

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0365

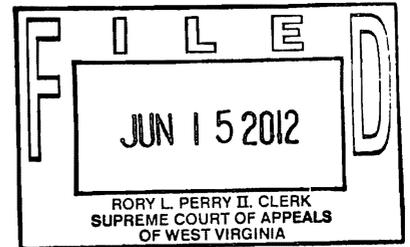
DOUGLAS BROWN, MARION ROBINSON,
MASON COUNTY FARM MUSEUM, MASON
COUNTY BOARD OF EDUCATION, HENDERSON
CHURCH OF CHRIST, BOB RIMMEY, HEATHER
HUTCHINSON and KAYLA NAVE,
Plaintiffs Below,

Petitioners,

v.

ROBERT D. FLUHARTY, in his fiduciary capacity as
Executor of the Estate of Bright McCausland,
Defendant Below,

Respondent.



BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. ASSIGNMENTS OF ERROR	1
II. STATEMENT OF THE CASE.....	1
A. Statement of Relevant Facts	1
B. Procedural History	3
III. SUMMARY OF ARGUMENT	5
IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	6
V. ARGUMENT.....	6
A. Standard of Review.....	6
B. It Is the Express Public Policy of West Virginia That a Testator’s Unequivocal Testamentary Intent Should Not be Thwarted by Slavish Adherence to Antiquated Textualism.	7
C. Mr. McCausland Complied with the Formal Requirements of West Virginia Code § 41-1-3 to Make His New Will His Valid Last Will and Testament	10
D. A Testator Must Substantially Comply With West Virginia Code § 41-1-3 to Make a Valid Will; Not Strictly Comply as Concluded by the Circuit Court of Mason County	14
VI. CONCLUSION	20

TABLE OF AUTHORITIES

West Virginia Cases:

Black v. Maxwell, 131 W. Va. 247, 46 S.E.2d 804 (1948) 14, 15, 16

Blake v. Charleston Area Medical Center, 201 W. Va. 469, 498 S.E.2d 41 (1997)..... 6, 10

Burks v. McNeel, 164 W. Va. 654, 264 S.E.2d 651 (1980) 15

Charleston National Bank v. Thru the Bible Radio Network, 203 W. Va. 345, 507 S.E.2d 708
(1998)..... 18, 19

Choice Lands, LLC v. Tassen, 224 W. Va. 285, 685 S.E.2d 679 (2008)7, 10

Clark v. Studenwalt, 187 W. Va. 368, 419 S.E.2d 308 (1992)..... 12, 13, 17, 18, 19, 20

Cobb v. Daugherty, 225 W. Va. 435, 693 S.E.2d 800 (2010) 9

Copley v. Mingo County Board of Education, 195 W. Va. 480, 466 S.E.2d 139 (1995) 6, 11

Dantzig v. Dantzig, 222 W. Va. 535, 668 S.E.2d 164 (2008)..... 7

Farley v. Farley, 215 W. Va. 465, 600 S.E.2d 177 (2004) 9

Farmers & Merchants Bank v. Farmers & Merchants Bank, 158 W. Va. 1012, 216 S.E.2d 769
(1975)..... 7

Forshey v. Jackson, 222 W. Va. 743, 671 S.E.2d 748 (2008) 11

In re Briggs' Estate, 148 W.Va. 294, 134 S.E.2d 737 (1964) 12, 14, 15

In re Estate of Teubert, 171 W. Va. 226, 298 S.E.2d 456 (1982)..... 18, 19

McMechen v. McMechen, 17 W. Va. 683, 41 Am.Rep. 682 (1881)..... 12

Moore v. Goode, 180 W. Va. 78, 375 S.E.2d 549 (1988) 9

Newman v. Michel, 224 W. Va. 735, 688 S.E.2d 610 (2009)..... 9

One Valley Bank Nat. Ass'n v. Hunt, 205 W. Va. 112, 516 S.E.2d 516 (1999)..... 7

Painter v. Coleman, 211 W. Va. 451, 56 S.E.2d 588 (2002)..... 7

<u>Petition of Shiflett</u> , 200 W. Va. 813, 490 S.E.2d 902 (1997)	9
<u>Reedy v. Propst</u> , 169 W. Va. 473, 288 S.E.2d 526 (1982)	7
<u>Ruble v. Ruble</u> , 217 W. Va. 713, 19 S.E.2d 226 (2005).....	7
<u>Transamerica Occidental Life Ins. Co. v. Burke</u> , 179 W. Va. 331, 368 S.E.2d 301 (1988).....	8
<u>Wade v. Wade</u> , 119 W. Va. 596, 195 S.E. 339 (1938)	8
<u>Weese v. Weese</u> , 134 W.Va. 233, 58 S.E.2d 801 (1950)	14, 15, 16
<u>Zickefoose v. Zickefoose</u> , ___ W. Va. ___, 724 S.E.2d 312 (2012)	15
Other Cases:	
<u>Dinning v. Dinning</u> , 46 S.E. 473 (Va. 1904)	13
<u>Slate v. Titmus</u> , 38 S.E.2d 590 (Va. 1989)	17
Statutes:	
West Virginia Code § 41-1-3 (West 2012).....	1, 8, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20
West Virginia Code § 41-5-11 (West 2012).....	16
Rules:	
Revised Rule of Appellate Procedure 18	6
Revised Rule of Appellate Procedure 20	6
Treatises and Other Sources:	
20 Michies Jurisprudence: Wills § 3 (2004).....	14, 15
<u>Harrison on Wills and Administration for Virginia and West Virginia</u> § 9.07 (2010).....	14, 15, 17, 19
Restatement (Third) of Property: Wills & Other Donative Transfers § 3.3 (1999).....	9
Unif. Probate Code § 2-503 (amended 1997) (West 2012)	9, 10

I. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The Mason County Circuit Court's Order, which denies the probate of the valid Last Will and Testament of Bright McCausland, violates the public policy of this State which clearly and consistently states that the testator's intent is paramount and that government and judicial hyper-technicality does not and should not thwart a testator's clear testamentary intent.

Assignment of Error No. 2: : The Mason County Circuit Court erred in granting Respondent, Robert D. Fluharty's, Motion for Judgment on the Pleadings, erroneously applying the standard of review for motions for judgments on the pleadings. In so doing, the Mason County Circuit Court misconstrued the factual circumstances surrounding the testator's actions in executing his will and applied an impermissibly inflexible reading of West Virginia Code § 41-1-3, which details the requirements to make a valid will.

Assignment of Error No. 3: The Mason County Circuit Court erred in making and relying upon erroneous conclusions of law respecting the requirements to make and execute a valid will to support its Order that wrongfully granted the Respondent, Robert D. Fluharty's Motion for Judgment on the Pleadings.

II. STATEMENT OF THE CASE

A. **Statement of Relevant Facts**

Bright McCausland ("Mr. McCausland") resided in Henderson, Mason County, West Virginia. (Pet'rs' App. R. 2, 6, 17.) Toward the latter part of his life, he was legally blind and required the assistance of others to help him complete daily tasks. (Pet'rs' App. R. 2, 38, 104, 112.)

In 2009, Mr. McCausland sought the estate planning assistance and services of the Respondent, Robert D. Fluharty, ("Mr. Fluharty"), a licensed attorney in West Virginia, who prepared a draft will for Mr. McCausland. Satisfied with the draft that Mr. Fluharty prepared, Mr. McCausland executed the document on October 28, 2009, as and for his last will and testament (the "Old Will"). (Pet'rs' App. R. 6-9.) At the time of execution, Mr. McCausland desired the Old Will to be his last will and testament.

In the succeeding months, and as is all too common, Mr. McCausland's physical health deteriorated precipitously, yet remained mentally competent. (Pet'rs' App. R. 2, 37-38.) In addition to being legally blind, he became physically disabled and was confined to a health care facility. (Pet'rs' App. R. 2, 112.)

Perhaps sensing his own mortality, or for whatever reasons known only to Mr. McCausland, he became dissatisfied with his Old Will and decided to revoke his Old Will and draft a new one. On or about April 10, 2010, Mr. McCausland informed his nephew, Douglas Brown, one of the Petitioner's herein, ("Mr. Brown"), that he was unhappy with the terms and provisions of his Old Will and that he desired to make a new will. (Pet'rs' App. R. 2, 38.)

Appreciating Mr. McCausland's grave physical status, Mr. McCausland and Mr. Brown immediately began working on drafting a new will for Mr. McCausland. Between April 10 and April 11, 2010, Mr. McCausland dictated the provisions of his new will to and in the presence of Mr. Brown and directed Mr. Brown to transcribe them. (Pet'rs' App. R. 2, 12, 38.) Mr. Brown transcribed everything that Mr. McCausland directed him to include in the document. (Pet'rs' App. R. 2, 38.) Mr. Brown then printed the document, which comprised three typewritten pages. (Pet'rs' App. R. 2, 38.)

On April 11, 2010, Mr. McCausland desired that the document become his valid last will and testament. He requested that two witnesses be present in his hospital room to witness the execution ceremony. (Pet'rs' App. R. 2, 12, 38.) Kristy Robinson ("Ms. Robinson") and Ryann Greer ("Mr. Greer"), neither of whom are heirs or beneficiaries, were secured as witnesses. (Pet'rs' App. R. 2-3, 12.) Thereafter, Mr. McCausland directed Mr. Brown, in the presence of Ms. Robinson and Mr. Greer, all of whom were in the presence of Mr. McCausland and each other, to read aloud his new will. (Pet'rs' App. R. 2-3, 12, 38.) Mr. Brown read aloud the new will, including the last line which states "I Bright McCausland being of sound mind hereby declare this to be my last will and testament and revoke all former wills previously made by me." (Pet'rs' App. R. 12.) Because he could not see or physically move his hand to sign the will, Mr. McCausland affirmatively stated in the presence of Mr. Brown, Ms. Robinson and Mr. Greer, that he directed Mr. Brown to transcribe the previously read will and declared the same to be his last will and testament. (Pet'rs' App. R. 2-3, 12, 38.) Ms. Robinson and Mr. Greer then signed their names as witnesses to the document. (Pet'rs' App. R. 2-3, 10-12, 38, 113-14.) (The three page typewritten Last Will and Testament of Mr. McCausland, dated 10 & 11 April 2010, witnessed by Ms. Robinson and Mr. Greer is hereinafter referred to as the "New Will"). (Pet'rs' App. R. 10-12.)

On April 22, 2010, at the age of ninety (90), Mr. McCausland breathed his last and died. (Pet'rs' App. R. 2, 17.)

B. Procedural History

On May 20, 2010, the Old Will was probated and admitted to record as and for the Last Will and Testament of Mr. McCausland in the Office of the Clerk of the County Commission of

Mason County, West Virginia, in Will Book 37, at page 111. (Pet'rs' App. R. 2, 6-9, 17, 21.)

Mr. Fluharty was also appointed as Executor under the same. (Pet'rs' App. R. 9.)

Petitioners, by and through counsel, on July 14, 2011, filed a Complaint against Mr. Fluharty in the Circuit Court of Mason County, seeking a court order that would set aside the Old Will, admit the New Will as and for the last will and testament of Mr. McCausland and direct the New Will to be probated accordingly. (Pet'rs' App. R. 1-15.) The parties stipulated on August 3, 2011, that Mr. Fluharty was joined as a Defendant in the action only in his fiduciary capacity as executor of the Estate of Bright McCausland. (Pet'rs' App. R. 20.)

On August 3, 2011, Mr. Fluharty filed his Answer and a corresponding Motion for Judgment on the Pleadings. (Pet'rs' App. R. 16-19, 21-36.) Petitioners filed, on August 19, 2011, Plaintiffs' Response to Defendant, Robert D. Fluharty's Motion for Judgment on the Pleadings. (Pet'rs' App. R. 37-54.) Mr. Fluharty filed a Reply on September 30, 2011 (Pet'rs' App. R. 55-72), and the Petitioners filed a Sur-reply on October 28, 2011. (Pet'rs' App. R. 73-81.)

Judge Thomas C. Evans, III ("Judge Evans") held a hearing on the Motion for Judgment on the Pleadings of October 31, 2011. (Pet'rs' App. R. 100-116.) At the hearing, Judge Evans orally granted Mr. Fluharty's Motion for Judgment on the Pleadings, but acknowledged that ". . . there is a substantial argument for extension and modification and reversal of the law as it is underlying the complaint." (Pet'rs' App. R. 113-14.) At the conclusion of the hearing, Judge Evans directed counsel for Mr. Fluharty to draft a proposed order reflecting the same. (Pet'rs' App. R. 114.)

On November 1, 2011, counsel for Mr. Fluharty provided one of Petitioners' attorneys, R. Michael Shaw, Sr., with a draft of the proposed order, requesting comments and proposed

revisions from Petitioners' counsel. (Pet'rs' App. R. 87.) By e-mail dated November 7, 2011, Petitioners' counsel requested that Mr. Fluharty's counsel grant Petitioners' counsel until November 11, 2011, to review and comment on the proposed order. (Pet'rs' App. R. 88.) Mr. Fluharty's counsel granted this extension and Petitioners' counsel timely submitted their proposed revisions and comments on the proposed order. (Pet'rs' App. R. 88.)

Nevertheless, by letter dated November 14, 2011, counsel for Mr. Fluharty tendered the proposed order to the Circuit Court of Mason County without consulting any of Petitioners' counsel. (Pet'rs' App. R. 88.) Petitioners' counsel timely tendered their Objection to the Proposed Order on November 21, 2011. (Pet'rs' App. R. 87-96.)

A hearing was scheduled for April 16, 2012, at 10:00 a.m. before Judge Evans, on the Objection to the Proposed Order. (Pet'rs' App. R. 97-99.) Despite the scheduled hearing, Judge Evans signed the proposed order tendered by Mr. Fluharty's counsel on February 9, 2012 (the "Order"). (Pet'rs' App. R. 117-122.) The Order was entered on the docket sheet on February 14, 2012. (Pet'rs' App. R. iii.)

Petitioners' counsel did not know of the entry of the Order until it received its attested copy from the Circuit Clerk of Mason County on March 8, 2012, inexplicably 23 days after the Clerk entered it on the docket and only seven days before the expiration of the time to file a Notice of Appeal with this Court.

III. SUMMARY OF ARGUMENT

A valid West Virginia will must substantially comply with a number of statutory requirements. One such requirement is that a will be signed by the testator or someone else at his direction so that the signature manifestly appears as the testator's final approval of the will. Mr. McCausland, blind and infirm, signed the new will when he dictated his will to his nephew,

Mr. Brown, and directed Mr. Brown to place Mr. McCausland's name at the end of the will as part of an emphatic clause adopting the will. When coupled with the fact that two disinterested witnesses subscribed their names to the New Will as witnesses to the execution ceremony, all statutory requirements were satisfied.

As part of his Order granting Mr. Fluharty's Motion for Judgment on the Pleadings, Judge Evans misstates law that he relies upon. Because the order misstates law, it is an erroneous order that must be overturned.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners respectfully request oral argument under Revised Rules of Appellate Procedure Rules 20(a)(1) and 20(a)(2). None of the criteria articulated in Revised Rule 18(a) that would preclude the need for oral argument is present. The matter before this Court implicates issues of first impression – specifically, what constitutes a “signature” to create a valid will when the testator is physically disabled and blind. Issues of fundamental public importance are implicated because the absence of plainly articulated rules places the wills of those who cannot or will not secure the benefit of legal counsel in jeopardy. Oral argument under Revised Rule 20, as well as a precedential disposition of the issues presently before the Court, is necessary.

V. ARGUMENT

A. Standard of Review

“Appellate review of a circuit court's order granting a motion for judgment on the pleadings is *de novo*.” Syl. pt. 1, Copley v. Mingo County Board of Education, 195 W. Va. 480, 466 S.E.2d 139 (1995); Syl. pt. 1, Blake v. Charleston Area Medical Center, 201 W. Va. 469,

498 S.E.2d 41 (1997) ; Syl. pt. 1, Choice Lands, LLC v. Tassen, 224 W. Va. 285, 685 S.E.2d 679 (2008).

B. It Is the Express Public Policy of West Virginia That a Testator’s Unequivocal Testamentary Intent Should Not be Thwarted by Slavish Adherence to Antiquated Textualism.

If Mr. McCausland’s New Will is not admitted to probate in Mason County, West Virginia, as and for his last will and testament, then it will represent this State’s first major departure from its avowed public policy to honor the testamentary intent of West Virginia testators. This court consistently, and rightfully reminds us in nearly every case involving a will that the paramount principle in construing or giving effect to a will is that the intention of the testator prevails, unless it is contrary to some positive rule of law or principle of public policy. Syl. pt. 1, Farmers & Merchants Bank v. Farmers & Merchants Bank, 158 W. Va. 1012, 216 S.E.2d 769 (1975). Syl. pt. 2, Dantzic v. Dantzic, 222 W. Va. 535, 668 S.E.2d 164 (2008). Syl. pt. 4, Ruble v. Ruble, 217 W. Va. 713, 19 S.E.2d 226 (2005); Syl. pt. 2, Painter v. Coleman, 211 W. Va. 451, 56 S.E.2d 588 (2002); Syl. pt. 2, One Valley Bank Nat. Ass’n v. Hunt, 205 W. Va. 112, 516 S.E.2d 516 (1999). The intention of the testator should therefore always prevail. See e.g., Syl pt. 1, Reedy v. Propst, 169 W. Va. 473, 288 S.E.2d 526 (1982) (“The cardinal rule in the construction of testamentary instruments is that a court should give effect to the intent of the testator.”).

This Court has also granted a certain leniency to those wills that have been prepared by laymen, without the assistance of counsel, noting that:

[i]f a will was drafted by one who is not a lawyer, a court will be more inclined to assume that the will was written in the language of the lay person and will be more inclined to give effect to the language of the will in accordance with the subjective sense employed by the testator or testatrix, and not according to the technical meaning of the language. . .

Syl. pt. 3, in part, Transamerica Occidental Life Ins. Co. v. Burke, 179 W. Va. 331, 368 S.E.2d 301 (1988).

There should be no question that the New Will evinces Mr. McCausland's final testamentary intent. He provides funeral details, directions to pay final expenses and debts. (Pet'rs' App. R. 10-12.) He disposes of his estate, making several personal bequests and requests related to family history. (Pet'rs' App. R. 10-12.) Mr. McCausland even makes extremely personal cash bequests of two-hundred and fifty dollars (\$250) to the "waitress's at Bob Evans who were good to him." (Pet'rs' App. R. 11-12.) Mr. McCausland, through his New Will, appoints an executor, who coincidentally, is the same executor serving under the Old Will. (Pet'rs' App. R. 12.) He likewise secured two witnesses who subscribed that they witnessed Mr. McCausland declare his New Will as and for his last will and testament. (Pet'rs' App. R. 12.)

Mr. McCausland did execute his New Will pursuant to the requirements of West Virginia Code § 41-1-3, making it a valid will. He may not have executed it the same manner that a sighted, healthy person who had the benefit of counsel would; but he did execute it in the best way that a blind, infirm individual, who did not have the benefit of counsel could. The requirements of West Virginia Code § 41-1-3 should be read through the lens of this case to give the New Will its full testamentary effect as required by and consistent with our State's public policy. If not, then West Virginia jurisprudence surrounding wills will begin to take an

illiberal and inflexible construction of the statute, giving preeminence to letter and not to spirit, and resulting in the thwarting of the intentions of testators even under circumstances where no possibility of fraud or impropriety exists.

Wade v. Wade, 119 W. Va. 596, 600, 195 S.E. 339, 341 (1938).

Denying the New Will probate is not only contrary to the public policy of West Virginia, but it would also represent a major shift away from modern authority, which has moved away from requiring strict adherence to will execution statutes. See Restatement (Third) of Property: Wills & Other Donative Transfers § 3.3, cmt. b (1999). Many state legislatures and courts instruct that the real inquiry to determine whether a will has been executed in conformance with statutory requirements should not focus on a slavish adherence to antiquated textualism, but rather “whether the evidence regarding the overall conduct of the testator establishes, in a clear and convincing manner, that the testator adopted the document as his or her will.” Id.

This modern trend away from strict textualism respecting will executions has been incorporated into the Restatement (Third) of Property, which has been cited favorably by this Court. See Cobb v. Daugherty, 225 W. Va. 435, 441, 693 S.E.2d 800, 806 & n. 3 (2010); Newman v. Michel, 224 W. Va. 735, 742, 688 S.E.2d 610, 617 (2009); Farley v. Farley, 215 W. Va. 465, 468, 600 S.E.2d 177, 180 (2004). It has also been incorporated into the Uniform Probate Code, which likewise has been cited favorably by this court. See Petition of Shiflett, 200 W. Va. 813, 817, 490 S.E.2d 902, 906 & n. 7 (1997); Moore v. Goode, 180 W. Va. 78, 84, 375 S.E.2d 549, 555 (1988). Both have very similar provisions to ensure that the testator’s clearly expressed testamentary intent is not thwarted. The Restatement (Third) of Property provides:

“A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.”

Restatement (Third) of Property: Wills & Other Donative Transfers § 3.3 (1999). The Uniform Probate Code provides:

“Although a document or writing added upon a document was not executed in compliance with Section 2-502 [Execution; Witnessed

or Notarized Wills; Holographic Wills], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.”

Unif. Probate Code § 2-503 (amended 1997) (West 2012).

This is not to suggest that this Court could or should legislate from the bench to incorporate either harmless error statutory provision exception into West Virginia will jurisprudence. Rather, it is presented and discussed to demonstrate the actions that legislatures have taken in response to courts that read flexibility into their respective state’s will act statutes to avoid the detriment of clearly expressed testamentary intent in appropriate cases. While Mr. McCausland did create a valid will pursuant to W. Va. Code § 41-1-3, to the extent there is any technical non-compliance, it is urged that this Court honor his intent by following the modern trend and the ruling of this Court to excuse any harmless error and recognize substantial compliance, so as to follow West Virginia’s public policy that respects testamentary intent with solemn reverence.

C. Mr. McCausland Complied with the Formal Requirements of West Virginia Code § 41-1-3 to Make His New Will His Valid Last Will and Testament

It is truly a rare case when a circuit court can grant a motion for judgment on the pleadings. A circuit court may only grant a motion for judgment on the pleadings, if it appears, after viewing all facts in a light most favorable to the nonmoving party, that the nonmoving party can prove no set of facts in support of his or her claim or defense. Choice Lands, LLC v. Tassen, 224 W. Va. 285, 289, 685 S.E.2d 679, 683 (2008); Blake v. Charleston Area Medical Center,

Inc., 201 W. Va. 469, 474, 498 S.E.2d 41, 46 (1997); Copley v. Mingo Bd. Of Educ., 195 W. Va. 480, 484, 466 S.E.2d 139, 143 (1995). A motion for judgment on the pleadings presents a challenge to the legal effect of given facts rather than on proof of facts themselves and in this respect is essentially, a delayed motion to dismiss. Copley, supra, at 484, 143. There is such disfavor for granting motions to dismiss, no matter the form, this Court counsels lower courts to rarely grant such motions. Forshey v. Jackson, 222 W. Va. 743, 749, 671 S.E.2d 748, 754 (2008).

Yet, despite the counseling of this Court to rarely grant such motions, the Mason County Circuit Court not only granted Mr. Fluharty's Motion for Judgment on the Pleadings, but granted it based upon an erroneous application of facts to law. There was no question as to what statutory authority governs the validity of wills—West Virginia Code § 41-1-3. Nevertheless, the Court failed to apply the pleaded facts to West Virginia Code § 41-1-3; had it done so, there is but one conclusion—that the New Will was executed in conformance with West Virginia Code § 41-1-3.

West Virginia Code § 41-1-3 states in its entirety:

No will shall be valid unless it be in writing and 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; and moreover, unless it be wholly in the handwriting of the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, and of each other, but no form of attestation shall be necessary.

W. Va. Code § 41-1-3. Of all the requirements of West Virginia Code § 41-1-3, the only statutory requirement that was debated relative to the New Will was the signature requirement.

(Pet'rs' App. R. 55, 111.) Or more specifically, whether Mr. McCausland "signed" the New Will, so as to comply with West Virginia Code § 41-1-3.

Admittedly, there is no swooping cursive signature that definitively reads "Bright McCausland" to satisfy the signature requirement. That was impossible because Mr. McCausland was blind and infirm. (Pet'rs' App. R. 2, 37-38, 104, 112.) But interestingly, "signed" and "signature," as used in West Virginia Code § 41-1-3, is not defined. Nor is there any prescribed method for signing. The only requirement is that a will be ". . . signed. . . in such manner as to make it manifest that the *name is intended as a signature. . .*" W. Va. Code § 41-1-3. (emphasis added).

Counsel for Mr. Fluharty directed the Mason County Circuit Court to, and the Circuit Court relied upon in its Order, a number of cases where the West Virginia Supreme Court of Appeals found otherwise non-conventional testator signatures as valid signatures on wills. (Pet'rs' App. R. 119, 129.) See McMechen v. McMechen, 17 W. Va. 683, 41 Am.Rep. 682 (1881) (another person may steady a testator's hand to aid in the testator's signature); See In re Briggs' Estate, 148 W.Va. 294, 134 S.E.2d 737 (1964) (testator's mark or initials intended as signature may serve as signature); See Clark v. Studenwalt, 187 W. Va. 368, 419 S.E.2d 308 (1992) (signature in exordium clause sufficient as signature on holographic will if intended as such). By extension, the Mason County Circuit Court posits that the common law in relation to the signature requirement for West Virginia Code § 41-1-3 only goes as far as reflected in the aforementioned cases, the New Will does not fit within any of those cases and is therefore not a valid will. (Pet'rs' App. R. 112-14, 119.)

The Mason County Circuit Court misconstrues this point. The fact that this Court has found the signatures in the aforementioned cases as valid for purposes of satisfying West

Virginia Code § 41-1-3's signature requirement is not dispositive where Mr. McCausland did not sign in the same way. West Virginia Code § 41-1-3 and the aforementioned cases do not stand for the proposition that subsequent factual situations must fit squarely within one of the previous "signature" cases to be considered a valid signature. Those cases are merely examples of instances where the will was ". . . signed. . . in such manner as to make it manifest that the name is intended as a signature. . ."

West Virginia Code § 41-1-3 allows a testator to direct another person to sign the testator's name to the will (" . . .by some other person in his presence and by his direction. . ."). That point of law remains uncontested. However, it is the next clause of West Virginia Code § 41-1-3 (" . . . in such manner as to make it manifest that the name is intended as a signature. . .") which seems to have been ignored in the Mason County Circuit Court's analysis. The purpose of that clause is to permit the probate of wills where the signature, though not at the technical end of the document, sufficiently evinces the finality of the testator's disposition. Dinning v. Dinning, 46 S.E. 473, 474-75 (Va. 1904); Clark v. Studenwalt, 187 W. Va. 368, 371, 419 S.E.2d 308 , 311 (1992).

When Mr. McCausland was dictating the New Will, he was directing Mr. Brown. When Mr. McCausland dictated "I Bright McCausland being of sound mind hereby declare this to be my last will and testament and revoke all former wills previously made by me" (Pet'rs' App. R. 12) he directed, as permitted by West Virginia Code § 41-1-3, Mr. Brown to place his (Mr. McCausland's) name to the New Will.

The volume of case law indicates the placement of the testator's name in this location on a will constitutes an appropriate and valid placement for a testator's signature. See e.g., Dinning v. Dinning, 46 S.E. 473 (Va. 1904) (Testator ended will by writing "I, William Dinning, say this

is my last will and testament,” of which the court found that placement to “. . . constitute an emphatic declaration that the signature was intended to authenticate all that had preceded it, as the final consummation of the testator’s purpose.”); See also Black v. Maxwell, 131 W. Va. 247, 258, 46 S.E.2d 804, 811 (1948) (placing name at end of document purporting to be a will removes equivocation and evidences finality of testamentary intent).

It was that direction from Mr. McCausland to Mr. Brown to place Mr. McCausland’s name that satisfies West Code Virginia § 41-1-3. Mr. McCausland’s name, placed at that location, combined with the fact that Mr. McCausland had his declaration witnessed that the New Will was his last will and testament is manifest evidence that he intended the placement of his name, there, by Mr. Brown, at Mr. McCausland’s direction, as his signature. The signature requirement of West Virginia Code § 41-1-3 is satisfied.

D. A Testator Must Substantially Comply With West Virginia Code § 41-1-3 to Make a Valid Will; Not Strictly Comply as Concluded by the Circuit Court of Mason County.

As part of his Order, Judge Evans makes a partially erroneous conclusion of law at Conclusion of Law 9. Judge Evans makes the following conclusion:

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).

(Pet’rs’ App. R. 119.)

Petitioners have reviewed all of the case law and secondary materials cited in Conclusion of Law 9. Many of the cases and other materials support the first sentence in Conclusion of Law

9, that the right to dispose of property by will is a statutory right. See In re Briggs Estate, supra, at 297, 740; Weese, supra, at 242, 807; Black, supra, at 254-55, 808; 20 Michie's Jurisprudence of Virginia & West Virginia: Wills § 3; Harrison on Wills & Administration of Virginia & West Virginia § 9.07 (2010). However, none of the other materials that Judge Evans cites stands for the proposition that "Failure to comply with every [statutory will execution] requirement results in a document unable to be probated as a valid will."

This is an erroneous conclusion of law upon which Judge Evans relied to grant Mr. Fluharty's Motion for Judgment on the Pleadings, effectively denying the New Will admission to probate. This conclusion is entitled to no deference and because it is erroneous, Judge Evans' Order must be overturned. See Syl. pt. 2, Zickefoose v. Zickefoose, ___ W. Va. ___, 724 S.E.2d 312 (2012) ("In reviewing the judgment of a lower court this 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."); See also Syl. pt. 1, Burks v. McNeel, 164 W. Va. 654, 264 S.E.2d 651 (1980).

The first case cited by Judge Evans in Conclusion of Law 9 is In re Briggs' Estate, which involves the question of probate of a holographic will in the form of a letter. The Court notes that the "primary issue" was whether the purported holographic will evidenced testamentary intent. 148 W. Va. at 299, 134 S.E.2d. at 741. Upon review of the purported holographic will, the Court held that the letter could not be probated as a holographic will because it lacked the requisite testamentary intent. 148 W. Va. at 301, 134 S.E.2d at 742. The case ultimately stands for the proposition that testamentary intent is essential to the validity of a will. There is no statement in the case that parallels Judge Evans' second sentence in Conclusion of Law 9.

In Weese v. Weese, the Court examined a single issue—whether the circuit court had jurisdiction to hear a complaint attacking an order admitting a will to probate on the basis that the order was procured by fraud since the complaint fell outside of the prescribed two-year statute of limitations of West Virginia Code § 41-5-11. 134 W. Va. at 238-39, 58 S.E.2d at 805-06. This case was ultimately about jurisdictional limitations imposed by statute of limitations. It had nothing to do with proving a valid last will and testament and the court likewise did not make the pronouncement that Judge Evans contends in Conclusion of Law 9.

Judge Evans also cites one of the hallmark cases of West Virginia will jurisprudence—Black v. Maxwell—to support his incorrect legal conclusions. In Black v. Maxwell, the Court was called upon to determine the validity of one purported holographic will and two purported codicils that were attached to the purported holographic will. 131 W. Va. at 258, 46 S.E.2d at 811. In the purported holographic will and first purported codicil, the testator’s name appeared in the exordium clause and was signed at the foot; in the last purported codicil, the testator only placed his name in the exordium clause before pasting it to the other two previous writings. 131 W. Va. at 258, 46 S.E.2d at 811. After examining West Virginia Code § 41-1-3 and considering contemporary Virginia case law, this Court concluded that the holographic will and the first codicil were valid testamentary documents, while the second purported codicil was not executed. 131 W. Va. at 258, 46 S.E.2d at 811. The Court reasoned that because the holographic will and first codicil were signed at the end, it indicated the finality and certainty of the testator’s intent, while the testator’s name only in the exordium clause of the second purported codicil indicated an equivocation. Id. Consequently, Black v. Maxwell stands for the proposition that the signature requirement is used to ensure the finality of testamentary intent. It does not quote or stand for the proposition put forth by Conclusion of Law 9.

The secondary materials cited in Conclusion of Law 9, as aforesaid, do reflect the first sentence of the Conclusion, but not the second sentence. In fact, Harrison on Wills & Administration for Virginia & West Virginia recognizes that the rigid statutory interpretation of the will execution statute has been relaxed over the past few decades in both Virginia and West Virginia (citing Slate v. Titmus, 38 S.E.2d 590 (Va. 1989) and Clark v. Studenwalt, 187 W. Va. 368, 419 S.E.2d 308 (1992)). It is acknowledged that the two purposes of the signature requirement are to connect the testator to the paper and to establish finality and completion of testamentary intent. Harrison recognizes that this can be done in different ways so long as it is “manifest from the whole writing itself that it was intended as a signature to the paper.” Harrison, supra, at § 9.07. With such liberal pronouncements respecting the interpretation of statutory will requirements by West Virginia and Virginia Courts, how can such a source be cited for such an inflexible and rigid conclusion as Conclusion of Law 9? The simple answer is that it cannot because Conclusion of Law 9 is an erroneous conclusion, unsupported by the law it cites.

If anything, a complete review of West Virginia case law respecting the statutory will execution requirements illustrates that West Virginia Code § 41-1-3 is, at least, a substantial compliance statute.

For example, one of the types of wills that West Virginia Code § 41-1-3 authorizes is what is commonly referred to as a holographic will—a will wholly in the handwriting of the testator. To that end, West Virginia Code § 41-1-3 states that a holographic will is invalid “unless it be wholly in the handwriting of the testator.” If a strict reading is applied to this clause, then only a blank sheet of paper to which a testator has written his will would qualify as a valid holographic will. Any typewritten portion, so the argument would go, would invalidate the will. If, for example, a testator wrote his final testamentary wishes entirely in his handwriting

and signed his name to the end, but did so on hotel letterhead, the document would not be “wholly in the handwriting of the testator,” and therefore unsuitable for probate. However, that is not the law in West Virginia and such a technocratic reading has never been applied. This Court consistently recognizes holographic wills that include typewritten portions.

In both In re Estate of Teubert and Charleston National Bank v. Thru the Bible Radio Network, purported holographic wills entirely in the testator’s handwriting, except for a few typewritten remarks, were offered for probate. In re Estate of Teubert, 171 W. Va. 226, 228, 298 S.E.2d 456, 459 (1982); Charleston National Bank v. Thru the Bible Radio Network, 203 W. Va. 345, 348-49, 507 S.E.2d 708, 711-12 (1998). Rather than deny such clear and complete expressions of testamentary intent because of some minor technical non-compliance with West Virginia Code § 41-1-3, this Court, in both instances, admitted the holographic wills to probate. Id. This Court admitted those wills even though the typewritten portions were not “wholly” in the testators’ handwriting. Those wills substantially complied with the statute; they did not strictly comply.

Even more instructive of this Court’s recognition of West Virginia Code § 41-1-3 as a substantial compliance statute is the 1992 opinion of Clark v. Studenwalt, authored by Justice Workman. 187 W. Va. 368, 419 S.E.2d 308 (1992). There a testator drafted a holographic will, but did not sign his name to the will. Id. at 369, 309. His name only appeared in the exordium clause. Id. at 370, 310. Nevertheless, the testator acknowledged the holographic will as his last will and testament before two subscribing witnesses. Id. at 369, 309. Even though the testator did not sign his will in the ordinary sense, Justice Workman stated that “the fact that [the Testator] intended to have his will witnessed, which is evident from the document’s preparation and the fact that he ultimately . . . obtained the signatures of two attesting witnesses to be

[sufficient evidence to prove the testamentary character of the will].” Id. at 371, 311. The holographic will did not comply with West Virginia Code § 41-1-3 in the ordinary sense, but rather than witness the death of both the testator and his testamentary intent, this Court honored his final testamentary wishes in finding that his holographic will substantially complied with West Virginia Code § 41-1-3.

As demonstrated with the foregoing, the authorities cited for the second sentence of Conclusion of Law 9, do not stand for the purported West Virginia Code § 41-1-3 dichotomy that a will must strictly comply with the statute or fail to be probated. If anything, some of the very sources cited by Mr. Fluharty, e.g., Harrison on Wills & Administration for Virginia & West Virginia, demonstrate that the trend over the past few decades in West Virginia and Virginia has been to move away from strict interpretation. Teubert, Charleston National Bank, and Clark, clearly evince this Court’s rejection of strict interpretation of West Virginia Code § 41-1-3, instead favoring substantial compliance with an eye towards honoring testamentary intent. Therefore, since Conclusion of Law 9 is clearly wrong, the order is based upon an erroneous conclusion and must be overturned.

Moreover, Petitioners maintain, as explained in full in V. C., that Mr. McCausland complied with West Virginia Code § 41-1-3 when he created his New Will. However, assuming *arguendo*, that Mr. McCausland’s New Will has a minor technical non-compliance with West Virginia Code § 41-1-3, it substantially complies in the same vein as Clark. At the time Mr. McCausland desired to make his New Will, he was blind and so physically disabled that he could not write. (Pet’rs’ App. R. 2, 37-38, 112.) He dictated his final testamentary wishes to his nephew, Mr. Brown, directing him to type what was just dictated and print the same. (Pet’rs’ App. R. 2-3, 38.) Similar to the testator in Clark, Mr. McCausland desired the New Will to

become his valid last will and testament and secured two disinterested witnesses to be present as he declared the same to be his last will and testament. (Pet'rs' App. R. 2-3, 38, 112-14.) The securing of the disinterested witness, just as in Clark, evidences that Mr. McCausland intended the New Will as his final expression of testamentary intent. In this way, Mr. McCausland complied with all requirements of West Virginia Code § 41-1-3, and as such, it should be admitted to probate in Mason County, West Virginia, as and for his valid last will and testament.

VI CONCLUSION

A last will and testament is the most solemn of all instruments. It is the final expression of a decedent's wishes and for that reason this Court has ensured that wills are probated to effect the clearly expressed intentions of testators.

Mr. McCausland drafted and executed his New Will in compliance with West Virginia Code § 41-1-3 in the best way that a ninety year old physically disabled blind man who did not have the benefit of counsel could. He cannot be held to the same standard as a healthy sighted man who had the benefit of counsel.

In any event, Judge Evans' Order not only misstates the law respecting what constitutes a valid will, but his Order serves to derail the modern trend of this Court and others throughout this nation to excuse harmless errors in creating a will. The result of Judge Evans' Order is untenable, not only because it suppresses the growth of law, but it denies Mr. McCausland's final wishes when he did all he could under his personal circumstances to make his New Will his valid last will and testament.

Moreover, this Court has consistently maintained that circuit courts should rarely grant motions for judgment on the pleadings. When Judge Evans granted Defendant's Motion for Judgment on the Pleadings, against such counseling, and against the weight of the facts and the

dictates of law, he committed a clear legal error. More significantly, Judge Evans' Order effectively denied the probate of Mr. McCausland's New Will and wrongfully silenced his final and clearly expressed wishes. Judge Evans' Order granting Defendants' Motion for Judgment on the Pleadings must be overruled to correct the legal error, ensure that the New Will is probated and that Mr. McCausland's testamentary intent and directions are honored.

Respectfully submitted this 15th day of June, 2012.

**DOUGLAS BROWN, MARION ROBINSON,
MASON COUNTY FARM MUSEUM, MASON
COUNTY BOARD OF EDUCATION, HENDERSON
CHURCH OF CHRIST, BOB RIMMEY, HEATHER
HUTCHINSON AND KAYLA NAVE, Petitioners,**

**BY: SPILMAN, THOMAS & BATTLE, PLLC, and
SHAW & TATTERSON, L.C.**

 *John F. Allevato by [Signature] with permission*

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0365

DOUGLAS BROWN, MARION ROBINSON,
MASON COUNTY FARM MUSEUM, MASON
COUNTY BOARD OF EDUCATION, HENDERSON
CHURCH OF CHRIST, BOB RIMMEY, HEATHER
HUTCHINSON and KAYLA NAVE,
Plaintiffs Below,

Petitioners,

v.

ROBERT D. FLUHARTY, in his fiduciary capacity as
Executor of the Estate of Bright McCausland,
Defendant Below,

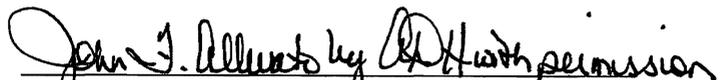
Respondent.

CERTIFICATE OF SERVICE

I, John F. Allevato, hereby certify that on this 15th day of June, 2012, the foregoing “**BRIEF OF PETITIONERS**” and “**PETITIONERS’ APPENDIX RECORD.**” were served upon counsel of record by mailing a true and correct copy thereof by United States mail, postage prepaid and properly addressed, as follows:

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