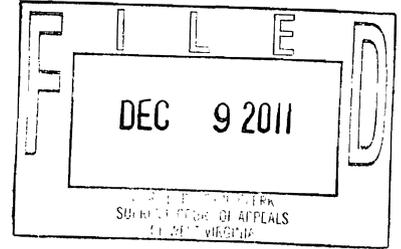


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1105



THOMAS H. JOHNSON and
TERESA S. JOHNSON;

Petitioners,

v.

BERTHA KIRBY, individually and
as Administratrix of the Estate of
Jesse Frances Kirby,

Respondent.

RESPONDENT'S BRIEF

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NOW COMES the Respondent, Bertha Kirby, by and through her counsel, Jeffry A. Pritt and Pritt Law Firm, PLLC, and does hereby respectfully respond to the Brief For the Petitioners as filed herein, and does further request that the ruling of the Monroe County Circuit Court granting her partial summary judgment be upheld.

STATEMENT OF THE CASE

The Respondent, Bertha Kirby, is the mother of Jesse Frances Kirby, and is also his sole and only heir at law. Mr. Kirby passed away on November 26, 2007. Fiduciary Record, Petitioner's Appendix (hereinafter "P.A.") 12. At the time of his death he was unmarried (having been divorced from Brenda C. Kirby), and left no surviving descendants. Only, his mother, the Respondent, survived him, as his father had passed away previously as well.

After Mr. Kirby's death his ex-wife, Brenda C. Kirby, quickly qualified as his "Executrix" on December 5, 2007, id., and presented his Last Will and Testament for probate. See Last Will and Testament of Jesse Frances Kirby, P.A. 10. Mr. Kirby's Will named his "wife", Brenda C. Kirby, as the sole person to receive his estate. Id. However, it is undisputed that by the time of Mr. Kirby's death he was divorced from Brenda C. Kirby, and both the Fiduciary Record, P.A. 12, and the Appraisalment of the Estate, P.A. 13-14, reflect such status and clearly state that Brenda C. Kirby was now his "x-wife". Id.

Mr. Kirby owned two tracts of land located in the Wolf Creek District of Monroe County at the time of his death which were valued on the Appraisement of his Estate at \$60,000.00. *Id.*, P.A. 13. On July 1, 2008, just a little over 7 months after Mr. Kirby's death, Brenda C. Kirby executed a deed as "sole heir of the Estate of Jesse Frances Kirby" whereby she purportedly transferred these two tracts to the Petitioners herein, Thomas and Teresa Johnson, for only \$11,500.00. P.A. 17-18. Brenda C. Kirby signed the deed solely in her individual name and not as Executrix of Mr. Kirby's Estate nor in any official capacity on behalf of his Estate. *Id.*¹

Upon learning that the most significant asset in the Estate had been fraudulently transferred rather than released to her, the Respondent herein, Bertha Kirby, filed an objection to the final settlement of her son's Estate on August 25, 2008, as the Estate remained open and unsettled as of that date. See generally, Objection to Final Settlement, Petition for Removal of Executor, and Demand for Accounting, P.A. 20-23. The basis for her objection was straightforward as W.Va. Code § 41-1-6, by operation of law, explicitly provides that if a testator is divorced after executing a Will, then any disposition of property to a former spouse is

¹Even if Brenda C. Kirby had signed the deed as "Executrix", or in some other official capacity on behalf of the Estate, the transfer would have been invalid because Mr. Kirby's Will did not bestow the power of sale upon his personal representative, nor had she filed a petition to subject the real estate of the decedent to the payment of his debts pursuant to W.Va. Code § 44-8-7.

automatically revoked, and the property instead passes as if the former spouse did not survive the testator.² Accordingly, by virtue of this statute, Bertha Kirby, as the closest surviving relative of the decedent, was his sole and only heir, and the rightful owner of his Estate assets (which included his land).

Bertha Kirby also requested that Brenda C. Kirby be removed as Executrix (since she had misrepresented her status as the sole heir of the Estate by entering into the deed transfer), and asked for a full accounting of the Estate assets. By its Order entered on

²The full text of W.Va. Code § 41-1-6 is as follows:

(a) If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, except that the provisions of section three, article three, chapter forty-one do not apply, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

(b) This section applies to all divorces, annulments or remarriages which become effective after the fifth day of June, one thousand nine hundred ninety-two.

April 1, 2009, the Monroe County Commission properly granted the relief sought by the Respondent. Order, April 1, 2009, P.A. 24. Neither Brenda C. Kirby nor any other party ever appealed this Order.

Thereafter, over six months later on October 9, 2009, the Petitioners herein filed their Petition asking that the title to the real estate that they purchased from Brenda C. Kirby be quieted, and asserting a creditor's suit and claim for unjust enrichment against the Estate of Jesse Frances Kirby in the alternative. See Docket Sheet, P.A. 1; and, Petition to Quiet Title to Real Estate, Creditor's Suit Against the Estate of Jesse Frances Kirby, and Claim for Unjust Enrichment, P.A. 3-8. In their Petition, as opposed to asserting any lack of jurisdiction on behalf of the Monroe County Commission to enter an Order confirming that Bertha Kirby was the sole and only heir of her son, Jesse Frances Kirby, the Petitioners instead plead that the Will was "voidable", and that the sale had been validly made by Brenda C. Kirby as "Executrix" of Mr. Kirby's Estate, even though that was simply not the case. Petition, P.A. 6.

The parties subsequently filed cross motions for summary judgment. Only at the time of filing their summary judgment motion did the Petitioners first assert some type of jurisdictional argument for the relief they were requesting. As set forth in their motion, they now attempted to argue that Bertha Kirby did not

attempt to impeach her son's Will within the six months limitation period set out in W.Va. Code § 41-5-11. See generally, Plaintiffs' Response to Defendants' Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment, P.A. 43-52.

Nevertheless, the Monroe County Circuit Court properly held that the Respondent's title to her son's land should quieted instead, as she had never joined in the deed to the Petitioners, and because it was abundantly clear, pursuant to W.Va. Code § 41-1-6, that Brenda C. Kirby simply had no title to convey to the Petitioners. See generally, Agreed Amended Order Granting Partial Summary Judgment, P.A. 90-96. The Circuit Court also specifically noted that "Jesse F. Kirby's marital status at the time of his death was a matter of public record prior to the date that Brenda Kirby executed a deed to the Petitioners for the subject tracts of property." Id., P.A. 94.

On the other hand, the Circuit Court found that there were material issues of fact preventing a summary judgment ruling for either party with respect to the issue of unjust enrichment which had been raised by the Petitioners in their original filing.³ Id.,

³The Petitioners allege that during the brief period of time of less than 60 (sixty) days which passed between them receiving a deed to the real estate from Brenda C. Kirby, and Bertha Kirby filing her initial objection to the settlement of the Estate of her son, that they spent a considerable sum enhancing and improving a residence located on the land. See Petition, Count II, Unjust Enrichment, P.A. 6-7. Accordingly, they assert that if Bertha Kirby is deemed to be the rightful owner of the land,

(continued...)

P.A. 94-95. Therefore, the Circuit Court granted partial summary judgment to the Respondent, and declared that she was the rightful owner of the real estate which her son had owned at the time of his death despite the attempted conveyance of the same by his ex-wife to the Petitioners. Thereafter, in order to facilitate the efficient resolution of this matter - and because the issue of ownership of the land is the single most important issue herein - the parties and the Circuit Court agreed to make that particular part of the ruling final and appealable. It is from this ruling that the Petitioners now appeal.

SUMMARY OF ARGUMENT

The Respondent is the sole and only heir of her late son by operation of law as a result of the provisions set out in W.Va. Code § 41-1-6. She prevailed for this reason before the Monroe County Commission, and this ruling was never appealed. Therefore, in a last ditch effort to claim title to the real estate that the Respondent has rightfully inherited, the Petitioners now attempt to claim some jurisdictional defect with the Commission's ruling.

In that respect the Petitioners claim that Bertha Kirby failed to impeach her son's Will within the period of time required by law. However, this argument must fail because the Respondent has

³(...continued)
then she has been unjustly enriched by virtue of the improvements that they made to the property.

at no time sought to impeach the Will her son wrote, nor does she need to do so. That Will is perfectly valid and no one disputes that it is the Last Will and Testament of Jesse Frances Kirby. It is only by operation of statute that the devise to Mr. Kirby's ex-wife set out therein must fail. However, the Will itself is not invalidated by the statute. Consequently, since the devise to Brenda C. Kirby fails, Bertha Kirby, as the sole and only heir of her son, is now the lawful owner of her son's real estate, and the Circuit Court's ruling was absolutely correct in that respect.

The Petitioners also suggest that they should have been granted summary judgment on their unjust enrichment claim. However, as discussed herein, that portion of the Circuit Court's Order below was not made part of the final appealable ruling, and is not ripe for appeal at this juncture.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent agrees with the Petitioners that oral argument is not required in this case pursuant to Rule 18(a)(3) of the Revised Rules of Appellate Procedure, as the dispositive issues herein have already been authoritatively decided by virtue of the clear and unambiguous language of W.Va. Code § 41-1-6.

ARGUMENT

In a desperate bid to avoid an otherwise inevitable result the Petitioners herein ask this Court to overturn the rulings of the

Monroe County Commission and Monroe County Circuit Court on jurisdictional grounds. Such contention wholly fails as the Petitioners misperceive the applicable statute which deems the Respondent to be the sole and only heir of her son. The bottom line is that the Petitioners received a deed to land from a person who was not the heir to an Estate, and they do not have valid title thereto. Moreover, such person was not an heir to the Estate by operation of a clear and unambiguous statute, and the facts establishing the application of the statute were a matter of public record.

I. Neither the Monroe County Commission nor the Monroe County Circuit Court lacked jurisdiction to enter the decisions they have made with regard to this matter.

The Petitioners seek to attack by way of this appeal the ruling of the Monroe County Commission which declared that Bertha Kirby stood to inherit all of her son's Estate as his only heir. This ruling was never appealed by any party, and was part of an entirely separate proceeding. Realizing that they have no viable alternatives by which to appeal said Order, the Petitioners fall back to the position that the Commission simply had no jurisdiction to find that the Respondent, Bertha Kirby, was the sole and only heir of her late son's Estate.⁴ However, in making this assertion,

⁴The Petitioners devote part II of their Argument, Petitioner's Brief, pp. 10-11, to a brief discussion alleging that the Monroe County Commission and Monroe County Circuit Court
(continued...)

they mistakenly rely upon the statutory procedure to impeach a Will, and argue that Bertha Kirby failed to follow the same.

At no time has Bertha Kirby sought to impeach the Will of her son, Jesse Frances Kirby, nor did she need to do so. She simply asked the Monroe County Commission to confirm that she was the sole and only heir of her late son by operation of that certain statute, W.Va. Code § 41-1-6. That statute invalidates a devise to a former spouse after divorce. There is no ambiguity in the wording of the statute, and there is no required procedure set forth therein in order to have its application enforced. It simply operates, as a matter of law, to invalidate those parts of a decedent's Will which would otherwise have devised something to a former spouse.

It is true in this particular case that the entirety of Mr. Kirby's Estate had been left to his former spouse. Nevertheless, W.Va. Code § 41-1-6 does not in any way, shape or form serve to actually invalidate a Will in its entirety. Likewise, neither Bertha Kirby nor any other party ever suggested that the Will

⁴(...continued)

likewise lacked jurisdiction to remove Mr. Kirby's ex-wife as the Executrix of his Estate. Apart from the rather obvious notion that an Executor can be removed for misconduct (and conveying real estate which actually belongs to an heir of the Estate certainly seems to constitute misconduct), the Petitioners likewise fail to recognize that the removal of Brenda C. Kirby as Executor has no effect on the validity of their deed from her. The deed was signed by her as "sole heir" of the Estate and not in any official capacity as the Executor. Deed, P.A. 17-18. Therefore, her removal as Executor has no bearing whatsoever on the outcome of this case, and no further response is required to Part II of the Petitioners' Argument.

presented for probate was not Mr. Kirby's true Will. It certainly was his Will, and that issue has never been disputed. In other words, there was never any attempt to impeach the Will at all. The only thing that transpired is that the Commission properly held that any devise to the ex-wife, Brenda C. Kirby, was invalid per the applicable statute. Thereafter W.Va. Code § 42-1-2(a) kicked in to decree that the portion of Mr. Kirby's Estate which was "not effectively disposed of by [his] Will passes by intestate succession", which meant that his mother, Bertha Kirby, as his closest living relative, inherited his Estate.

A cursory review of W.Va. Code § 41-1-6 reveals no provision therein whatsoever that attempts to declare an entire Will invalid or ineffective merely because a former spouse is included within its terms. The only portion of a Will that is invalidated is that part by which a devise is made to a former spouse. The rest of the Will remains unaffected. Accordingly, if Jesse Frances Kirby had made provisions for others in his Will, then those bequests would have been completely valid. That statute simply does not operate to invalidate or impeach a Will at all, nor does it even require any sort of legal procedure for its effect to apply.

Therefore, it simply cannot be said that one has to "impeach" a Will in order to apply W.Va. Code § 41-1-6 to it. The Will itself remains perfectly valid. Indeed, the Will of Jesse Frances Kirby is itself a valid Will and reflects what the testator

intended at the time he wrote it. However, the pertinent statute invalidates those provisions leaving anything to the former spouse by operation of law, and no affirmative conduct is required for such to take effect (unless, as in this case, the requirements of the law are being ignored).

This is especially true in a situation such as the instant one where all of the facts were matters of public record and plainly accessible to the Petitioners. The fiduciary records were recorded in the Office of the Clerk of the Monroe County Commission and clearly showed that Brenda C. Kirby was divorced from Jesse Frances Kirby. For this reason it is difficult to comprehend why the Petitioners had any reasonable basis to believe they were receiving clear title to the real estate conveyed to them by her when the records showed that she and the decedent were divorced.

It would be a sincere miscarriage of justice to find that Mr. Kirby's ex-wife is now entitled to his entire Estate rather than his mother. Surely this could not have been what Mr. Kirby intended, but most importantly it is not what the law permits. No action is required on behalf of the beneficiary to apply the law. Sometimes, as in this case, the beneficiary may need to enforce the law, but there is no provision requiring them to do anything in the first instance, nor is there any time deadline set out in the statute itself. The statute invalidating any bequest to Brenda C. Kirby was operative from the moment of Mr. Kirby's passing

regardless of the acts or omissions of any party. For that reason the Appeal filed herein must fail, and the ruling of the Monroe County Circuit Court affirming the Respondent's title to her son's land must stand.

II. The issue of unjust enrichment is not ripe for appeal.

As part of their Brief filed herein, the Petitioners also assert that the Monroe County Circuit Court erred by not granting them summary judgment with regard to that count of their Petition below seeking damages for unjust enrichment. However, it is not appropriate that this matter be raised on appeal at the current time.

Pursuant to the Agreed Amended Order Granting Partial Summary Judgment the parties hereto agreed to make the ruling deciding who was the lawful owner of the real estate a final, appealable decision. It was agreed to make that singular issue appealable now because if that decision is reversed by this Court, then a further hearing on the unjust enrichment claim is moot. However, as set forth on the first page of the Order, P.A. 90, *only* the issue as to who was the sole heir of the Estate of Jesse Frances Kirby, and therefore the lawful owner of the real estate, was made final and appealable. The ruling of the Circuit Court below with regard to the unjust enrichment issue was not finalized, nor was it agreed that such issue could be appealed at this time.

Even if this were not true it is clear that summary judgment

could not have been granted with respect to this aspect of the case at the current time as our state generally only recognizes claims for unjust enrichment when either the parties had some sort of prior agreement or relationship (which is not the case here as Bertha Kirby had no association with the Petitioners); or, there was a reasonable mistake of law (which is highly questionable in this case as the facts establishing Brenda C. Kirby's status as the ex-wife of Jesse Frances Kirby were a matter of public record thereby calling into question her alleged ownership of any land inherited from him). See generally, Realmark Developments, Inc. v. Ranson, 208 W.Va. 717, 542 S.E.2d 880 (2000); Realmark Developments, Inc. v. Ranson, 214 W.Va. 161, 588 S.E.2d 150 (2003); and, *Restatement, Restitution* § 53 (1937). Obviously, in order to determine if the conduct of the Petitioners was reasonable, the Circuit Court determined that additional factual inquiry was necessary.

While the Respondent may disagree with that ruling, and instead consider the Petitioners' beliefs to have been patently unreasonable in light of the clear law regarding a devise to a former spouse, it is still a fact-bound determination. And in this instance, the Circuit Court found that further factual development was necessary. Moreover, it is equally clear that denial of summary judgment in and of itself is ordinarily not appealable: "An order denying a motion for summary judgment is merely

interlocutory, leaves the case pending for trial, and is not appealable except in special instances in which an interlocutory order is appealable." Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York, 148 W.Va. 160, 133 S.E.2d 770, Syll. Pt. 8 (1963). So for these reasons this Court should refuse to consider any issues of unjust enrichment with regard to this appeal.

CONCLUSION

Our legislature apparently recognized that citizens of our state oftentimes get divorced and may not immediately update their estate plan. Obviously, it is difficult to imagine that many persons want their ex-spouse to receive part or all of their estate. Fortunately, by virtue of W.Va. Code § 41-1-6, that type of unfortunate result is automatically avoided, and devises to former spouses fail by operation of law.

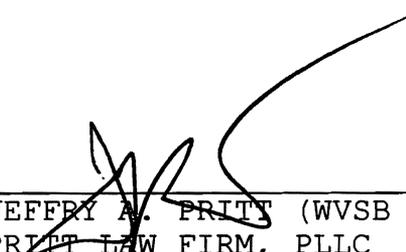
There is no procedure that anyone has to perform in order to apply the workings of the statute. There is no deadline to which one must adhere. The act of the divorce itself invokes the protection of the statute. And, in a case such as this, *where the fact of the divorce is a matter of public record and part of the probate file itself*, there is simply no justifiable excuse for any party to assert ignorance of the facts or the law in an attempt to take land from a grieving mother.

The Monroe County Commission clearly has jurisdiction to issue rulings in probate matters pending in our county, and it made the

correct ruling when it enforced the plain terms of W.Va. Code § 41-1-6 and deemed Bertha Kirby to be the sole and only heir of her son's Estate. The Monroe County Circuit Court likewise plainly had jurisdiction to quiet title to the real estate that Bertha Kirby inherited from her son which is located in Monroe County. There was simply no jurisdictional defect in the rulings below in which the law of this state was correctly applied.

The Petitioners herein are certainly entitled to continue to attempt to pursue their alleged claim for unjust enrichment before the Circuit Court below. However, they are not permitted to appeal the denial of their request for summary judgment on that issue. Accordingly, the ruling of the Monroe County Circuit Court granting partial summary judgment to the Respondent, Bertha Kirby, should be upheld, and this matter should then be remanded for further proceedings with regard to the unjust enrichment claim.

BERTHA KIRBY, individually and
as Administratrix of the Estate of
Jesse Frances Kirby,
By Counsel



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CERTIFICATE OF SERVICE

I, Jeffry A. Pritt, counsel for the Respondent, Bertha Kirby, do hereby certify that service of the attached RESPONDENT'S BRIEF has been made upon the Petitioners by depositing a true and correct copy thereof in the regular U.S mail, postage prepaid, and properly addressed to their counsel of record as follows:

Barry L. Bruce
Jesseca R. Church
Barry L. Bruce and Associates, L.C.
P.O. Box 366
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this 8th day of December, 2011.


JEFFRY A. PRITT