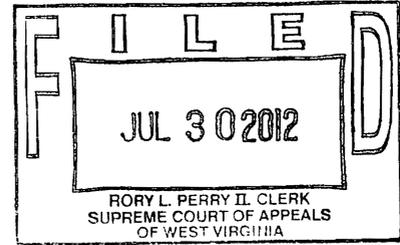


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 RESPONDENT

Submitted by:

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STATEMENT OF THE CASE

Bright McCausland (“Decedent”) died on April 23, 2010. 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. (Petitioners’ App. R. 6-9.) 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 against Robert D. Fluharty to have the probated will revoked by an unexecuted document purporting to be the Last Will and Testament of Bright McCausland. (Petitioners’ App. R. 1, 6-9, 10-14.) The unexecuted document consists of five pages the Petitioners allege Douglas Brown transcribed from Bright McCausland’s dictation (“The Oral Will”). (Petitioners’ App. R. 10-14.) Furthermore, Plaintiffs sought to offer this unexecuted Oral Will for probate in place of the properly executed, probated will because the unexecuted will was allegedly made at a later date than the probated will. (Petitioners’ App. R. 1, 6-9, 10-14.) On August 2, 2011, a Stipulation was executed specifying that Robert Fluharty be a party to this suit only in his capacity as Executor of the Estate of Bright McCausland. (Petitioners’ App. R. 20.)

On February 14, 2012, Judge Thomas C. Evans, III signed an order granting a Motion for Judgment on the Pleadings. (Petitioners’ App. R. 127-134.) On July 16, 2012, Petitioners filed an appeal of that order. Petitioners’ Statement of the Case is mostly correct; however, there are some discrepancies corrected as follows. Respondent corrects that the Last Will and Testament dated October 28, 2009, was not prepared by Respondent, Robert D. Fluharty, Esq.¹ (Petitioners’

¹ While the fact is immaterial to the case at bar, Respondent rebuts the Petitioners’ allegations on this issue. Mr. Fluharty never represented or advised Mr. McCausland in any legal matters; Mr. McCausland appointed Mr. Fluharty as Personal Representative because the two were personal acquaintances.

Brief 2.) Instead, the document was prepared by Bill Booker, Esq., of Kay, Casto, & Chaney, and a codicil was prepared by Martha Nepa, Esq., of Jackson Kelly PLLC.

Contrary to Petitioners “innuendo,” there is no evidence that Mr. McCausland ever became dissatisfied with the Last Will and Testament dated October 28, 2009. (Petitioners’ Brief 2.) In fact, the only evidence that Mr. McCausland took part in the creation of The Oral Will is the allegation of Petitioner Douglas Brown, a party who will substantially benefit if The Oral Will is deemed valid.

While The Oral Will dated April 10 and 11, 2010 was allegedly attested to by the affidavits of Kristy Robinson and Ryann Greer, signed on December 6, 2010 and December 14, 2010, respectively, it is unclear what event or events Ms. Robinson and Ms. Greer witnessed, considering the affidavits were dated nearly 8 months after The Oral Will was allegedly dictated on April 10 and 11, 2010 and after Mr. McCausland’s death on April 22, 2010. (Petitioners’ App. R. 10-14.) Kristy Robinson’s Affidavit states:

On or about the 6 day of December 2010, I was present and witnessed Bright McCausland freely, voluntarily, and intelligently execute his Last Will and Testament. This affidavit is given freely, voluntarily, and intelligently.

(Petitioners’ App. R. 13.) Similarly, Ryann Greer’s Affidavit states:

On or about the 14 day of December 2010, I was present and witnessed Bright McCausland freely, voluntarily, and intelligently execute his Last Will and Testament. This affidavit is given freely, voluntarily, and intelligently.

(Petitioners’ App. R. 14.)

Both of these witnesses claim to have been present and to have witnessed Bright McCausland execute his Last Will and Testament; however, no document purporting to be the Last Will and Testament of Bright McCausland dated December 6, 2010 or December 14, 2010 has been produced. No Last Will and Testament was produced because everyone agrees that

such document does not exist; there was admittedly no execution of The Oral Will. Given the undisputed fact that Mr. McCausland died on April 22, 2010, there could have been no execution of a Last Will and Testament on either December 6, 2010 or December 14, 2010.

Finally, Petitioner states that Mr. McCausland directed Petitioner Brown to “transcribe the previously read will and declared the same to be his last will and testament.” (Petitioners’ Brief 2.) However, Petitioner does not and cannot testify that Mr. McCausland directed Petitioner Brown, or any other party, to affix a signature to the document dated April 10 and 11, 2010. Without a signature, the document cannot be considered a valid will.

SUMMARY OF ARGUMENT

Disposing property by will is a statutory right under the control of the legislature, not a common law right controlled by the courts. Failure to comply with proper procedural safeguards in the execution of the will 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 (1964); *Weese v. Weese*, 134 W.Va. 233, 58 S.E.2d 801 (1950); *Black v. Maxwell*, 131 W.Va. 247, 46 S.E.2d 804 (1948); 20 Michies Jurisprudence: Wills § 3 (2004); James P. Cox, III, Harrison on Wills and Administration for Virginia and West Virginia § 9.07 (2010).

Here, The Oral Will allegedly dictated on April 10 and 11, 2010 lacked the most fundamental requirements: (i) a signature and (ii) proper witnessing. For these reasons, the document dated April 10 and 11, 2012 (“The Oral Will”) cannot be probated as a valid will.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principle issues in this case have been authoritatively decided by the Court’s decision in *Stevens v. Casdorff*, 203 W. Va. 450, 453, 508 S.E.2d 610 (1998) and W.Va. Code § 41-1-3, all facts and legal arguments are adequately presented in the brief and record on appeal, the decisional process would not be significantly aided by oral argument. Oral argument under Rev.

R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

I. Standard of Review

An appellate court's review of an order granting a motion for judgment on the pleadings from a circuit court is *de novo*. *Choice Lands, LLC v. Tassen*, 224 W.Va. 285, 685 S.E.2d 679 (2008); *Blake v. Charleston Area Medical Center*, 201 W.Va. 469, 498 S.E.2d 41 (1997); *Copley v. Mingo County Board of Education*, 195 W.Va. 480, 466 S.E.2d 139 (1995).

II. Testamentary Intent Is Secondary to the Essential Elements of a Valid Last Will and Testament Execution.

Petitioners argue that West Virginia law elevates a testator's intent above all other considerations. However:

This Court in *Black v. Maxwell*, 46 S.E.2d 804, held that "testamentary intent and a written instrument, executed in the manner provided by [W.Va. Code § 41-1-3], existing concurrently, are essential to the creation of a valid will." *Black* establishes that **mere intent by a testator to execute a written will is insufficient. The actual execution of a written will must also comply with the dictates of W.Va. Code § 41-1-3.** *Id.* at 811

(emphasis added); *Stevens v. Casdorff*, 203 W. Va. 450, 453 (1998).

Petitioners would have this Court discard not only established law and the entire contents of W. Va. Code § 41-1-3, but also any formality requirement whatsoever. Here, The Oral Will of April 2010 does not contain any signature. Furthermore, even if there had been a signature to acknowledge, the witnesses did not acknowledge the document on the same date it was allegedly made, nor did the witnesses sign on the same date as each other. *Stevens v. Casdorff*, 203 W.

Va. 450, 453 (1998)². Holding this will to be valid despite not meeting any of the required formalities would effectively dispose of any formality requirement in West Virginia.

It is well established in West Virginia:

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.**

(emphasis added). *Ruble v. Ruble*, 217 W. Va. 714, 718 (2005). See also *Farmers and Merchants Bank*, 158 W.Va. 1012, 1016, 216 S.E.2d 769 (1975); *Goetz v. Old National Bank*, 140 W. Va. 422, 429, 84 S.E.2d 759 (1954); *Cresap v. Cresap*, 34 W. Va. 310, 324, 12 S.E. 527 (1890).

While it is customary for West Virginia Courts to honor the intent of the testator, *Ruble v. Ruble*, 217 W. Va. 714, 718 (2005); *Farmers and Merchants Bank*, 158 W.Va. 1012, 1016, 216 S.E.2d 769 (1975); *Goetz v. Old National Bank*, 140 W. Va. 422, 429, 84 S.E.2d 759 (1954); *Cresap v. Cresap*, 34 W. Va. 310, 324, 12 S.E. 527 (1890), the very issue in this case is verifying that The Oral Will, allegedly transcribed on April 10 and 11, 2010, manifests the intent of the testator since he made no effort to sign or direct another to sign on his behalf. To suggest that this will manifests the testator's desire to revoke his prior will and declare an entirely new testamentary scheme ignores the very purpose of this state's formality requirements.

Although public policy enforces a testator's wishes, public policy, more importantly, also dictates there be substantial compliance with formality requirements in order to protect the testator from a disposition that is contrary to his intent.

Petitioners urge this Court to find the Oral Will dictated on April 10 and 11, 2010 document valid, despite "technical non-compliance" with requisite formalities. However, this

² The Court held witnesses must sign not only in the presence of the testator, but in the presence of each other as well.

document has not met any of the W. Va. Code § 41-1-3 requirements. Finding the will invalid would not, therefore, be an instance of “slavish adherence to antiquated textualism,” (Petitioners’ Brief 7.) but an acknowledgement that a will must attempt to satisfy the most basic formalities of a legal document that would control the disposition of one’s entire estate.

Probating a document identical to the document dated April 10 and 11, 2010 would certainly violate public policy, as it would make it possible for anyone to create a typed document and deem it another person’s will. Without his signature, it is unclear that Bright McCausland ever even knew the contents of this document.

III. The Purported Will Does Not Comply with the Other Formal Requirements of West Virginia Code § 41-1-3.

The Oral Will allegedly dictated on April 10 and 11, 2010 document does not include Mr. McCausland’s signature, handwriting, or dictated signature. Furthermore, the purported Oral Will dated April 10 and 11, 2010 does not meet all, or any, of the elements to be considered 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 (1908). West Virginia law does not dictate *where* a signature must appear on a document, but it does dictate that there must be a signature on the document. *Charleston Nat’l Bank v. Thru the Bible Radio Network*, 203 W.Va. 345, 507 S.E.2d 708 (1998); *Black v. Maxwell*, 46 S.E.2d 804.

Petitioners argue that Mr. McCausland was too infirm to sign the April 10 and 11, 2010 document. However, the West Virginia Code and this Court have previously provided for this exact situation. 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 (1881).

In West Virginia, 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*, 134 S.E.2d 737. “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 (1992) (citing *Black v. Mawell*, 46 S.E.2d 804; *LaRue v. Lee*, 60 S.E. 288). In this matter, there was nothing.

While this Court has held that a testator writing his or her name in the first line is sufficient to consider it a signed document, this rule only applies to a holographic will. *Clark v. Studenwalt*, 419 S.E.2d 308. A holographic will is a document wholly in the testator’s handwriting. W.Va. Code § 41-1-3; see *In re Briggs’ Estate*, 134 S.E.2d 737. In the case at hand, the will does not contain a single stroke of the testator’s handwriting.

Not only do the Petitioners fail to meet the signature requirement, The Oral Will also failed the witness requirements of W.Va. Code § 41-1-3. A valid will must contain two witness signatures, and such witnesses must acknowledge the testator’s signature in the presence of the testator *and* each other. W.Va. Code § 41-1-3 (2011).

In *Stevens v. Casdorph*, 203 W. Va. 450, 451 (1998), a testator signed his Last Will and Testament at a bank. Later, witnesses who had not seen the testator sign his will signed as witnesses to the execution. *Id.* Further, the alleged witnesses failed to sign in the presence of one another. *Id.* at 453. This Court held that since “none of the parties signed or acknowledged their signatures in the presence of each other. This case meets neither the narrow exception of

*Wade*³ nor the specific provisions of W.Va. Code § 41-1-3.” *Id.* Ultimately, the Court struck down the will as void since it failed to comply with the basic requirements of W. Va. Code § 41-1-3. *Id.*

While there appears to be two signatures of persons other than the Decedent, both signing affidavits purporting to “witness” the execution of this document, there is no signature of the Decedent for them to acknowledge. No signature, initials, handwriting of the Decedent, nor evidence of someone signing on behalf of the Decedent appears anywhere on the document. Without this signature, the document does not meet the elements of a valid will in West Virginia. Further, the affidavits clearly show they were executed separately and nearly eight months after The Oral Will was allegedly dictated and Mr. McCausland had died. Finally, according to the affidavits, witnesses did not sign in the presence of each other or the testator. One affidavit was signed December 6, 2010, and the other was signed on December 14, 2010, in front of different notary publics; Mr. McCausland was deceased on both of these dates. Therefore, in addition to failing the statutory signature requirement, the April 10 and 11, 2010 document was not properly witnessed in accordance with W.Va. Code §41-1-3.

**IV. An Unsigned Last Will and Testament Has Never Been Considered
“Substantially Compliant” with West Virginia Code § 41-1-3.**

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.

³ In *Wade v. Wade*, 119 W.Va. 596, 195 S.E. 339 (1938), this Court permitted a narrow exception to W.Va. Code § 41-1-3, which allowed witnesses to acknowledge a testator’s signature on separate occasions while in the presence of each other and the testator. Here, this could not have happened as Mr. McCausland, the testator, had died 8 months prior to the witnesses’ signatures.

W.Va. Code §41-1-3 (2011) (emphasis added).

No good faith argument can possibly be asserted that the purported will was substantially compliant with W.Va. Code §41-1-3. W.Va. Code §41-1-3 contains no ambiguity, leaving no room for interpretation or construction, plainly stating, “No will shall be valid unless it be in writing and signed by the testator...” *Id.* “Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” *Pauley v. Gilbert*, 206 W. Va. 114, 522 S.E.2d 208 (1999) (quoting Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968)) (additional citations omitted). Petitioners’ argument that the will is substantially compliant with W.Va. Code §41-1-3 is, therefore, baseless and not presented in good faith. Instead, it is a plea to blatantly disregard the safeguards put in place by the legislature.

Not only does the Petitioners’ position stand in opposition to the legislature’s intent and ask this court to violate the separation of powers doctrine, but adopting this position would also set a dangerous precedent that violates public policy. Adopting the Petitioners’ position, that an unsigned will may still be considered valid, would create “testamentary anarchy” and make a mockery of W.Va. Code §41-1-3. Setting such a precedent would allow anyone to type up a document and claim that it was a decedent’s final draft of his or her valid will.

Without some type of signature by the testator, this “will” is nothing more than a typed note done by someone other than the testator. No amount of discovery can possibly change the basic fact that the document purporting to be The Oral Will is not a valid will; therefore, the judgment on the pleadings is appropriate.

An oral devise cannot be specifically enforced during or after the lifetime of the testator. During a testator’s life, all testamentary documents are revocable, thus, an oral contract to devise

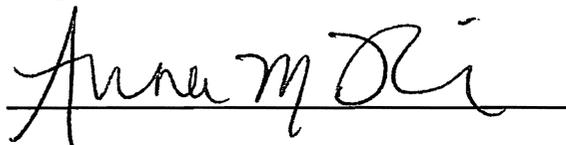
cannot be enforced as it may always be revoked. After the death of a testator, an oral devise still cannot be enforced because the testator can no longer make a will. 58 W.Va. L. Rev. 393.

While compliance with West Virginia Code § 41-1-3 has been relaxed in certain situations, this Court has *never* ruled that a document without a signature can be deemed a valid will in situations like the present case.

CONCLUSION

WHEREFORE, the Circuit Court's granting of Judgment on the Pleadings must be upheld, and this matter should be dismissed.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Anna M. Price", is written over a horizontal line.

Daniel J. Konrad, Esquire (WVSB #2088)
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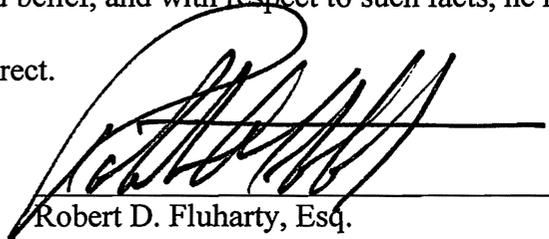
ROBERT D. FLUHARTY, in his fiduciary capacity as
Executor of the Estate of Bright McCausland,
Defendant Below,

Respondent.

VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF CABELL, to-wit:

Robert D. Fluharty, Esq., being first duly sworn, on oath, deposes and says that he has read the foregoing "*Brief of Respondent*" ("Brief"). He fully understands the foregoing Brief. The facts contained therein, and the Brief is, to the best of his knowledge, true and correct, except such facts, which are upon information and belief, and with respect to such facts, he is informed and believes the same to be true and correct.

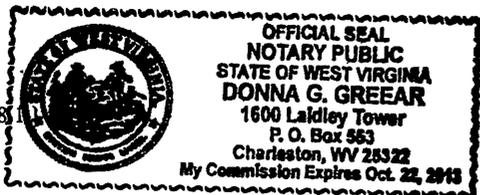

Robert D. Fluharty, Esq.

Taken, subscribed and sworn before me, a Notary Public in and for the County and State aforesaid, this 27th day of July, 2012.

My commission expires: October 22, 2013

Notary Public

{H0777478}



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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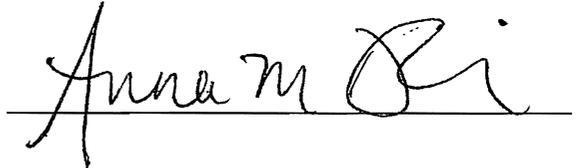
CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that on this 30th day of July 2012, the foregoing "*Brief of Respondent*" 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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