

12-1541

**IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA**

**PHILIP VALLANDINGHAM and  
CATHY CYFERS, as Co-Executors  
of the Estate of Lois Jayne Cyfers  
Miller, deceased,**

**Plaintiffs,**

**vs.**

**Civil Action No. 10-C-744  
Judge F. Jane Husted**

**CATHY CYFERS, DEBBIE CYFERS,  
DELORES CYFERS, DELORES  
MILLER YOUNG, DOTTIE CYFERS,  
ELEANOR LAMBERT, GETRUDE  
NOLTE CYFERS, HELEN CYFERS,  
JACK CYFERS, JOSEPH CYFERS,  
MEGAN CYFERS, ROGER CYFERS,  
and WAYNE CYFERS,**

**Defendants.**

**FINAL JUDGMENT ORDER**

On this day, came the Court, for entry of a final judgment order in this case as follows:

1. On October 9, 2012, the parties appeared, by counsel, for a trial in this matter.
2. After the jury was empanelled, the Court announced that after reviewing the various motions, memoranda, the arguments of counsel, and the entire record in this action, it was prepared to make a ruling as a matter of law on the issues to be tried.
3. The parties advised the Court through their counsel that the parties were willing to waive their right to a jury trial in favor of a ruling as a matter of law.
4. At that point, the Court ruled in favor of the defendants, Jack Cyfers, Helen Cyfers, Roger Cyfers, Dottie Cyfers, and Wayne Cyfers, and against the defendants, Cathy Cyfers, Joseph Cyfers, and Megan Cyfers, as provided in this Final Judgment Order.

**Findings of Fact**

5. This case arises from the Last Will and Testament of Lois Jayne Cyfers Miller, who died a resident of Cabell County, West Virginia on January 27, 2009.

6. The Will was executed by Ms. Miller on August 15, 2006, and was witnessed by Stacy Clark and Boyce Griffith, Esq., a Hamlin attorney who prepared the Will for Ms. Miller.

7. Upon Ms. Miller's death, this Will with an "Exhibit A" attached was submitted for probate by co-executors, Philip Vallandingham and Cathy Cyfers.

8. An order admitting the Will including Exhibit A to probate was entered by the Cabell County Commission on May 14, 2009, which states, "and no one appearing and objecting to the probate of said paper writing, it is ordered that the same be, and it is hereby duly probated and ordered to be recorded as and for the true Last Will and Testament of said Lois Jayne Cyfers Miller, deceased," and the Will with Exhibit A attached was recorded by the Cabell County Clerk in Book No. 190, at Page 506.

9. On that same date, May 14, 2009, another order was entered by the Cabell County Commission appointing Philip Vallandingham and Cathy Cyfers "under the provisions of the Last Will and Testament of the said decedent" as "Co-Executors."

10. Attached to that order was a list of distributees submitted to the Cabell County Commission by those co-executors, under oath, identifying the beneficiaries as those individuals referenced in the Will, including Exhibit A.

11. On December 3, 2009, the co-executors filed an appraisal of the Estate duly recorded by the Cabell County Clerk in Book No. 522, Page 510, listing the total value of probate assets at \$296,987.27.

12. Articles II and VII of the Will contain hand-written notations.

13. Article IV of the Will provides that other devises may be made through an exhibit, identified as Exhibit A, of even date with the Will.

14. Exhibit A contained hand written notations using different colors of ink.

15. Eventually, a dispute arose between the co-executors and the beneficiaries regarding administration of the Estate and on October 7, 2010, defendants, Jack Cyfers, Helen Cyfers, and Roger Cyfers filed a petition with the Cabell County Commission to remove the co-executors stating that, "the Executors of Lois Jayne Cyfers Miller's estate have continually refused to administer the estate, pursuant to the Decedent's last wishes, as set out in her Last Will and Testament. They refuse to distribute the assets as directed by the Will."

16. Later, on October 13, 2010, the co-executors filed a petition for declaratory relief with this Court asking for (a) "An order determining whether the handwritten notations on the face of the will alter the will or have no effect on the will;" (b) "An order determining whether the handwritten attachment, Exhibit A, is validly incorporated by reference;" and (c) "For such other relief and direction in the administration of said estate as the Court deems proper."

17. The Cabell County Commission conducted a hearing on the beneficiaries' petition to remove the co-executors and on November 24, 2010, the Commission entered an order ruling that (a) "By her Last Will and Testament recorded in the office of the Clerk of the County Commission of Cabell County, West Virginia, in Will Book 190, at Page 506, Lois Jayne Cyfers Miller left all her tangible personal property to Cathy Cyfers and all of the remainder of her personal property, including the proceeds from the sale of her home located at 3273 Rt. 60, East, Huntington, West Virginia, to those people listed in Exhibit 'A' attached to the Will;" (b) "the Executors of Lois Jayne Cyfers Miller's estate have failed to administer the estate, pursuant to the Deceased's last wishes, as set out in her Last Will and Testament;" (c) "the Respondents

have contested the validity of Ms. Miller's will, which places them in conflict with the heirs to Ms. Miller's estate as well as in conflict with the wishes of Ms. Miller;" and (d) "the appointment of the Philip Vallandingham and Cathy Cyfers, as Executors of the Estate of Lois Jayne Cyfers Miller be revoked effective immediately" and "the Sheriff of Cabell County, West Virginia be appointed to serve as Executor . . . ," which is recorded in Book No. 157, Page 645.

18. Since entry of the order by the Cabell County Commission on November 24, 2010, the Sheriff has served as executor of the Estate of Ms. Miller.

19. As set forth in the petition for declaratory judgment, the two disputed issues in this case are (a) "whether the handwritten notations on the face of the will alter the will or have no effect on the will" and (b) "whether the handwritten attachment, Exhibit A, is validly incorporated by reference," which this Court resolves as a matter of law.

#### **Conclusions of Law**

1. With respect to whether Exhibit A was duly incorporated by reference, the law and the evidence is clear.

2. "The doctrine of incorporation by reference states that a will, duly executed and witnessed according to statutory requirements, may incorporate by an appropriate reference a written paper or document which is in existence at the time of execution of the will . . . ." 79 Am. Jur. 2d *Wills* § 186 (2012)(footnotes omitted).

3. "An express reference in one paper to another or others, present at the time, may undoubtedly indicate the integration of all of them as one will." *Id.* at § 4 (citations omitted); see also 79 Am. Jur. 2d *Wills* § 178 (2012)("A will may be valid although written on separate sheets of paper, if the several sheets are coherent in sense. The law is satisfied by the fact that the several sheets were tacked together in the mind of the testator.")(footnotes omitted).

4. “So incorporated, the extrinsic paper takes effect as part of the will and is admitted to probate as such.” 79 Am. Jur. 2d *Wills* § 186 (emphasis supplied and footnote omitted); see also 95 C.J.S. *Wills* § 211 (2012)(“Any paper, not properly executed, but incorporated by reference in a properly executed will and identified by clear and satisfactory proof in that will as the paper referred to, takes effect as part of the will.”)(emphasis supplied and footnote omitted).

5. In this case, “Exhibit A” (a) is repeatedly referenced in the Will; (b) is attached to the Will; (c) is written in the Testator’s handwriting; and (d) Ms. Miller’s prior Will, executed in 1999, also had an “Exhibit A” attached indicating her wishes.

6. Defendants, Cathy Cyfers, Joseph Cyfers, and Megan Cyfers, argue that handwritten notations on Exhibit A place into doubt whether it existed at the time the Will was executed, but there is no genuine issue of material fact regarding this question and, indeed, it was defendant, Cathy Cyfers, who as co-executor submitted the Will with Exhibit A to probate and listed as distributees the individuals identified on Exhibit A.

7. The only evidence relied upon by these defendants to argue that Exhibit A did not exist at the time the Will was executed are certain handwritten notations on Exhibit A, but an examination of the law and the evidence clearly indicate that any handwritten notations on the Will or Exhibit A are surplusage and are to be disregarded with respect to whether Exhibit A existed at the time the Will was executed or with respect to Ms. Miller’s testamentary intent.

8. The leading case in West Virginia regarding validation of a testator’s intent and surplusage is *In re Estate of Teubert*, 171 W. Va. 226, 298 S.E.2d 456 (1982).

9. In *Teubert*, the Cabell County Commission refused to probate a will and a separate codicil.

10. First, the documents left by the decedent, some of which were attached to the Court's opinion, were not a formal will and/or codicil, but were merely found among his personal papers. *Id.* at 228, 298 S.E.2d at 458.

11. Second, the documents, left by a retired postal worker who accumulated an Estate of about \$3 million, were partially in handwriting and partially typewritten. *Id.* at 229, 298 S.E.2d at 459.

12. Third, the documents devised certain real property to the Jehovah's Witnesses and created a foundation for the blind and, certain aspects of these documents, like the ones in the present case, were crossed through and various notations were added. *Id.*

13. Finally, as in the instant case, the proponents of these documents, as a will and codicil, argued that the typewritten material was surplusage and there was sufficient certainty as to the testator's intent to validate the documents as the testator's will and codicil. *Id.*

14. Presented with this set of facts, in which the testator's intent was far less certain than it is in the present case, the Court nevertheless upheld the validity of the documents as the last will and testament of the decedent.

15. First, the Court adopted the "surplusage rule" as follows: "we believe that the surplusage rule is compatible with our law. We, therefore, hold that where a holographic will contains words not in the handwriting of the testator, such words may be stricken if the remaining portions of the will constitute a valid holographic will." *Id.* at 230, 298 S.E.2d at 460.

16. Second, the Court held that to the extent that a purported will is ambiguous, extrinsic evidence to explain any ambiguous language is admissible: "Where the words of a will are ambiguous as to testamentary intent, extrinsic evidence is admissible to prove the testator's intent." *Id.* at 231, 298 S.E.2d at 461. (citations omitted).

17. Finally, even though Mr. Teubert's documents were ambiguous, the Court nevertheless held them sufficiently certain, considering the available extrinsic evidence, to effectuate his testamentary intent:

Admittedly, the testator's handwriting and occasional interlineations and cryptic comments tend at first reading to be rather vague. However, if a close scrutiny is given to the writing, two fundamental dispositive patterns are discernible. After the direction to pay just debts and funeral expenses, there is the devise of real estate located at "619-16 St & 7 Ave" to the "Jehovah Witness (East & West Div.)." This description would appear to sufficiently identify the property. *Truslow v. Ball*, 166 Va. 608, 186 S.E. 71 (1936). The same is true of the direction to sell the Plateau Eastwood Lots and the property at 570-7th Avenue.

In addition to disposing of the foregoing specific items of real property, the testator in the upper righthand portion of the writing made cash bequests as follows: (1) "\$100.00 each year as special prize [to] Carl 'Duke' Ridgely Golf Tournament;" and (2) "\$100.00 to each of Little League B. Ball clubs (each year) for bats, balls, uniforms, Etc." There may be some ambiguity as to how these bequests are to be paid. However, these items appear under the language "(The Foundation to be perpetual in nature)."

Much of the ambiguity as to the payment of these cash bequests is clarified by the second dispositive portion of the writing, where the testator creates the "James H. & Alice Teubert Foundation to receive Bal. money in bank, all stocks and money with Bache & Co. and Merrill Lynch, Pierce, Fenner & Smith, Inc. together with all other things of value." Thus, it is clear that after the transfer of the real estate to the Jehovah's Witnesses, the money from the sale of the remaining assets will pass to the Foundation.

We need not detail in depth the testator's specific directions for the Foundation's payments except to state that they are to both named individuals and charitable organizations and represent extremely small amounts of money in comparison to the estate's total value of approximately three million dollars. The more significant fact is that the residuary bequest is "Residue to aid the blind only."

Id. at 232-33, 298 S.E.2d at 462-63.

18. In this case, the testator's intent is far less ambiguous than it was in *Teubert* and the law regarding allegations of post-execution notations on a will plainly dictates that the notations at issue in this case be disregarded as surplusage.

19. "An alteration that does not affect the validity of the provisions not altered, but only those altered, where the two are separable and enforceable independently of one another." 95 C.J.S. *Wills* § 218 (2012)(footnote omitted).

20. "Where the alteration is an immaterial one," like the ones at issue in this case, "the validity of the will is not affected whether made before or after the execution of the will, and the alteration, or interlineations in such cases is ignored." *Id.* (and footnotes omitted).

21. With respect to the argument by defendants, Cathy Cyfers, Joseph Cyfers, and Megan Cyfers, that Exhibit A should be disregarded because it contains handwriting both in blue and black ink, the Court notes that the Will, under which defendant, Cathy Cyfers, seeks to recover as residuary beneficiary, also contains handwriting both in blue and black ink, including by the witnesses and the notary.

22. The fact that notations on a will may be made in different color ink is irrelevant, without more, if those notations do not create doubt as to the testator's intent.

23. In *In re Will of Allen*, 559 S.E.2d 556 (N.C. Ct. App. 2002), for example, the court held that inclusion in holographic will of phrase "bank close," which appeared to be written with a different pen and which was alleged not to be in testator's handwriting, did not invalidate will; "bank close" was meaningless surplusage which could be disregarded, and remainder of will was sufficient to express testator's intent and to dispose of his property.

24. Likewise, in this case, all of the disputed notations with dates after the Will was executed are surplusage and can be disregarded as the remainder of the Will is more than adequate to express Ms. Miller's intent and to dispose of her property.

25. With respect to the argument by defendants, Cathy Cyfers, Joseph Cyfers, and Megan Cyfers, that Exhibit A should be disregarded because it contains a date, November 29, 2006, in Ms. Miller's handwriting in blue ink, which was three months after the Will was executed, the Court notes that the Will, under which defendant, Cathy Cyfers, seeks to recover as residuary beneficiary, contains a date, August 17, 2007, written in Ms. Miller's handwriting in blue ink, which is over a year after the Will was executed.

26. Not only do the arguments by defendants, Cathy Cyfers, Joseph Cyfers, and Megan Cyfers, ignore the fact that the same post-execution references in Ms. Miller's handwriting in blue ink exist on both the Will, under which Cathy Cyfers seeks to recover almost all of Ms. Miller's Estate as residuary beneficiary, and Exhibit A which Cathy Cyfers seeks to invalidate depriving all of the named beneficiaries therein of their designated inheritance, but they ignore the nature of the references themselves.

27. The first notation by Ms. Miller in blue ink is on the first page of the Will and states, "August 17 2007 I went to McGhee Handly with Cathy took care of (Paid by check) for my needs. Save all of you the trouble!!"

28. This notation has no impact on any testamentary disposition, but is surplusage; merely noting the fact that after the Will was executed, Ms. Miller took care of her funeral arrangements which are referenced in the Will.

29. The second notation by Ms. Miller in blue ink is on the third page of the Will and states, "My Blazer is to go to Cathy!!! Sam & Andrew buy my house."

30. This notation has no impact on any testamentary disposition, but is surplusage, merely noting Ms. Miller's wish that defendant, Cathy Cyfers, receive her truck, which was given to her before Ms. Miller's death, and her preference that two of her relatives buy her house from the Estate.

31. The notation on Exhibit A by Ms. Miller in blue ink, relied upon by defendants, Cathy Cyfers, Joseph Cyfers, and Megan Cyfers, states, "I love all my relatives and I have no children. My sisters & brothers have left their children their estates; therefore, some do not need as others, am taking all into consideration, am trying to do what, I think, is best. Gertrude was so good to Mom, Dad and Uncle Elmer!!! Since Joe Miller, my love, help me make a lot of this money I want his only line sibling to have equal monies. I love you Deloris. (11/29/06.)"

32. This notation has no impact on any testamentary disposition, but is surplusage, merely explaining why on Exhibit A immediately above this entry Ms. Miller allocated the bulk of her Estate, which consisted of (a) a savings account at Chase; (b) a checking account at Chase; (c) a savings account at First State; and (d) the proceeds of the sale of her home, "Equally" among "Gertrude Nolte Cyfers," "Jack & Helen Cyfers," "Sister in Law Delores Miller Young," and "Wayne Cyfers, brother."

33. Indeed, next to the name of her late husband's sister, Delores Miller Young, Ms. Miller wrote, "some of this money Joe made," to further explain her testamentary intent, and next to the name of her brother, Wayne Cyfers, Ms. Miller wrote, "Closest relative," to further explain her testamentary intent.

34. The other notations in Ms. Miller's handwriting which are both in blue and black ink, have no impact on any testamentary disposition, but are surplusage.

35. For example, on the first page of Exhibit A she crossed out a bank account originally allocated to "Joseph & Cathy Cyfers" and explained, "I gave this to my nephew Joe Cyfers & wife Cathy this money already from Chase Bank."

36. As in her 1999 Will, Ms. Cyfers carefully listed in columns designated "Name," "Relationship," and "Property," each person she wanted to receive each item of property and their relationship to her.

37. To Joseph and Cathy Cyfers, she left a projector, record player, records, tapes, and other household items listed in a column to the right of their names; to Roger and Dottie Cyfers, she left a coin collection and various items of furniture listed in the same manner; to Debbie Cyfers, she left some family albums, a coat, a clock, and various items of clothing; to Jack Cyfers, Dottie Cyfers, Delores Cyfers, and Eleanor Lambert, she left various items of artwork listed in the same manner; to Joseph and Cathy Cyfers, she left some household items similar to the other household items listed in Exhibit A in the same manner; to Megan Cyfers, she left some collectible spoons, which she listed in the same manner; and, finally, after listing the various bank accounts discussed above, making reference to how bills were to be paid from those accounts during her lifetime, and expressing a wish, also expressed in her Will, that a member of her family purchase her home from the Estate upon her death, clearly states, "After all debts are paid finances left distributed as follows to share equally" and lists "Gertrude Nolte Cyfers," "Jack & Helen Cyfers," "Sister in Law Delores Miller Young," and "Wayne Cyfers, brother."

38. Finally, on the last page of Exhibit A, Ms. Miller expressed her wish that Dick Cyfers receive the proceeds of a \$2,000 life insurance policy; that Delores Miller Young, her sister-in-law, receive her late husband's rings and knives, the latter of which Ms. Miller

expressed be shared with her late husband's nephews; and that "Cathy is to be given my 99 Blazer runs like a new car," which is also consistent with her notation on the Will.

39. The reliance by the residuary beneficiary, Cathy Cyfers, upon the decision in *Wible v. Ashcraft*, 116 W. Va. 54, 178 S.E. 516 (1935), is misplaced.

40. The issue in *Wible*, unlike the present case, was not whether extrinsic documents were validly incorporated by reference into the testator's will, but whether deeds executed at the time the testator executed his will, which did not specifically incorporate them by reference, would be considered incorporated by reference in light of the circumstances presented.

41. Rather than holding, as defendant, Cathy Cyfers, argues, that the deeds were not incorporated by reference, the Court held that, "Where it appears from the language of a will that deeds bearing a certain date were included in the testator's plan for the disposition of his property and prompted the provision for the one bequest made therein, and the reference to the deeds is sufficient to reasonably identify them, such deeds become part and parcel of the will as completely as if copied therein for the purpose of ascertaining the testator's intention regarding the said bequest." Syl. pt. 1, *Wible*.

42. Accordingly, *Wible* undermines rather than supports the position of defendant, Cathy Cyfers.

43. Throughout this case, defendant, Cathy Cyfers, the residuary beneficiary, has argued that Ms. Miller's intent is irrelevant in determining whether Exhibit A was validly incorporated by reference into her will, but "[T]he intention of the testator is the polar star of construction." See *Wilcox v. Mowrey*, 125 W. Va. 333, 24 S.E.2d 922, 925 (1943); *Groves' Estate v. Groves*, 120 W. Va. 373, 198 S.E. 142, 146 (1938); *Morris' Ex'r v. Morris' Devisees*, 48 W. Va. 430, 37 S.E. 570, 571 (1900); *Bartlett v. Patton*, 33 W. Va. 71, 10 S.E. 21, 22 (1889).

44. “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 and Merchants Bank v. Farmers and Merchants Bank*, 158 W. Va. 1012, 216 S.E.2d 769 (1975).

45. “The intention of the testator is to be gathered from the whole instrument, not from one part alone.” *Emmert v. Old Nat'l Bank*, 162 W. Va. 48, 54, 246 S.E.2d 236, 241 (1978).

46. Only where testamentary documents are “too vague and uncertain to enforce,” should a testator’s obvious intent with respect to the distribution of his or her Estate not be vindicated. Syl., *First National Bank of Bluefield v. Cundiff*, 174 W. Va. 708, 329 S.E.2d 74 (1985).

47. In *Hobbs v. Brenneman*, 94 W. Va. 320, 326, 118 S.E. 546, 549 (1923), the Court described the role of the judiciary in ascertaining a testator's intent:

When the intention is ascertained from an examination of all its parts the problem is solved. The interpretation of a will is simply a judicial determination of what the testator intended; and the rules of interpretation and construction for that purpose formulated by the courts in the evolution of jurisprudence through the centuries are founded on reason and practical experience. It is wise to follow them, bearing in mind always that the intention is the guiding star, and when that is clear from a study of the will in its entirety, any arbitrary rule, however ancient and sacrosanct, applicable to any of its parts, must yield to the clear intention.

48. Here, other than speculation, supposition, and conjecture, which are insufficient for a rational fact-finder, *Singleton v. The Citizens Bank of Weston, Inc.*, 2012 WL 2924373 (W. Va.) and *Gibson v. Little General Stores, Inc.*, 221 W. Va. 360, 655 S.E.2d 106 (2007), that an explanatory entry in blue ink on Exhibit A dated three months after the Will was executed giving reasons why Ms. Miller allocated the bulk of her Estate equally among members of her and her late husband’s immediate family, there is nothing to indicate that the Will together with Exhibit

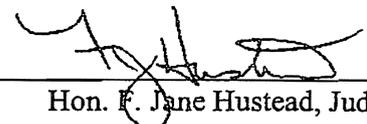
A do not adequately and accurately reflect how Ms. Miller intended her Estate to be divided upon her death.

The Court has received proposed orders from both Mr. Ramey and Mr. Hussell reflecting the Court's findings of fact and conclusions of law. Mr. Hussell has not identified any facts that are in dispute in Mr. Ramey's proposed order. Wherefore, the Court has adopted Mr. Ramey's order as being an accurate reflection of the agreed facts and a more comprehensive recitation of the law relied upon by the Court in making its final judgment order.

WHEREFORE, this Court enters FINAL JUDGMENT in favor of defendants, Jack Cyfers, Helen Cyfers, Roger Cyfers, Dottie Cyfers, and Wayne Cyfers, and ORDERS that the Estate of Lois Jayne Cyfers Miller be administered by the Sheriff of Cabell County, West Virginia, in accordance with this FINAL JUDGMENT ORDER and further according to law, with the objections and exceptions of all the other parties to this case duly preserved.

The Clerk of this Court is further directed to provide a copy of this FINAL JUDGMENT ORDER to all counsel and unrepresented parties in this action as they appear herein.

Entered this 28th day of November, 2012.

  
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Hon. F. Jane Hustead, Judge