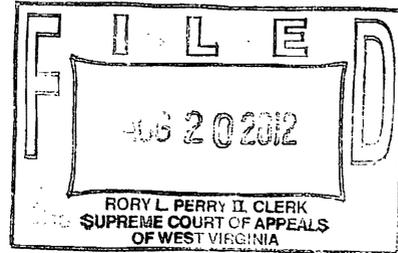


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

REPLY BRIEF OF PETITIONERS

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I. INTRODUCTION

Respondent continues to assert that because the three-page typewritten Last Will and Testament of Mr. McCausland, dated 10 & 11 April 2010 (the “New Will”) does not mirror his October 28, 2009, attorney prepared last will and testament (the “Old Will”), that the New Will cannot be valid under existing West Virginia law. To that end, Respondent misrepresents Petitioners’ arguments regarding West Virginia will law, creates straw man arguments and levels unfounded allegations of ethical impropriety.

Petitioners maintain that, pursuant to established West Virginia law, the New Will is, and has always been, the valid Last Will and Testament of Mr. McCausland. Judge Evans wrongfully entered an Order granting Respondent’s Motion for Judgment on the Pleadings when he, *inter alia*, relied upon an erroneous conclusion of law and denied Petitioners their right to have their day in court.

In addition, Judge Evans foreclosed Mr. McCausland the right to speak, for his final time, through his most solemn instrument—his last will and testament. Why? Quite simply, Mr. McCausland’s New Will looks different from the attorney prepared Old Will of Mr. McCausland. Failure to probate the New Will flies in the face of West Virginia case law and public policy and punishes those who cannot or will not seek legal counsel in creating, arguably, the most important document of their lives.

II. ARGUMENT

A. **Mr. McCausland’s New Will Complies With the Formal Requirements of West Virginia Code § 41-1-3.**

It is undisputed that West Virginia law requires a testator to follow certain formalities to create and execute a valid last will and testament. (Br. of Pet’rs 5.) (Br. of Resp’t 8.) It is

undisputed what that law is: West Virginia Code § 41-1-3. (Id.) In Petitioners' Brief, we explained how Mr. McCausland's testamentary intent was clear and how he complied with the signature requirement of West Virginia Code § 41-1-3 – the requirement the Respondent alleges is deficient in the New Will. (Br. of Pet'rs 7-14.) Despite this careful analysis, Respondent dismissively misrepresents Petitioners' arguments. By negative implication, Respondent claims that Petitioners argued that the mere intent of a testator to execute a will is sufficient to create a will. (Br. of Resp't 8.) Respondent also claims that Petitioners' argument discards established law because the New Will was not signed. (Id.)

However, for all of Respondent's misrepresentations, resolution of this case requires only the application of simple facts to West Virginia Code § 41-1-3, which 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. When broken down, West Virginia Code § 41-1-3 mandates three requirements for a testator to make a valid last will and testament. The will must be (1) in writing; (2) executed; and (3) witnessed.

The New Will is three typewritten pages dated 10 & 11 April 2010. It is unquestionably in writing and satisfies the writing requirement of West Virginia Code § 41-1-3.

Pursuant to West Virginia Code § 41-1-3, to execute a will, the testator must either sign his name to the will or direct another person, in the testator's presence, to sign the testator's will. The form or manner by which the will is signed is not prescribed, so long as the signature by the

testator or the signature by another at the testator's direction is "in such manner as to make it manifest that the name is intended as a signature." W. Va. Code § 41-1-3.

The final line that Mr. McCausland dictated to Mr. Brown when making his will was "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.) In dictating this line, Mr. McCausland, as permitted by West Virginia Code § 41-1-3, directed Mr. Brown to place his (Mr. McCausland's) name to the New Will. Mr. Brown complied with Mr. McCausland's direction and the phrase appears at the end of the New Will—the place most recognized as evincing an emphatic finality of testamentary intent. See e.g., Black v. Maxwell, 131 W. Va. 247, 258, 46 S.E.2d 804, 811 (1948). See also Dinning v. Dinning, 46 S.E. 473, 474 (Va. 1904).

Pursuant to West Virginia Code § 41-1-3, to be considered valid, the testator's signature to the will must be made or acknowledged in the presence of two witnesses and the witnesses must subscribe to the document. On April 11, 2010, Mr. McCausland, Mr. Brown, Ms. Robinson and Mr. Greer were all in Mr. McCausland's presence. Mr. Brown read aloud the New Will. Mr. McCausland, blind and infirm, declared the same to be his last will and testament. Ms. Robinson and Mr. Greer then subscribed their names to the New Will as witnesses. When Mr. McCausland acknowledged the New Will, read in its entirety, including the line, "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," he acknowledged his signature before two witnesses. Ms. Robinson subscribed her signature as witness to the same and with the final stroke of Mr. Greer's pen, his signature finalized not only the two witness requirement of West Virginia Code § 41-1-3, but finalized the New Will as a will validly executed pursuant to West Virginia law.

Despite the New Wills' demonstrable compliance with West Virginia Code § 41-1-3, Respondent continues their narrow argument that in West Virginia a testator's signature must be a swooping cursive signature, or initials, or first name, or mark intended as a signature, or in the exordium clause in a holographic will. (Resp. Br. 11). However, Respondent examines the signature requirement incorrectly. West Virginia Code § 41-1-3 requires a signature, yes. But it does not state what constitutes a signature or how the signature is to be made; only that it be "in such manner as to make it manifest that the name is intended as a signature." W. Va. Code § 41-1-3. Respondent would have this Court believe that Mr. McCausland's signature must fit within a narrow definition which Respondent has not provided and which this Court has never specifically defined in the wills context.

The fatality of Respondent's argument is that that precise argument has consistently failed in the very cases they cite. For example, in Pilcher v. Pilcher, 84 S.E. 667 (Va. 1915) (cited with favor for the same principle in In re Estate of Briggs, 148 W. Va. 294, 299, 134 S.E.2d 737, 742 (1964)), the testator placed his initials at the end of his will. Id. at 668. The contestant to the will argued that the testator's initials did not constitute a valid signature because the Virginia courts had not recognized initials as valid signatures on wills. Id. Finding the contestant's argument unpersuasive, the Court held that a testator's initials could constitute a valid signature especially since it had more *indicia* of reliability than a mark (which had previously been held as a valid signature). Id. at 670-71.

Even as late as 1992, in Clark v. Studenwalt, the same argument was presented and rejected by this Court. 187 W. Va. 368, 419 S.E.2d 308 (1992). In Clark, the testator placed his name in the exordium clause, but nowhere else in his holographic will. Id. at 370, 310. The opponents to the probate of the will contended, just as the Respondent does here, that it did not

constitute a valid signature to a will because West Virginia courts did not recognize exordium clause signatures. Id. at 369, 309. But this court would not apply such an inflexible reading to West Virginia Code § 41-1-3. Instead, this Court created a new syllabus point that “[t]he procurement by the testator of attesting witnesses” to the holographic will satisfied the requirements of West Virginia Code § 41-1-3, even though the testator’s signature appeared only in the exordium clause because the witnesses provided internal evidence that the name was intended as a signature. Id. at Syl. pt. 2.

The fatality of Respondent’s argument and Judge Evans’ ruling is that each take a narrow view of what constitutes a signature. To them, a signature is only what has been previously held to be a signature. But that is not what West Virginia Code § 41-1-3 states or this Court counsels. As Clark instructs, the signature requirement is to ensure the finality of the testator’s actions. Clark, 187 W. Va. at 311, 419 S.E.2d at 311. That is present here, especially with two subscribing witnesses—their purpose, of course, to protect the testator from fraud. Stevens v. Casdorff, 203 W. Va. 450, 455, 508 S.E.2d 610, 615 (1998) (Workman, J., dissenting.). See also Syl. pt. 2, Clark v. Studenwalt, 187 W. Va. 368, 419 S.E.2d 308 (1992).

In fact, the situation here is not dissimilar from Clark. In Clark, the testator did not sign in the traditional sense, but was ultimately determined to have signed for purposes of complying with West Virginia Code § 41-1-3 by placing his name in the exordium clause and then acknowledging his will as his before two subscribing witnesses. Id. at 371, 311. Here, Mr. McCausland, likewise, did not sign in the traditional sense. Instead, since he was blind and infirm, he directed another, Mr. Brown, to place his (Mr. McCausland’s) name on the New Will in the exordium clause, as is permitted for infirm testators in West Virginia. See W. Va. Code § 41-1-3. See also McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682 (1881). Mr.

McCausland then, like the testator in Clark, declared the New Will to be his and acknowledged his signature to the same before two witnesses who subscribed their names. Mr. McCausland, like the testator in Clark, complied with all requirements of West Virginia Code § 41-1-3 and, consequently, the New Will should be recognized as his valid last will and testament.

B. Granting the Motion for Judgment on the Pleadings Wrongfully Denied Petitioners Their Right to Their Day in Court.

What seems to have evaded the lower court and Respondent more than anything in this matter is the threshold standard by which courts may grant motions for judgment on the pleadings. It is an extremely high standard. Indeed, 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). It is a standard that is so high that this Court instructs lower courts to rarely grant such motions. Forshey v. Jackson, 222 W. Va. 743, 749, 671 S.E.2d 748, 754 (2008).

The only real inquiry in deciding a motion for judgment on the pleadings is whether the non-movant can prove any facts justifying the relief he seeks in his complaint. See Copley v. Mingo County Board of Education, 195 W. Va. 480, 484, 466 S.E.2d 139, 143 (1995). As Petitioners demonstrated in the initial merit brief and more fully supra, Mr. McCausland complied with all of the requirements of West Virginia Code § 41-1-3 to make the New Will his valid last will and testament. So it is quite evident that with the pleaded facts, Petitioners could and can prove that the New Will should be probated in lieu of the Old Will.

Even assuming, *arguendo*, that there is some minor error in Petitioners' reasoning or there are disputed or undeveloped facts, the litigation should have survived the motion for judgment on the pleadings given its high standard. Respondent even claims that there are some

undeveloped facts (Br. of Resp't 6, 9) and some which may be inconsistent or unclear. (Id. at 9). If that really is true, it is all the more reason why this suit should have continued—to allow the facts to be discovered in the traditional and established process of American jurisprudence.

Dismissing the case in its infancy on a motion for judgment on the pleadings was not only based upon an erroneous understanding of the law, but flies in the face of this Court's avowed public policy that matters should be decided on their merits. See Hardwood Group v. Larocco, 219 W. Va. 56, 66, 631 S.E.2d 614, 624 (2006) (Albright, J., concurring) (“[T]his Court has made it clear that our policy is to prefer that a decision be reached on the merits of the case.”). See also Parsons v. Consolidated Gas Supply Corp., 163 W. Va. 464, 471, 256 S.E.2d 758, 762 (1979) (“[W]e have established as a basic policy that cases should be decided on their merits.”).

Judge Evans' Order granting Respondent's Motion for Judgment on the Pleadings ensured that this case was not decided on the merits. His order foreclosed any opportunity to engage in discovery to resolve the purported inconsistent and undeveloped facts that Respondent claims exist. More importantly, Judge Evans' order wrongfully denied Petitioners their right to have their day in court, present their case in chief and have their case decided, as is the preference in West Virginia, on the merits. Instead, Judge Evans ends the litigation by taking an “illiberal and inflexible construction of [West Virginia Code § 41-1-3], giving preeminence to letter and not to spirit and resulting in the thwarting of the intentions of [the] testator[] 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).

C. Public Policy Mandates That a Testator Be Permitted to Speak for His Final Time Through the Most Solemn Instrument—His Last Will and Testament.

Petitioners would be remiss if we did not rise to contest the unfounded allegations of ethical impropriety leveled against us by Respondent for bringing this action and couching it in terms of public policy. In response to our merit brief, Respondent alleges that our cause is one that is “baseless and not presented in good faith” indeed that “[n]o good faith argument can possibly be asserted.” (Br. of Rep’t 13.)

Petitioners have consistently demonstrated in the lower tribunal and in the proceedings before this Court that there is a substantial argument to be made in this matter. Judge Evans noted as much in the hearing on the Motion for Judgment on the Pleadings stating “that there is a substantial argument for the extension and modification and reversal of the law as it is underlying the complaint.” (Pet’rs’ App. R. 114.) Yet, despite such recognition by the circuit court, Respondent still chose to devote an entire section of their Response Brief before this Court to raise indefensible ethical slams against Petitioners. Raising such allegations is completely unnecessary, further damages the image of the practice of law and violates the West Virginia Standards of Professional Conduct.

In relevant part, the West Virginia Standards of Professional Conduct states that:

3. A lawyer should not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.

Standard I.A.3, W. Va. Standards of Prof. Conduct. Respondent has not demonstrated, nor can he demonstrate any bad motives or impropriety by Petitioners. None exists and Respondent’s allegations are unsupported and, dare we say, baseless. It is not that Petitioners fear responding to a stern or well-reasoned brief. Quite the contrary, crafting such arguments is one of the things

that makes the legal profession great. More than that, it is the integrity of its members that truly make it the oldest and greatest profession. A lawyer's integrity is often his greatest asset. So for Respondent to make such continued, unsupported bombastic allegations against fellow members of the bar is to repeatedly diminish the integrity of these individual bar members as well as the collective membership.

Respondent purportedly levels such allegations in an attempt to defend public policy surrounding wills in West Virginia to prevent "testamentary anarchy." (Br. of Resp't 13.) Petitioners agree that this case implicates principals of public policy; however, Petitioners reach a much different conclusion.

Respondent is purportedly concerned that if the New Will is probated that anyone could "type up a will," claim that it was someone else's and that fraudulent will could be probated. (Br. of Resp't 13.) This is nothing but a straw man argument that does not even accurately represent the facts of this case. Here, the New Will was executed by the witnesses in the presence of the testator, in the presence of each other, after it was read aloud and approved by him. How is that even remotely an example of "testamentary anarchy"? Even under the most flexible reading of West Virginia Code § 41-1-3, a typewritten will would require two subscribing witnesses. That should allay some of Respondent's concerns of fraudulent wills on demand because the fraudulent will would require that at least two other co-conspirator witnesses participate in the fraud.

But even if Respondent's fears are not allayed, there is no fail safe way to guarantee that fraudulent wills are never offered for probate. That is why the West Virginia Code provides several bases to contest wills. See e.g., W. Va. § 41-5-7 (Any person feeling aggrieved of an order of the county commission admitting or denying a will to probate may file an appeal in the

circuit court to contest the order.). See e.g., W. Va. Code § 41-5-11 (Interested persons who were not parties to an *ex parte* or solemn form probate proceeding may seek to impeach a will under appeal provisions of an *issue devisavit vel non*). As it relates to the matter at hand—there were two subscribing witnesses to the New Will. The testator was present. Respondent’s concerns in this regard are addressed and therefore unfounded.

Above all, the principle remains that the last will and testament is the most solemn of all instruments and that West Virginia courts will strive to give effect to a will so 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, 619 S.E.2d 226 (2005); Syl. pt. 2, Painter v. Coleman, 211 W. Va. 451, 566 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.”). Do the circumstances surrounding this execution ceremony—the presence of the testator, the presence of witnesses, the reading of the New Will—not exhibit one of the most stark examples of the intent of the testator being thwarted if the New Will is not admitted to probate?

Mr. McCausland’s testamentary intent was clear in the New Will by its giving and familial nature and the laymen’s language in which he used. In addition, as discussed fully supra, the New Will was executed within the parameters of West Virginia Code § 41-1-3. Therefore his clearly expressed testamentary intent and validly executed will should not, by the

virtue of West Virginia public policy, be silenced merely because his New Will was drafted and executed in a manner that was different than his attorney prepared Old Will. The New Will is valid and Mr. McCausland should be permitted to speak for the final time through his New Will.

Failure to probate this will places in jeopardy the wills of those testators who cannot or will not seek counsel. It is no secret that there is a segment of the population that does not care for lawyers, or cannot afford a lawyer, and will therefore not seek their counsel in drafting a will. It would be naïve to think that all of those wills squarely complied in the traditional sense with West Virginia Code § 41-1-3. Many; however, would be in substantial compliance. Those wills should not be placed in jeopardy merely because they did not follow the typical law firm drafting and execution ceremonies. So long as those wills substantially comply with West Virginia Code § 41-1-3, they, like Mr. McCausland's New Will, should be admitted to probate.

When intent is clear but there is a harmless error in the execution of a will, courts should not punish the harmless errors. After all, the purpose of statutory requirements for executing wills is to facilitate the determination of whether the decedent adopted the document as his will. Restatement (Third) of Property (Wills & Donative Transfers) § 3.3 (1999), cmt. a. The statutory requirements are "not to be ends in themselves." *Id.* Here, with two subscribing witnesses to Mr. McCausland's declaration that the New Will was his last will and testament, it is evident that Mr. McCausland adopted the New Will as his last will and testament.

III. CONCLUSION

When Mr. McCausland, blind and infirm, directed Mr. Brown to write "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) Mr. McCausland signed his will pursuant to West Virginia Code § 41-1-3 in the only way that he knew how. When Ms.

Robinson and Mr. Greer witnessed Mr. McCausland declare his New Will to be his last will and testament and then subscribed their names as witnesses to the same, the New Will became the properly executed and witnessed last will and testament of Mr. McCausland.

Admittedly, there is no West Virginia case law that has precisely handled this circumstance relative to the requirements of West Virginia Code § 41-1-3. To the extent that there is any technical non-compliance, Petitioners maintain that Mr. McCausland substantially complied with the requirements of West Virginia Code § 41-1-3; substantial compliance being the standard for West Virginia Code § 41-1-3 pursuant to its common law progeny and well-developed case law.

At the very least, Judge Evans' Order granting Respondent's Motion for Judgment on the Pleadings was improvidently granted and must be overruled. It was based upon an incorrect conclusion of law, denies Petitioners their day and court, and wrongfully silences Mr. McCausland by denying him the right to speak for the final time through his New Will.

Respectfully submitted this 20th day of August, 2012.

**DOUGLAS BROWN, MARION ROBINSON,
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Plaintiffs Below,

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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 20th day of August, 2012, the foregoing "**REPLY BRIEF OF PETITIONERS**" was 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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