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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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' REPLY BRIEF

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I. INTRODUCTION

Respondents argue that a document that was clearly not in existence at the time of the execution of a validly executed will should be incorporated by reference. The Respondents, however, completely disregard the elements and legal requirements for incorporation by reference, and, in doing so, seek to circumvent the intent and purpose behind West Virginia law that requires certain formalities for the proper execution of a will.

In their brief, the Respondents attempt to portray one of the Petitioners, Cathy Cyfers, as some sort of distant or estranged relative that had no relationship with the decedent. At the same time, the Respondents try to portray themselves as "cherished members of [the decedent's] immediate family" and refer to themselves as "the Cyfers Family." Respondents' Brief p. 5. These portrayals are disingenuous, at best. To be clear, four of the five Respondents have the same degree of relationship to the Decedent as do the Respondents. Arguably, the Decedent "cherished" Cathy Cyfers more than any other "immediate" family member as evidenced by her being named as Co-Executrix and the residuary beneficiary under the Last Will and Testament of Lois Jane Cyfers Miller ("Will").

The Respondents place a great deal of emphasis on the fact that Petitioner, Ms. Cyfers, submitted the Will with Exhibit A to probate and listed individuals identified on Exhibit A as distributees. Respondents' Brief p. 14. Surely, the Respondents and their counsel would not expect every lay person designated as an executor under a will to be familiar with the doctrine of incorporation by reference or similar laws of will construction. Even those officials charged with oversight probate matters on a day-to-day basis are not always familiar with such legal intricacies. The fact that Ms. Cyfers submitted the Will to probate with Exhibit A does not imply her concession that Exhibit A is a valid document under West Virginia law.

Nonetheless, for the reasons set forth in Petitioners' Brief and below, Cathy Cyfers, Joseph Cyfers, and Megan Cyfers, respectfully request that the Court reverse the September 18, 2012, Order of the Circuit Court of Cabell County.

II. SUMMARY OF ARGUMENT

Under West Virginia law, a document can be incorporated by reference in a testamentary instrument. However, there are certain requirements that must be met in order for a document to be properly incorporated by reference. If all requirements are not met, then, under the law, the document cannot be incorporated by reference. In this matter, the document the Respondents seek to incorporate by reference does not meet all of the requirements because it was not in existence at the time the Will was executed. Further, the Respondents' cross-assignment of error and contention that notations made on a will have the same effect as notations made to a document sought to be incorporated by reference is incorrect.

III. ARGUMENT

A. Exhibit A in its Present Form Was Not in Existence at the Time Lois Jane Cyfers Miller Executed Her Will.

In their brief, the Respondents repeatedly reference the Petitioners' acknowledgment that "The Decedent did prepare an Exhibit 'A.'" The Respondents incorrectly use this acknowledgment to seemingly imply that the Petitioners concede that (1) Exhibit A was in existence at the time of the execution of the Will and (2) the Exhibit A which was admitted to probate is the exact same document that was in existence at the time of the execution of the Will. Respondents' Brief pp. 12, 17. The Petitioners have never made such concessions, as is suggested in Respondents' Brief. The statement that "the Decedent did prepare *an* Exhibit 'A'" does not mean that the Exhibit prepared by the Decedent is the same Exhibit A that was in existence at the time of the execution of the Will. To the contrary, as stated in Petitioners' Brief

and the record below, it has been the Petitioners' contention all along that the facts clearly show that the Exhibit A which was admitted to probate was not in existence at the time of the execution of the Will.

The fundamental question to be addressed with respect to this issue is whether a document to be incorporated by reference that may be in existence at the time a will is executed is considered to be the same document if changes are subsequently made to the document after the will is executed. The Petitioners contend that not only the law, as set forth in Petitioners' Brief, but also common sense, dictates that the answer to the foregoing question is clearly "no." As an illustrative example, a document in existence at the time a will is executed that consists of one page and contains ten words cannot be considered to be the same document if it later consists of two, three, or four pages, and contains one-thousand, one-hundred, or eleven words. In other words, any subsequent change made to a document that is in existence at the time of execution, no matter how significant or insignificant, makes it a different document.

The purpose for the requirement that the document be in existence at the time of execution is to uphold the integrity of the protections afforded by the requisite formalities of execution. Without such requirement, it would be very easy for a third-party to frustrate the intent of the testator by fraudulently altering the documents to be incorporated by reference after execution or by exerting undue influence over the testator into altering the documents after execution outside the presence of two witnesses. A document that is in existence at the time of execution is not subject to such actions, while a document that is not in existence at the time of execution is. As another illustrative example, it is not inconceivable that a document in existence at the time a will is executed contains the following specific monetary bequest: "I

bequeath to John Doe the sum of $100," and then at the time the document is admitted to probate the document contains the following language: "I bequeath to John Doe the sum of $100,000".

A determination that a document to be incorporated by reference can be changed subsequent to execution and still be considered the same document that was in existence at the time of execution would essentially eliminate the protections afforded by the requisite formalities of execution of having two witnesses present at the time of execution of a testamentary instrument.

Because Exhibit A was not in existence at the time of execution of the Will as set forth above, it cannot be incorporated by reference under West Virginia law. In their brief, the Respondents spend a great deal of time discussing and citing secondary authorities and jurisprudence from other jurisdictions relating to the doctrine of incorporation by reference, but mention only once Wible v. Ashcraft, 116 W. Va. 54, 178 S.E. 516 (1935), the seminal West Virginia case in which this Court has clearly set forth the elements for incorporation by reference under West Virginia law.

In their only mention of Wible, the Respondents try to dispel the applicability of it to the case at hand by arguing that the issue in Wible "was *not* whether extrinsic documents were validly incorporated by reference into the testator's will..." Respondents Brief p. 17. Contrary to the foregoing assertion by the Respondents, that is precisely one of the issues that this Court identified and addressed in Wible. *See* Wible, 116 W. Va. at 58, 178 S.E. at 518 ("Have the deeds been incorporated into the will in the present case?") Significantly, in Wible, this Court adopted the doctrine of incorporation by reference and set forth the rule and elements required for incorporation by reference under West Virginia law. Inexplicably, the Respondents do not even mention or address any of the specific elements set forth in Wible. However, it is clear

that one of the requisite elements for a document to be properly incorporated by reference is that the document must be in existence at the time of execution. In this matter, because Exhibit A was not in existence at the time of execution of the Will as set forth above, it cannot be incorporated by reference under West Virginia law.

B. The Surplusage Theory Does Not Apply to the Determination of Whether or Not Exhibit A was Validly Incorporated by Reference into the Will.

Respondents assert that certain notations on Exhibit A should be disregarded as surplusage. However, the surplusage theory is in applicable with respect to whether or not Exhibit A was validly incorporated by reference into the Will. As set forth above, in order for a document to be validly incorporated by reference into a will under West Virginia law as articulated in the Wible decision, the document must have been in existence at the time of the execution of the will. Exhibit A was not in existence at the time of the execution of the Will. Any changes made to Exhibit "A" after the Will was executed affect its ability to be validly incorporated into the Will and therefore, any notations made thereafter cannot be treated as surplusage

C. The Intent of the Testatrix is Irrelevant with Respect to Whether or Not Exhibit A was Validly Incorporated by Reference in the Will under West Virginia Law.

The Respondents continue to argue that the intent of the Testatrix is relevant even though the document they seek to have incorporated by reference is not a valid testamentary instrument under West Virginia law. As set forth in Petitioners' Brief, the intent of the testator is irrelevant in determining the *validity* of a testamentary instrument. Petitioners' Brief p. 11. The validity of a testamentary instrument must first be established before the intent of the testator is even considered. *See* Grace v. Klein, 150 W. Va. 513, 147 S.E.2d 288 (1966).

In Klein, the testatrix wrote a letter that was testamentary in nature to a bank directing the disposition of certain assets to the testatrix's sister upon death. Upon the death of the testatrix, the sister sought to have the dispositions contained in the letter enforced. The Court refused to do so holding that although it appears that the testatrix did intend to make dispositions of property to her sister, the plaintiff, such disposition, being testamentary in character, must be done "in accordance with the requirements of law pertaining to the disposition of property by will." Thus, even though the testatrix intended to dispose of her assets in a certain manner stated in the letter, such intent was irrelevant because the letter was not a valid testamentary instrument under West Virginia law.

Applying the Klein holding to the present matter, any supposed intent of the Testatrix set forth in Exhibit A is irrelevant because Exhibit A is not a valid testamentary instrument under West Virginia law. Exhibit A was not executed in accordance with the requisite formalities prescribed by West Virginia law nor was it properly incorporated by reference under West Virginia law. Based on the foregoing, because Exhibit A was not property incorporated by reference into the Will, the intent of the Testatrix is irrelevant in this matter.

D. The Invalidation of Exhibit A Does Not Invalidate the Will.

Respondents have asserted a cross-assignment of error that notations made on a will should have the same effect as notations made to a document that is to be incorporated by reference. That is simply not the case.

With respect to Exhibit A, the document the Respondents attempt to incorporate by reference, the notations contained therein were made after the execution of the Will which simply shows that the Exhibit A that was in existence at the time the Will was executed is not the same document that was admitted to probate. Thus, the mere existence of notations on Exhibit A

alone does not automatically preclude it from being incorporated by reference. Rather, the notations provide clear evidence that the Exhibit A which was admitted to probate was not in existence at the time the Will was executed. Had the notations been made prior to the execution of the Will—which they clearly were not—then Exhibit A possibly could have been incorporated by reference under West Virginia law. With respect to the Will, the law simply does not state that handwritten notations invalidate a will. Rather, as noted in Respondents' brief, the law is that alterations made after execution of a will are of no effect, and the will must be enforced as though no changes had been made. Respondents' Brief pp. 15, 18. Part of the rationale behind the law, which is similar to the rationale behind the requirement that a document be in existence at the time of execution to be properly incorporated by reference, is that handwritten notations on a Will are not subject to the protections afforded by the requisite formalities of execution. Based on the foregoing, Respondents' cross-assignment of error that notations made on a will have the same effect as notations made to a document sought to be incorporated by reference is a misapplication of the law.

IV. CONCLUSION

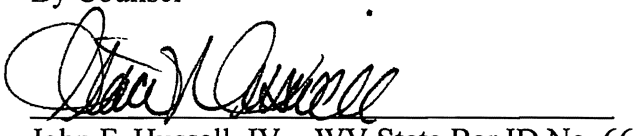
The document the Respondents seek to incorporate by reference does not meet the requirements for incorporation by reference under West Virginia law because it was not in existence at the time the Will was executed. Further, Respondents' cross-assignment of error and contention that notations made on a will have the same effect as notations made to a document sought to be incorporated by reference is incorrect. 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 1st day of July, 2013,

CATHY CYFERS, JOSEPH CYFERS,
AND MEGAN CYFERS

By Counsel



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CERTIFICATE OF SERVICE

The undersigned, of counsel for Petitioners, does hereby certify that the foregoing **PETITIONERS' REPLY BRIEF** has 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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Done this 1st day of July, 2013.

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