

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-1541

**Cathy Cyfers, Joseph Cyfers, and Megan Cyfers,
Petitioners,**

vs.

**Jack Cyfers, Helen Cyfers, Roger Cyfers, Dottie Cyfers,
Wayne Cyfers, Cathy Cyfers, Philip Vallandingham,
Sheriff of Cabell County, Sean K. Hammers, Esq.,
Debbie Cyfers, Gertrude Cyfers, Dick Cyfers,
Eleanor Lambert, and Delores Cyfers,
Respondents**

**On Appeal from Honorable F. Jane Hustead, Judge
Circuit Court of Cabell County
Civil Action No. 10-C-744**

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

1. The Court erred in concluding that Exhibit "A" to the Will was in existence at the time of execution of the Will and was properly incorporated by reference to the Will. In order for a document to be incorporated by reference to a will, the document must have been in existence at the time of the execution of the will, must have been referred to in the will, and must be identified by clear and satisfactory proof as the document referred to therein. Wible v. Ashcraft, 116 W. Va. 54, 57-58, 178 S.E. 516, 517 (1935). In the present matter, Exhibit "A" was not in existence in its present form at the time Lois Jane Cyfers Miller, deceased, executed the Will. Therefore, Exhibit "A" was not validly incorporated by reference to the Will under West Virginia law.

2. The Court erred in concluding that the handwritten notations on Exhibit "A" are surplusage and are to be disregarded. Under West Virginia law, the application of the surplusage theory is limited to holographic wills. Where a holographic will contains words not in the handwriting of a testator, such words may be stricken if the remaining portions of the will constitute a valid holographic will. In re Estate of Teubert, 171 W. Va. 226, 230, 298 S.E.2d 456, 460 (1982); First Nat'l Bank of Bluefield v. Cundiff, 174 W. Va. 708, 329 S.E.2d 74 (1985); Charleston Nat'l Bank v. Thru the Bible Radio Network, 203 W. Va. 345, 507 S.E.2d 708 (1998). In the present matter, the Will was not in the handwriting of Lois Jane Cyfers Miller, deceased, and Exhibit "A" does not meet the requirements of a valid holographic will under West Virginia law. Accordingly, the surplusage theory is inapplicable with respect to whether or not Exhibit A was validly incorporated by reference to the Will.

3. The Court erred by considering the intent of Lois Jane Cyfers Miller, deceased, with respect to whether or not Exhibit "A" was properly incorporated by reference to the Will. The intent of a testator is not a factor to be considered when determining whether a document is

incorporated by reference into a will, but rather, it is to be considered when interpreting a particular provision of a will. Goetz v. Old Nat'l Bank of Martinsburg, 140 W. Va. 422, 429, 84 S.E.2d 759, 766 (1954). The present matter does not involve a question of interpretation of the provisions of the Will. Rather, the issue is whether or not Exhibit "A" was validly incorporated by reference to the Will under West Virginia law. Accordingly, the intent of Lois Jane Cyfers Miller, deceased, is irrelevant in the present matter and the Court erred by considering it as a factor with respect to whether or not Exhibit "A" was validly incorporated by reference to the Will.

STATEMENT OF THE CASE

This matter involves whether or not the provisions of a handwritten document which was attached to the Last Will and Testament of Lois Jane Cyfers Miller (Will), and labeled as Exhibit "A," is a valid document incorporated by reference into the Will.

Lois Jayne Cyfers Miller (Decedent) died a resident of Cabell County, West Virginia on January 27, 2009. Cyfers-Appendix, 007. On August 15, 2006, the Decedent executed her Will, which is of record in the Office of the Clerk of the County Commission of Cabell County, West Virginia, in Will Book 190, at Page 506. Id. Pursuant to Article I of the Will, Philip Vallandingham and Cathy Cyfers were appointed as Co-Executors of the Estate of Lois Jayne Cyfers Miller (the Estate) on July 31, 2009. Id.

The Will itself contains hand-written notations dated after the execution of the Will. Id. at 013, 015. For example, under Article II of the Will, a handwritten notation dated August 17, 2007, states "I went to McGhee Handley with Cathy took care of (paid by) check) for my needs. Save all of you the trouble!!!" Id. at 013. In addition, a handwritten notation under Article VII of the Will states "My Blazer is to go to Cathy??? Sam & Andrew to buy my house." Id. at 015. Article IV of the Will provides provides that "I do hereby bequeath unto the beneficiaries

identified on Exhibit "A," which exhibit is of even date with this, my Last Will and Testament and signed by me, attached hereto and expressly incorporated herein by refernce [sic] thereto, the items of property opposite the beneficiary's name." Id. at 014. The Decedent did prepare an Exhibit "A." Id. at 019. However, this Exhibit "A" was completed using two different colors of pen, black ink and blue ink. One notation contained therein bears a date of November 29, 2006, which is nearly four months after that of the Will. Id. at 022. It is apparent that a portion of Exhibit "A" was added after the date of the execution of the Will as evidenced by the notation of the date November 29, 2006. Much of the list of property included in Exhibit "A" is written in black ink, while the names of the individuals to whom the Decedent was purportedly bequeathing these items are written in both black and blue ink. For example, the Decedent listed "2 Geese Paintings" in black ink beside the name "Jack Cyfers," which was written in blue ink. Moreover, with respect to certain bank accounts, the Decedent wrote "All above monies to the following:" in black ink. This is followed by a list in blue ink of certain relatives and a note, all of which are dated November 29, 2006. A notation, "After all debts are paid finances left distribet [sic] as follows" is written in blue ink above this entry. In addition, the Decedent initially purportedly bequeathed a Chase Bank checking account to Joseph and Cathy Cyfers; however, the Decedent later crossed that out and noted, "I gave this to my nephew Joe Cyfers and wife Cathy this money already from Chase Bank [sic]".

On October 13, 2010, Philip Vallandingham and Cathy Cyfers, as Co-Executors of the Estate of Lois Jane Cyfers Miller, deceased, filed a Petition for Declaratory Relief naming Cathy Cyfers, Debbie Cyfers, Delores Cyfers, Delores Miller Young, Dottie Cyfers, Eleanor Lambert, Gertrude Nolte Cyfers, Helen Cyfers, Jack Cyfers, Joseph Cyfers, Megan Cyfers, Roger Cyfers, and Wayne Cyfers as parties. Id., at 002. The Co-Executors filed the Petition for Declaratory

Relief seeking determination of whether or not handwritten notations on the Last Will and Testament of Lois Jane Cyfers Miller (“Will”) altered the Will and whether or not a handwritten attachment labeled “Exhibit A” was validly incorporated by reference to the Will. Id.

In July, 2011, Petitioners, Cathy Cyfers, Joseph Cyfers, and Megan Cyfers, and Respondents, Jack Cyfers, Helen Cyfers, and Roger Cyfers, submitted cross-motions for summary judgment with respect to whether or not Exhibit A was validly incorporated by reference to the Will. Id. at 041, 071, and 0196. In a decision dated September 26, 2011, the Circuit Court concluded that Exhibit A was not validly incorporated by reference to the Will under West Virginia law and granted Petitioners’ Motion for Summary Judgment. Id. at 221. The Circuit Court further directed the Petitioners to submit an Order reflecting the Court’s ruling. Id. On January 10, 2012, Petitioners submitted an Order Granting Motion for Summary Judgment in accordance with the Circuit Court’s ruling of September 26, 2011. On January 17, 2012, Respondents, Jack Cyfers, Helen Cyfers, Roger Cyfers, Dottie Cyfers, and Wayne Cyfers, filed an Objection to Proposed Order Granting Motion for Summary Judgment and Motion for Reconsideration. Id. at 223. On September 18, 2012, the Circuit Court entered an Order granting the Motion for Reconsideration and setting the matter for trial on October 9, 2012. Id. at 403. On October 9, 2012, the parties appeared for the trial in this matter. After conferring with counsel to address several issues with respect to the trial, Court inquired of counsel whether or not they wished to proceed with the jury trial or whether or not they wished for the Court to make a ruling on renewed cross motions for summary judgment. Id. at 509. After consultation, counsel agreed that they wished the matter to be resolved on summary judgment. Id. On November 28, 2012, the Court entered the Final Judgment Order. Id. at 410. The Court committed multiple errors by granting judgment in favor of Respondents, Jack Cyfers, Helen

Cyfers, Roger Cyfers, Dottie Cyfers, and Wayne Cyfers, which justify appellate review.

Petitioners, Cathy Cyfers, Joseph Cyfers, and Megan Cyfers, respectfully request that the

Supreme Court of Appeals of West Virginia review this matter on appeal and reverse the Circuit Court's erroneous findings of fact and conclusions of law as set forth in the Order dated November 28, 2012.

SUMMARY OF ARGUMENT

The Petitioners contend that Exhibit "A" to the Last Will and Testament of Lois Jayne Cyfers Miller is an invalid testamentary instrument and therefore does not control the disposition of assets that belonged to Mrs. Cyfers at the time of her death. Exhibit "A" is an invalid testamentary instrument because, standing alone, it does not meet the formal requirements of a valid will required under West Virginia law, and the facts clearly show that it was not properly incorporated by reference to the Will under West Virginia law. Based on the clear facts and the applicable law in West Virginia discussed below, the Court should reverse the ruling of the Circuit Court of Cabell County, West Virginia, granting summary judgment in favor of Jack Cyfers, Helen Cyfers, Roger Cyfers, Dottie Cyfers, and Wayne Cyfers.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners request to present oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure because this matter involves assignments of error in the application of settled law. The Petitioners contend that a memorandum decision is not appropriate in this appeal seeking the reversal of a decision of the lower tribunal.

ARGUMENT

A. Standard of Review

“A circuit court’s entry of summary judgment is reviewed de novo. When reviewing a lower court’s decision regarding summary judgment, we apply the same standard required of the circuit court. In this regard, we have long held that a motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Estate of Robinson v. Randolph County Comm’n, 209 W.Va. 505, 509-510, 549 S.E.2d 699, 703-704 (2001) (citations omitted).

B. Discussion of Law

1. **The Court erred in concluding that Exhibit A to the Will was in existence at the time of execution of the Will and was properly incorporated by reference to the Will.**

The Supreme Court of Appeals of West Virginia has held that an unattested or imperfectly attested document may be incorporated into a will by reference. Wible v. Ashcraft, 116 W. Va. 54, 57, 178 S.E. 516, 517 (1935). In order for a document to be incorporated by reference, the document must have been in existence at the time of the execution of the will, must have been referred to in the will, and must be identified by clear and satisfactory proof as the document referred to therein. Id. 116 W. Va. at 57-58, 178 S.E. at 517. Moreover, this Court, when analyzing whether or not the deeds at issue in Wible had been incorporated by reference into the will, the Court considered whether or not the deeds were in existence at the time of the execution of the will. Id. 116 W. Va. at 58, 178 S.E. at 517. Accordingly, West Virginia law requires that the unattested document must have been in existence at the time of the execution of the will in order to be validly incorporated by reference into the will.

The doctrine of incorporation by reference has also been adopted by courts in several other jurisdictions. Triplett's Ex'r v. Triplett, 172 S.E. 162, 167 (Va. 1934); Lawless v. Lawless, 47 S.E.2d 431, 434 (Va. 1948); Daniel v. Tyler's Ex'r, 178 S.W.2d 411, 414 (Ky. Ct. App. 1943); Tyson v. Henry, 514 S.E.2d 564, 566 (N.C. Ct. App. 1999); In re Shillaber, 15 P. 453, 454 (Cal. 1887). In addition, courts have held that “[t]here must be affirmative evidence that a document sought to be enforced as part of the will was in existence when the will was made.” Daniel, 178 S.W.2d at 414 (citations omitted). Furthermore, where a will and codicils thereto were written in black ink, and changes appeared in ink of a different color and were otherwise of a character to indicate that they may have been made after the execution of the will and codicils, the proponents had the burden of proving that the changes were made prior to execution. Triplett, 172 S.E. at 166. Accordingly, if a document was not in existence at the time of the execution of the will, it cannot be treated as being incorporated by reference into the will.

Although not a West Virginia decision, the Triplett decision is directly on point in this matter. In Triplett, the decedent handwrote a will and codicils. Triplett, 172 S.E. at 163. In addition, the decedent left a memorandum stating that he was in the process of rewriting his will; however, he did not wish his original will to be affected by this undertaking should he fail to complete it. Id. at 167. The memorandum further indicated that the decedent preferred the “change made in [his] third request” to be substituted for the original. Id. The decedent also left the unfinished will which he was engaged in rewriting. Id. The court held that the memorandum and unfinished will failed to meet the requirements for incorporation by reference. Id. at 168. Although the memorandum and the unfinished will were discovered in the same envelope, the court found that this did not prove that the unfinished will was in existence at the time the memorandum was executed. Id. Because the unfinished will may have been written in part at

the time the memorandum was executed and partly written thereafter, the court held that there was not sufficient proof to admit either the memorandum or unfinished will to probate. Id.

“Here changes appear on the face of the paper in ink of a different color and otherwise of a character to indicate that they may have been made after execution, the proponents must, therefore, sustain the burden of proving that these changes were made prior to execution.” Id. at 166.

In the present matter, although portions of Exhibit “A” may have been completed at the time of the execution of the Will, certain portions were clearly added after the date the Will was executed. Specifically, at least one portion of Exhibit “A” is dated after the Will was executed. Cyfers Appendix, 019-025. For example, it appears that descriptions of certain property were written in black ink at one time, perhaps prior to the execution of the Will, and then at some later date, names and additional notations were filled in with blue ink. These notations in blue ink are dated November 29, 2006, which is clearly after the Will was executed. Cyfers-Appendix, 022. Moreover, the Decedent initially bequeathed a Chase Bank checking account to Joseph and Cathy Cyfers. However, the Decedent later crossed that out and noted that she had already given this money to Joe and Cathy Cyfers. Clearly, this notation was made after the original bequest of the Chase Bank account to Joseph and Cathy Cyfers in the Will. Id. at 019.

Furthermore, Boyce Griffith, the attorney who prepared the Will, has admitted that Exhibit “A” in its present form was not in existence as of the date of the execution of the Will. Id. at 096. Mr. Griffith has further stated that he is not certain what portion of Exhibit “A” may have existed at the time of the execution of the Will. Significantly, Mr. Griffith acknowledged that at least certain portions of Exhibit “A” were added after the Will was executed. Id. at 0 93,

095-096. Accordingly, Exhibit "A" was not in existence in its present form as of the date the Will was executed.

Based on the foregoing, it is apparent that at least portions of Exhibit "A" were added after the execution of the Will, as in Triplett. Even if some portion of Exhibit "A" were in existence prior to the execution of the Will, a document partially written prior to the execution of a will and partly thereafter may not be incorporated by reference. See Triplett, 172 S.E. at 168; Freeman v. Anderson, 55 Va. Cir. 353, 355 (Va. Cir. Ct. 2001) (noting that the date on an addition to the document to be incorporated by reference indicated that all portions of the document were in existence at the time of the will). Thus, Exhibit "A" clearly fails to meet the requirements to be incorporated by reference.

Even assuming that portions of Exhibit "A" may have been completed at the time of the execution of the Will, certain portions were clearly added after the date the Will was executed. For example, at least one portion of Exhibit "A" is dated after the Will was executed. In addition, it appears that descriptions of certain property were written in black ink at one time, perhaps prior to the execution of the Will. Then at some later date, names and additional notations were filled in with blue ink. These notations in blue ink are dated November 29, 2006, which is after the date the Will was executed. Cyfers-Appendix, 022. Based on the foregoing, Exhibit "A" was not validly incorporated by reference into the Will.

2. **The Court erred in concluding that the handwritten notations on Exhibit A are surplusage and are to be disregarded.**

The surplusage theory is inapplicable to the present matter. The Supreme Court of Appeals of West Virginia has adopted the surplusage theory. In re Estate of Teubert, 171 W. Va. 226, 298 S.E.2d 456 (1982). However, Teubert and subsequent decisions addressing surplusage

limit its application to holographic wills. Teubert, 171 W. Va. at 230, 298 S.E.2d at 460; First Nat'l Bank of Bluefield v. Cundiff, 174 W. Va. 708, 329 S.E.2d 74 (1985); Charleston Nat'l Bank v. Thru the Bible Radio Network, 203 W. Va. 345, 507 S.E.2d 708 (1998). According to Teubert, "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." Teubert, 171 W. Va. at 230, 298 S.E.2d at 460

Exhibit "A" does not meet the requirements of a valid holographic will under West Virginia law because it is not wholly in the handwriting of the Decedent. In West Virginia, "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 (2010) (emphasis added). Exhibit "A" does not meet the requirements under West Virginia law to be a valid holographic will because it is not wholly in the handwriting of the Decedent, it was not signed by her, and it does not evidence testamentary intent. Accordingly, the surplusage theory is inapplicable to the present matter, because Exhibit "A" is not a holographic will.

Pursuant to the doctrine of incorporation by reference, the unattested document must have been in existence at the time the will was executed and any notations made thereafter cannot be treated as surplusage. Accordingly, any changes made to Exhibit "A" after the Will was executed prevent Exhibit "A" from being validly incorporated into the Will. Because it is

clear that significant portions of Exhibit “A” were added or changed after the execution of the Will, it may not be incorporated by reference into the Will.

3. The Court erred by considering the intent of Lois Jane Cyfers Miller, deceased, with respect to whether or not Exhibit “A” was properly incorporated by reference to the Will.

In this matter, the Decedent’s intent is irrelevant with respect to whether or not Exhibit “A” is incorporated by reference into the Will. Although the intent and purpose of a testator is the controlling factor in the construction of a will, the present matter concerns the validity of Exhibit “A,” not its construction. Brookover v. Grimm, 118 W. Va. 227, 190 S.E. 697, syl. pt. 3 (1937); Hedrick v. Hedrick, 125 W. Va. 702, 706, 25 S.E.2d 872, 875 (1943); Wilcox v. Mowrey, 125 W. Va. 333, 338, 24 S.E.2d 922, 925 (1943). A testator’s intent is not a factor to be considered when determining whether a document is incorporated by reference into a will. Instead, intent is relevant only when a court is called upon to interpret a particular provision of a will. Goetz v. Old Nat’l Bank of Martinsburg, 140 W. Va. 422, 429, 84 S.E.2d 759, 766 (1954).

Petitioners agree that the intent of the testator is the controlling factor in the construction of a will. However, the present matter does not involve the construction of the Will or Exhibit “A.” Rather, the present matter concerns the *validity* of Exhibit “A.” Accordingly, whether the Decedent intended that Exhibit “A” be incorporated by reference into the Will is irrelevant.

Moreover, even in construing a will, the intention of the testator will not be given effect if that intention violates some positive rule of law. Goetz, 140 W. Va. at 429, 84 S.E.2d at 766. For example, in Brookover, the Court held that if the intent of the testator violates the rule against perpetuities, the rule shall prevail and will be applied. Brookover, 118 W. Va. at 232, 190 S.E. 697 at 701. Similarly, in the present matter, Exhibit “A” would not be incorporated by

reference into the Will even if the Court finds that the testator's intention is relevant as this would violate the doctrine of incorporation by reference. Therefore, whether the Decedent intended that Exhibit "A" be incorporated by reference into the Will is inapplicable.

Application of the decision of In re Estate of Teubert, 171 W. Va. 226, 298 S.E.2d 456 (1982) to support the reliance on extrinsic evidence to prove the intent of the Decedent is misplaced. In the present matter, the Court has not been called upon to interpret any purported ambiguous provisions of Exhibit "A." Again, the question before this Court is whether or not Exhibit "A" was properly incorporated by reference into the Will. Therefore, whether the Decedent intended that Exhibit "A" be incorporated by reference into the Will is irrelevant as Exhibit "A" does not satisfy the requirements of incorporation by reference set forth in the Wible decision.

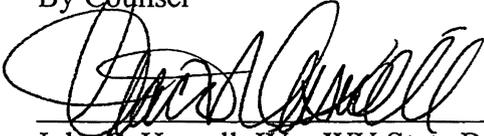
CONCLUSION

It is apparent that Exhibit "A" did not exist in its current form on the date of execution of the Will, August 15, 2006. Accordingly, Exhibit "A" does not satisfy the criteria to be incorporated by reference into the Will. Based on the foregoing, Petitioners respectfully request that this Court reverse the Trial Court's ruling granting summary judgment in favor of Jack Cyfers, Helen Cyfers, Roger Cyfers, Dottie Cyfers, and Wayne Cyfers and direct the Trial Court to enter summary judgment in favor of Petitioners consistent with West Virginia law and the original decision the Trial Court dated September 26, 2011.

Respectfully submitted this 29th day of March, 2013,

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**On Appeal from Honorable F. Jane Hustead, Judge
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Civil Action No. 10-C-744**

CERTIFICATE OF SERVICE

The undersigned, of counsel for Petitioners, does hereby certify that the foregoing **Petitioner's Brief and Appendix** have been served upon the following by this day mailing to them, by first class mail, postage prepaid, a true copy thereof:

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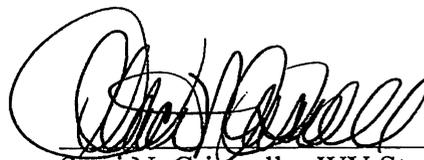
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