert that this Court should not review the erroneous rulings of a Circuit Court, even when those rulings run contrary to settled law. Respondents effectively urge this Court to encourage extraordinary writ practice, rather than addressing substantive errors on appeal.

CONCLUSION

The Circuit Court erred in its construction of instant Will because it did not consider or give effect to the “right title and interest” language. It also erred in placing all of its reliance on the “just debts” clause, which is ‘stock’ language. Accordingly, the Circuit Court’s *Final Order* should be reversed.

Petitioners,
By Counsel

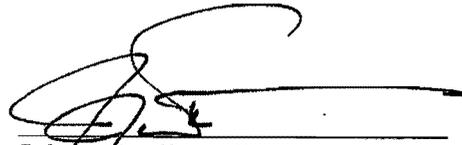


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CERTIFICATE OF SERVICE

I, John J. Wallace, IV, counsel for Petitioners, hereby certify that the foregoing *Petitioners' Reply Brief* was served upon counsel of record on this 16th day of August, 2011 by depositing a true and correct copy thereof in the United States Mail, postage prepaid, in an envelope addressed as follows:

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