

12-0365

IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

DOUGLAS BROWN, MARION ROBINSON,  
MASON COUNTY FARM MUSEUM,  
MASON COUNTY BOARD OF EDUCATION,  
HENDERSON CHURCH OF CHRIST,  
BOB RIMMY, HEATHER HUTCHINS, and  
KAYLA NAVE,

PLAINTIFFS,

vs.

Civil Action No.: 11-C-74  
Judge: Thomas C. Evans, III

ROBERT FLUHARTY, in his fiduciary capacity  
As Executor of the Estate of Bright McCausland,

DEFENDANT.

FILED  
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ORDER

On this 31<sup>st</sup> day of October 2011, came Defendant Robert Fluharty, by and through counsel, Bruce L. Stout, Esq., and Anna M. Price, Esq., and brought on for hearing their previously filed and noticed "*Motion for Judgment on the Pleadings*" in the above-styled civil action. Plaintiffs, Douglas Brown, Marion Robinson, Mason County Farm Museum, Mason County Board of Education, Henderson Church of Christ, Bob Rimmy, Heather Hutchins, and Kayla Nave, were represented by and through counsel, R. Michael Shaw, Sr., Esq., John F. Allevato, Esq., and David R. Croft, Esq.

The Court, upon consideration of the pleadings, an examination of the record as whole, and the oral argument of both parties, is of the opinion to and does hereby GRANT the Defendant's Motion for Judgment on the Pleadings. The Court, however, DENIES the Defendant's request for attorneys' fees. Issues have been fully briefed by all parties. In support of this Order, the Court makes the following findings of facts and conclusions of law:

### FINDINGS OF FACT

1. Bright McCausland ("Decedent") died on April 23, 2010.
2. In the months preceding Decedent's death, he was blind and infirmed.
3. On May 20, 2010, the Last Will and Testament of Bright McCausland, dated October 28, 2009, was probated and recorded in Will Book 37, Page 111 in Mason County, West Virginia.
4. On July 14, 2011, Plaintiffs, Douglas Brown, Marion Robinson, Mason County Farm Museum, Mason County Board of Education, Henderson Church of Christ, Bob Rimmy, Heather Hutchinson and Kayla Nave, brought Civil Action Number 11-C-74-E to have the probated will revoked by a second document, dated April 10-11, 2010 ("second document"). Furthermore, Plaintiffs contend that the second document should be probated in place of the probated document because the second document was deemed later in time.
5. The second document, prepared by Douglas Brown, contains a type written statement claiming that the document was dictated by the Decedent, but the second document contains no mark, signature, or other writing of the Decedent.
6. While the second document does include two affidavits by Kristy Robinson and Ryann Greer, signed on April 10 and April 11, 2010, it is unclear what event or events were witnessed.
7. There is no dispute of material facts with respect to the Motion for Judgment on the Pleadings now before this Court.

### CONCLUSIONS OF LAW

8. The Court will grant a defendant's motion for judgment on the pleadings if it appears *beyond doubt* that the plaintiff can prove no set of facts that will support its claim for requested relief. Kopelman & Assocs. V. Collins, 196 W.Va. 489, 473 S.E.2d 910 (W.Va. 1996). In West Virginia, a motion for judgment on the pleadings generally is viewed as a motion to dismiss for failure to state a claim. Copley v. Mingo County Bd. Of Educ., 195 W.Va. 480, 466 S.E.2d 139 (W.Va. 1995).
9. Disposing property by will is a statutory right under the control of the legislature, not common law controlled by the courts. Failure to comply with every requirement results in a document unable to be probated as a valid will. In re Estate of Briggs, 148 W.Va. 294, 134 S.E.2d 737 (W.Va. 1964); Weese v. Weese, 134 W.Va. 233, 58 S.E.2d 801 (W.Va. 1950); Black v. Maxwell, 131 W.Va. 247, 46 S.E.2d 804 (W.Va. 1948); 20 Michies Jurisprudence: Wills § 3 (2004); James P. Cox, III, Harrison on Wills and Administration for Virginia and West Virginia § 9.07 (2010).
10. The second document which Plaintiffs purport to be the Last Will and Testament of Bright McCausland is not a valid will in West Virginia. W.Va. Code § 41-1-3 states that a valid will in West Virginia must be a written document "signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature." Unless the will is holographic, a testator must sign in front of at least two witnesses. W.Va. Code § 41-1-3; Larue v. Lee, 63 W.Va. 388, 60 S.E.288 (W.Va. 1908).
11. When a Testator is physically unable to sign his own name, some other person may sign "in his presence and by his direction." W.Va. Code § 41-1-3. Another person may even

- steady a testator's hand to aid a signature when a testator is physically unable to complete it. McMechen v. McMechen, 17 W.Va. 683, 41 Am. Rep. 682 (W. Va. 1881). Neither of these exceptions is applicable here.
12. A testator's initials, first name only, or a mark intended as a signature may be sufficient to constitute a signature to meet the requirements of a valid will. In re Estate of Briggs, 148 W.Va. 294, 134 S.E.2d 737 (W.Va. 1964). "The only express requirement with respect to the act of signing is that it be done in such a manner as to make it manifest that the name is intended as a signature." Clark v. Studenwalt, 187 W.Va. 368, 419 S.E.2d 308 (W.Va. 1992) (citing Black v. Maxwell, 131 W.Va. 247, 46 S.E.2d 804 (W.Va. 1948); LaRue v. Lee, 63 W.Va. 388, 60 S.E.288 (W.Va. 1908)).
13. While the Supreme Court of Appeals of West Virginia has held that a testator writing his or her name in the first line or the exordium clause of a holographic will is sufficient to consider it a signed document, this rule only applies to a holographic will. Clark v. Studenwalt, 419 S.E.2d 308 (W.Va. 1992). A holographic will is a document wholly in the testator's handwriting. W.Va. Code § 41-1-3; see In re Briggs' Estate, 148 W.Va. 294, 134 S.E.2d 737 (W.Va. 1964).
14. The importance of a signature on a will is its indication of final testamentary intent. When a document purporting to be testamentary in nature ends without a signature, the question of the instrument's completeness is immediately raised. Clark v. Studentwalt, 187 W.Va. 368, 419 S.E.2d 308 (W.Va. 1992).
15. West Virginia does not recognize oral wills with one narrow exception allowing oral wills for soldiers in actual military service, or a mariner or seaman being at sea. W.Va.

Code § 41-1-5; H.G.U., *Oral Contracts to Devise and Bequeath in West Virginia*, 58 W.Va. L. Rev. 393 (1956). This narrow exception is not applicable here.

16. This Court concludes that the Decedent did not sign his name anywhere on the second document, and therefore, there being no signature, under W.Va. Code § 41-1-3, the second document is not a valid will.

**WHEREFORE** the Court upon sufficient information and for the reasons set forth above does hereby **GRANT** the Defendant's Motion for Judgment on the Pleadings and dismissal of Plaintiffs' claims as to the Defendant. The Court, however, **DENIES** Defendant's request for attorneys' fees and costs in this matter, as this Court find no violation of Rule 11 of the West Virginia Rules of Civil Procedure.

The respective objections of each party to adverse rulings are noted and are preserved for the record.

The Court **DIRECTS** the Clerk to send a certified copy of this Order to counsel of record.

R. Michael Shaw, Sr. (WVSB# 3354)  
SHAW & TATTERSON, L.C.  
610 Main Street  
P.O. Box 3  
Point Pleasant, WV 2550  
(304)675-2669

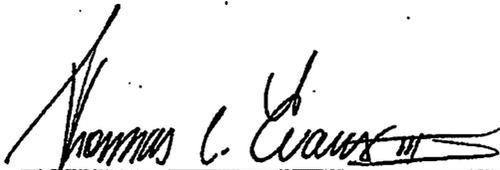
John F. Allevato (WVSB# 7871)  
SPILMAN THOMAS & BATTLE, PLLC  
300 Kanawha Boulevard, East  
Charleston, WV 25321  
(304)340-3800

David R. Croft (WVSB# 8061)  
SPILMAN THOMAS & BATTLE, PLLC  
1217 Chapline Street,  
P.O. Box 831  
Wheeling, WV 26003  
(304) 230-6952

*Anna M. Price, Esq.*  
*Huddleston Bolen LLP*  
*P.O. Box 2185*  
*Huntington WV 25722-2185*

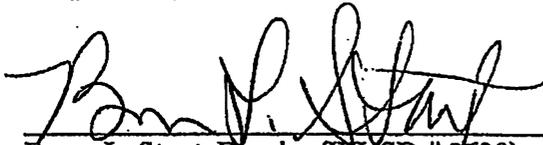
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Enter this 9<sup>th</sup> day of Feb., 2012, ~~2011.~~



Thomas C. Evans, III  
JUDGE, CIRCUIT COURT OF MASON COUNTY

Prepared by:



Bruce L. Stout, Esquire (WVSB # 3630)  
Anna M. Price, Esquire (WVSB # 11515)  
HUDDLESTON BOLEN LLP  
Post Office Box 2185  
Huntington, West Virginia 25722-2185  
Telephone: (304) 529-6181  
Fax: (304) 522-4312  
*Counsel for Defendant*

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