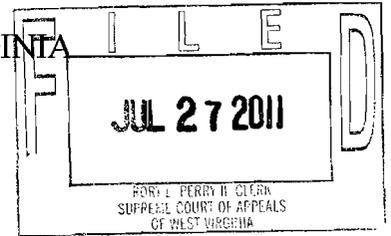


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



THE ESTATE OF ROGER G. FUSSELL,  
DECEASED, AND ANDREA M. SIMMONS,  
EXECUTRIX OF THE  
ESTATE OF ROGER G. FUSSELL,  
Defendants Below, Petitioners,

vs.

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

KRISTI FORTNEY AND  
CHANDA COLLETTE,  
Plaintiffs Below, Respondents.

**BRIEF OF RESPONDENTS**  
**KRISTI FORTNEY AND CHANDA COLLETTE**

Submitted by:

A handwritten signature in black ink, appearing to read "Harry A. Smith, III".

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### ASSIGNMENTS OF ERROR

As permitted by Rule 10(d), *West Virginia Revised Rules of Appellate Procedure*, Respondents do not restate here Petitioners' Assignments of Error.

### STATEMENT OF THE CASE

Respondents accept Petitioners' Statement of the Case with these exceptions:

1. The "Facts", as recited by Petitioners, contain the following sentence:

". . . (T)he Estate ceased making payments as such payments were the responsibility of the devisees." This statement is not a *fact*; the Circuit Court of Randolph County has determined that "such payments" were the responsibility of the Estate of Roger G. Fussell and not the responsibility of "the devisees." It is this very issue which is before this Court in this appeal.

2. The "Facts", as recited by Petitioners, note that Respondents "acquired payment for six months in 2010 from decedent's widow Joann Fussell." Petitioners are alluding to the fact that Respondents borrowed funds from Ms. Fussell to pay the mortgage. The source of Respondents' funds, however, is absolutely irrelevant to the issues in this case; it makes no difference whatsoever as to the source of the funds which enabled Respondents to make their mortgage payments after Mr. Fussell's death.

## SUMMARY OF ARGUMENT

I. As to Petitioners' first assignment of error, Respondents contend that the will is unambiguous and that the Circuit Court correctly found that the Estate of Roger G. Fussell is responsible for the payment of the mortgage debt that encumbers the two tracts of real estate devised to Respondents. Case law holds that specific devisees *are* responsible for inheritance or estate tax attributable to the specific property devised to them, but only pursuant to statute; otherwise, a residuary estate is responsible for the payment of all debts of a decedent's estate, whether or not there is (as there is in this case) a clause in the will directing the payment of "all . . . just debts . . . as soon as conveniently possible."

II. As to Petitioners' second assignment of error, that the Circuit Court failed to require Respondents to execute an injunction bond, the issue is moot. During the pendency of this action, the Circuit Court issued a preliminary mandatory injunction which resulted in Petitioners making five mortgage payments prior to the Court's final judgment order finding for Respondents (Appendix ["App."], 26-27, 36-37, 45-49). Petitioners made five payments, totalling less than \$7,000.00, during the pendency of the case (App. 47), and then the Court found against them. Even if the issue were not moot, however, the Court's refusal to require a bond was for good cause and consistent with the sound exercise of judicial discretion.

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

Respondents believe that oral argument is not necessary in this case. The facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process will not be significantly aided by oral argument. Rule 18(a)(4), *West Virginia Revised Rules of Appellate Procedure*.

### **ARGUMENT**

#### **Standard of Review**

Respondents agree with Petitioners that the issues raised herein are subject to *de novo* review.

#### **I.**

**The Circuit Court correctly found that the Estate of Roger G. Fussell is responsible for payment of the mortgage debt encumbering the devises to two of his daughters, the Respondents herein.**

The language of the “First” section of Mr. Fussell’s will is unambiguous. The Davis Trust Company mortgage loan is obviously a “just debt” of the Estate and Mr. Fussell directed that such debts be paid “as soon as conveniently possible” (App. 8-10). The will is not complicated. Other than two sections relating to the fiduciary and her powers, the will says, simply: (1) my debts are to be paid; (2) my wife is to get her statutory share; (3) my daughter Kristi Fortney is to get the designated Leadsville District real estate; (4) my daughter Chanda Collette is to get the designated Beverly District real estate; and (5) my

daughter Andrea M. Fortney and her husband get the residue. The will could not be clearer.

Petitioners' argument is, essentially, that Mr. Fussell's will does not mean what it says; specifically, Petitioners contend that the clear direction that "all" of Mr. Fussell's "just debts be paid as soon as possible after the date of [his] death" excludes the debt secured by the deed of trust encumbering the real estate devised to Respondents.

Petitioners suggest that "West Virginia law is settled, 'all just debts' does not literally mean 'all just debts', rather something less than that." Petitioners, in advancing their position, rely upon three very distinguishable West Virginia cases - - *First National Bank of Morgantown v. McGill*, 180 W.Va. 472, 377 S.E.2d 464 (1988); *Estate of Hobbs v. Hardesty*, 167 W.Va. 239, 282 S.E.2d 21 (1981); and *The Citizens State Bank of Ripley v. McKown*, 106 W.Va. 626, 146 S.E.876 (1929). These cases do not support Petitioners' contentions and, in fact, support Respondents' position that the real estate devised to them should be received by them free and clear.

The most recent of cases cited by Petitioners, *First National Bank of Morgantown v. McGill, supra*, holds that the former West Virginia inheritance tax was payable by the specific devisees of real estate. That holding, however, is limited to inheritance tax, "a tax on the right to receive property" from an estate. The Court in *McGill* was clear in its reliance upon the provisions of the inheritance tax statute which imposed a tax "on the beneficiary in proportion to the amount of the estate received." The Court held that, under the specific facts of that case, the debt payment provisions of the will simply did

not override the clear language and intent of the inheritance tax statute. The Court notes that a residuary estate “is ordinarily not liable under the law for *inheritance taxes* (emphasis added).”

*Estate of Hobbs v. Hardesty, supra*, is similar to *First National Bank of Morgantown v. McGill*, in that the Court there held that, based §44-2-16a, *West Virginia Code*, federal estate taxes are to be apportioned among the beneficiaries of an estate. Again, the reason why the beneficiary of a devise/bequest is responsible for the tax is purely statutory. *Hobbs* simply does not stand for the proposition that a “just debts” clause puts the burden of a mortgage debt upon a devisee.

Interestingly, Petitioners appear to place reliance upon language in *Hobbs* stating that “the law requires” that the executor pay “funeral expenses, just debts, and taxes”; Respondents agree that the executrix in this case is required to pay all just debts and would be required to do so even in the absence of the “just debts” clause at issue.

The last case relied upon by Petitioners could not be more favorable to Respondents. *The Citizens State Bank of Ripley v. McKown, supra*, is an action in which a creditor sought to subject a specific devise of real estate to a charge (or encumbrance) for the payment of certain indebtedness, not an action seeking a declaration that the real estate should not be so encumbered. *McKown* refused to charge the real estate with the claimed debt, stating that the “courts now require that the intention to so charge debts be clearly expressed.” Looking at this case then through the prism of *McKown*, if the real estate

devised by Mr. Fussell is to be charged with the Davis Trust Company debt, the “intention to so charge” must be “clearly expressed”; in fact, there is no expression whatsoever in Mr. Fussell’s 2009 will implying that the devise of this real estate should be subject to a debt incurred some 11 years earlier (App., 86). *McKown*, citing *Bailey v. Hudkins*, 103 W.Va. 556, 138 S.E. 118 (1927), states: “The mere statement in a will of the desire 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.”

Petitioners argue, without specific citation, that the “right, title, and interest” language of the will implies that Mr. Fussell intended to charge the devisees with the mortgage debt. This language is typical of quitclaim deed conveyances, wherein the grantor conveys all that he or she has, whatever that might be. The 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. This “quitclaim” language is not used to denote the quality of the title (i.e., whether it is encumbered), but the extent of the grantor’s ownership of the real estate being conveyed. There is nothing in Mr. Fussell’s will that would imply that he intended, by this language, to devise the real estate in question subject to the Davis Trust Company mortgage debt. If Mr. Fussell had intended for the real estate to be charged with the Davis Trust Company debt, and if the will had been carefully drafted, as Petitioners imply it was or could have been, surely Mr. Fussell would have addressed the fact that the Davis Trust Company mortgage encumbered both of the tracts devised to

Respondents and he would have allocated the debt proportionately to the value of the real estate so devised (App. 91-92); from the fact that he did not so allocate, it can be inferred that Mr. Fussell did not intend for the real estate to be charged with, or encumbered by, the debt.

Petitioners argue that there are “significant policy concerns at issue in this case,” asking the Court to “envision widows and widowers devoting their spouses’ estates to the payment of deeds of trust, exhausting or diminishing their assets.” Petitioners’ *in terrorem* argument is confusing and clearly has no application to the instant case. The controversy here is not the same as in Petitioners’ “burdened widow” example - - it is between two devisees and a third-party residuary beneficiary, all of whom are siblings and the daughters of the testator. The scenario about which Petitioners worry appears to be one in which a widow is her very own adversary and is forced to pay off her own mortgage to acquire her own domicile, a bizarre and wholly unrealistic situation. Respondents submit, moreover, that family homes are almost universally held as joint tenancies with survivorship, to the end that such homes are rarely devised and rarely become part of the probate estate. Respondents’ position does not invite the catastrophe of which Petitioners are frightened and Petitioners’ argument simply makes no sense in the context of this case.

As an afterthought, Petitioners argue that Respondents have received an unlawful preference, in violation of §44-2-21, *West Virginia Code*. This code section,

however, has no application to the instant case; by its explicit terms, the statute only applies if the assets of an estate “are insufficient to pay all claims.”

## II.

**The Circuit Court did not commit error in issuing an injunction without requiring bond. The issue, moreover, is moot in that the Court found for Respondents on the ultimate issue.**

The Circuit Court mandated that Petitioners, during the brief pendency of this action in the trial court, make the mortgage payments. These payments, being five monthly payments, totaled \$6,844.10 (App. 47). The Court, in its final order, found for Respondents; at this point, whether or not the interim payments were secured by a bond, was, and is, completely moot.

Notwithstanding the mootness, however, the Circuit Court did not err in not requiring a bond. The Court fully considered Petitioners’ request for a bond (App. 75-76) and, acting as a court of equity, declined that request for good cause - - the apparent inability of Respondents to pay for a bond (“I just don’t see that there’s an ability to pay right now”). The Court obviously believed that Respondents were likely to prevail and was unwilling to deny them interim injunctive relief because they lacked the resources to post a bond.

**CONCLUSION**

For the reasons stated herein and in the record as a whole, Respondents pray that the Judgment Order of the Circuit Court of Randolph County, entered on February 10, 2011, be affirmed.

Respectfully submitted,

KRISTI FORTNEY and  
CHANDA COLLETTE,  
Respondents

By Counsel



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**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this date served a true copy of the foregoing upon all other parties to this action by:

\_\_\_\_\_ Hand delivering a copy hereof to the parties listed below:

or by

X Depositing a copy hereof in the United States Mail, first class postage prepaid, properly addressed to the parties listed below.

Dated at Elkins, West Virginia, this 26<sup>th</sup> day of July, 2011.



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