

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, and WAYNE CYFERS,**

Respondents

Hon. F. Jane Hustead, Judge
Circuit Court of Cabell County
Civil Action No. 10-C-744

**BRIEF OF THE RESPONDENTS
AND CROSS-ASSIGNMENT OF ERROR**

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I. STATEMENT OF THE CASE

This case is about the heartless efforts of a niece by marriage to disinherit the decedent's entire family and frustrate the decedent's intent by arguing that notations on a will should be ignored, but that similar notations on an attachment to the will invalidate the attachment so as give the niece the entire residue of the decedent's estate.¹

Respondents, Jack Cyfers, Helen Cyfers, Roger Cyfers, Dottie Cyfers, and Wayne Cyfers [Cyfers Family] are all beneficiaries of the Last Will and Testament of Lois Jayne Cyfers Miller [Decedent]. App. 13-26. Petitioner, Cathy Cyfers [Ms. Cyfers],² was designated in the Last Will and Testament as one of two Co-Executor, but after being appointed by the County Commission as Co-Executor, App. 18, Ms. Cyfers refused to administer the Will in accordance with its provisions and the Cyfers Family was forced to retain counsel and file an action with the County Commission to have Ms. Cyfers removed as a Co-Executor, App. 412.

In response to the Cyfers Family's action to remove her as a Co-Executor, Ms. Cyfers filed a declaratory judgment action against the Cyfers Family essentially seeking to invalidate

¹ Not only did the niece attempt to thwart the intent of the decedent regarding the disposition of her estate through the inconsistent argument that notations on a will can be ignored but notations on an attachment to the will invalidate the attachment, she sought the seal the lips of the intended beneficiaries of the decedent through the filing of a motion in limine under the Dead Man's Statute that this Court recently invalidated. App. 562-566; Syl. pt. 6, *State Farm Fire & Cas. Co. v. Prinz*, No. 11-1265 (W. Va. May 21, 2013).

² The other two petitioners are Ms. Cyfers' husband and daughter. Although the petitioners' brief mentions other members of the Cyfers' family, the sheriff, the sheriff's attorney, and Ms. Cyfers' co-executor, Philip Vallandingham, none of those parties litigated the issues resolved by the Circuit Court. For no ostensibly reason other than to generate fees and/or expenses, the co-executors, Mr. Vallandingham and Cathy Cyfers (whose inherent conflict of interest is palpable), filed a brief with this Court taking no position. Indeed, the Circuit Court specifically appointed the sheriff as administrator in order to "minimize fees" and ordered the co-executors "not to take a position in the . . . declaratory judgment action," App. 522, but both have continued to run up their fees, filing unnecessary pleadings, including a brief with this Court; attending hearings and the trial; and engaging in other activities with no ostensible purpose than to erode the proceeds of the Estate.

the very Will she had admitted to probate and had been appointed by the Cabell County Commission to administer as a Co-Executor. App. 3-12.

After the filing of this declaratory judgment action, the County Commission removed Ms. Cyfers as a Co-Executor, ruling as follows: (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."³ App. 412-413.

Thereafter, Ms. Cyfers pursued her own individual interests unsuccessfully prosecuting her suit filed in response to the Cyfers Family's successful action to remove her as a Co-Executor.⁴ As set forth in her suit, the two disputed issues raised by Ms. Cyfers were (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

³ Since entry of this order by the Cabell County Commission on November 24, 2010, the Sheriff has served as Executor of the Estate of Ms. Miller.

⁴ During the pendency of this litigation, the assets of the Estate have been frozen. App. 530.

reference.” App. 10. Both of those issues have been fully and finally determined in favor of the Cyfers Family, App. 410-423, and the judgment of the Circuit Court should be affirmed.

A. The Decedent’s Wishes Regarding Distribution of Her Estate Are Made Abundantly Plain in Her Last Will and Testament.

On January 27, 2009, Lois Jayne Cyfers Miller died a resident of Cabell County. App. 7. On August 15, 2006, the Decedent had executed her Last Will and Testament [“Will”], which is attached hereto as Exhibit A.⁵ The Will executed by Decedent was witnessed by Stacy Clark and Boyce Griffith, Esq., a Hamlin attorney who prepared the Will for the Decedent. Id. Upon the Decedent’s death, this Will with an “Exhibit A” attached was submitted for probate by Ms. Cyfers as Co-Executor of the Estate. App. 7-8.

An order admitting the Will to probate including Exhibit A 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. App. 411.

On that same date, May 14, 2009, another order was entered by the Cabell County Commission appointing Philip Vallandingham, another relative, and Ms. Cyfers “under the provisions of the Last Will and Testament of the said decedent” as “Co-Executors.” App. 411. Attached to that order was a list of distributees, including respondents, submitted to the Cabell

⁵ She had executed a previous Will in 1999 that, in large measure, was consistent with the Will she executed on August 15, 2006. 36. As in her 1999 Will, the Decedent carefully listed in columns designated “Name,” “Relationship,” and “Property,” each person she wanted to receive each item of property and their relationship to her.

County Commission by those Co-Executors, under oath, identifying the beneficiaries as those individuals referenced in the Will, including Exhibit A. Id.

On December 3, 2009, the Co-Executors filed an appraisal duly recorded by the Cabell County Clerk in Book No. 522, Page 510, listing the total value of probate assets at \$296,987.27. App. 411. Soon thereafter, however, the Co-Executors stopped administering the Will in accordance with its terms and despite protestations from the Decedent's relatives to the contrary, began administering the Will in a self-serving matter.

Eventually, after the Co-Executors, including Ms. Cyfers, refused to administer the Will in accordance with its terms, the Cyfers Family filed an action to remove the Co-Executors, App. 411, and, in response, on October 13, 2010, the Co-Executors filed a petition for declaratory relief in the Circuit Court of Cabell County 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." App. 26.

The County Commission conducted a hearing on the Cyfers Family's petition to remove the co-executors and on November 24, 2010, as previously noted, 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. App. 411-412.

Thereafter, Ms. Cyfers continued her attack on the plain terms of the Decedent's Will in the form of the declaratory judgment action she had filed as a Co-Executor.

As with her previous Will, Articles II and VII of the 2006 Will contain hand-written notations. **Exhibit A.** 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. *Id.* The Decedent did prepare an Exhibit A using different colors of ink. *Id.* 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 bequeathed these items are written in both black and blue ink. *Id.*

The Decedent's niece by marriage, Ms. Cyfers, after being appointed as Co-Executor to administer the Will, including Exhibit A, decided to try to exploit the fact that the Decedent used two colors of ink to make handwritten notations on Exhibit A to the Will to express her wishes to argue that Exhibit A should be invalidated; that similar notations on the Will should be ignored; and that she should receive all of the property the Decedent indicated on Exhibit A should be inherited by the cherished members of her immediate family should instead be received by Ms. Cyfers, a niece by marriage, as residuary beneficiary under the Will.

Plainly, as found by the Circuit Court, the Decedent's wishes with respect to the distribution of her Estate to members of her immediate family can readily be determined from the Will and Exhibit A. App. 410-423.

For example, as acknowledged in Ms. Cyfer's brief, Petitioners' Brief at 2, after the Decedent made arrangements, on her own, for her funeral, she made a handwritten notation on the face of the Will: "I went to McGhee Handley with Cathy took care of (paid by) check for my needs. Save all of you the trouble!!!" Exhibit A. In other words, in order to clarify her testamentary intent regarding payment of her funeral expenses, the Decedent, after executing the 2006 Will, simply noted on the Will that those expenses had been paid. Moreover, it was the petitioner, Ms. Cyfers, who assisted the Decedent in making those funeral arrangements noted by the Decedent on the face of the Will.

Likewise, after Ms. Cyfers elicited transfer of the Decedent's Blazer to Ms. Cyfers prior to the Decedent's death, the Decedent noted on the face of the Will: "My Blazer is to go to Cathy." Id. Again, Ms. Cyfers acknowledges this in her brief. Petitioners' Brief at 2.

As to these notations on the face of the Will, both of which directly involved Ms. Cyfers, she argued in the Circuit Court and continues to argue that they can be ignored, but that similar notations on Exhibit A to the Will cannot be ignored and that Exhibit A should essentially be torn away from the Will which will result in Ms. Cyfers receiving everything listed in Exhibit A because she is residuary beneficiary under the Will.

As the Circuit Court correctly found, however, just as the Decedent's wishes as expressed in the Will can be clearly determined, her wishes as expressed in Exhibit A to the Will can be clearly determined. App. 411-412.

First, despite Ms. Cyfers' arguments to the Circuit Court to the contrary,⁶ she now concedes that, "The Decedent did prepare an Exhibit 'A.'" Petitioners' Brief at 3.

Second, all of the notations on Exhibit A to the Will are in blue and black ink just as the notations on the Will are in blue and black ink. **Appendix A.**

Third, just as some of the notations on Exhibit A to the Will appear to have been written after its execution, some of the notations on the Will appear to have been made after its execution. *Id.*

Finally, just as none of the post-execution notations in blue and black ink on the Will prevent discernment of the Decedent's testamentary intent none of the notations on Exhibit A prevent discernment of the Decedent's testamentary intent. *Id.*

Specifically, with respect to the argument by Ms. Cyfers that Exhibit A should be disregarded because it contains a date, November 29, 2006, in the Decedent's handwriting in blue ink, which was three months after the Will was executed, the Cyfers Family notes that the Will, which under which Ms. Cyfers seeks to recover as residuary beneficiary, contains a date, August 17, 2007, written in the Decedent's handwriting in blue ink, which is over a year after the Will was executed. *Id.*

In other words, if there is a handwritten notation on Exhibit A which contains the Decedent's wishes that her Estate be distributed to her immediate family members that was made three months after the Will was executed, that handwritten notation invalidates Exhibit A, and Ms. Cyfers receives all that property as residuary beneficiary, but if there is a handwritten

⁶ Her argument in the Circuit Court, which she has now abandoned, was that because there were post-execution notations on Exhibit A it could not be determined whether Exhibit A existed at the time of execution of the Will and, therefore, Exhibit A should be disregarded in its entirety. Faced with the inconsistency of arguing for invalidation of Exhibit A due to post-execution notations but for validation of the Will despite the same post-dated notations, Ms. Cyfers has changed her argument on appeal.

notation on the Will which contains the Decedent's wishes regarding payment of her funeral expenses and the gifting of a truck to Ms. Cyfers that was made over a year after the Will was executed, that handwritten notation should be ignored. Obviously, the Circuit Court correctly rejected this facially and logically inconsistent argument.

More important than the inconsistency between embracing post-execution handwritten notations on the Will while rejecting post-execution handwritten notations on Exhibit A to the Will, the nature of the November 29, 2006, notation on Exhibit A itself demonstrates that it raises no doubt as to the Decedent's testamentary intent. *Id.*

The notation on Exhibit A by the Decedent in blue ink relied upon by Ms. Cyfers simply 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." *Id.*

This notation has no impact on any testamentary disposition, but is surplusage, merely explaining why on Exhibit A immediately above this entry the Decedent 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." *Id.*

Indeed, next to the name of her late husband's sister, Delores Miller Young, the Decedent wrote, "some of this money Joe made," to further explain her testamentary intent, and next to the

name of her brother, Wayne Cyfers, the Decedent wrote, "Closest relative," to further explain her testamentary intent. *Id.*

Under Ms. Cyfers' theory of fairness, however, Delores Miller Young, the Decedent's sister-in-law, and Wayne Cyfers, the Decedent's brother, get nothing, but all of what the Decedent intended to give to her sister-in-law, because some of the Decedent's Estate was earned by the Decedent's husband, who was Ms. Young's brother, and all of what Decedent intended to give to her brother as her "Closest relative," will go instead to Ms. Cyfers, the Decedent's niece by marriage.

Similarly, the other notations on Exhibit A to the Will in the Decedent's handwriting which are both in blue and black ink, have no impact on any testamentary disposition, but are surplusage.

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." *Id.* Again, under Ms. Cyfers' theory of fairness, notations on the face of the Will in which she was directly involved are to be ignored, but a notation on Exhibit A made by the Decedent after Ms. Cyfers convinced the Decedent that, in addition to the truck, the Decedent should also give Ms. Cyfers the proceeds of a Chase Bank checking account prior to her death, should invalidate Exhibit A.⁷

⁷ In addition to the facial inconsistency of Ms. Cyfers' argument that notations on the Will can be ignored but notations on Exhibit A invalidate it, one of the most frustrating aspects of this litigation for the Cyfers Family is that Ms. Cyfers is seeking to effectively disinherit the Cyfers Family because of notations made by the Decedent that were precipitated by Ms. Cyfers persuading the Decedent to give Ms. Cyfers advances on her inheritance. How can the beneficiary of a will convince the testator to make advances from the testator's estate and then argue that once the testator makes notations on an attachment to the will explaining those advances to the other beneficiaries, the attachment is thereby invalidated and the beneficiary who received advances now deserves to receive everything as residuary beneficiary.

To Joseph and Cathy Cyfers, the Decedent 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, Exhibit A to the Will 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." Id.

Finally, on the last page of Exhibit A, the Decedent 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 the Decedent 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. Id.

II. SUMMARY OF ARGUMENT

Petitioners do not dispute that the Decedent executed her Last Will and Testament with Exhibit A attached on August 15, 2006, as that matter is uncontested. Petitioners do not dispute that both the Will and Exhibit A contain handwritten notations made after the Will with Exhibit

A attached was executed. Petitioners somehow argue that the post-execution notations on the Will are to be ignored, but the post-execution notations on Exhibit A invalidate Exhibit A but not the entire Will which incorporates by reference Exhibit A, and that Ms. Cyfers should receive all of the property the Decedent wanted her closest relatives to receive because of Ms. Cyfers' status as residuary beneficial. This is wrong not only as a matter of fairness, but as a matter of law, and none of petitioners' three assignments of error have any merit.

First, petitioners' argument that Exhibit A is to be disregarded relying on law providing that a document not in existence at the time of the execution of a will is to be disregarded has no merit as petitioners concede it was in existence at the time of execution of the Will in this case.

Second, petitioners' argument that the surplusage rule applies only to holographic wills has no merit as *Teubert* itself involved both typewritten and handwritten documents, and many causes have applied a surplusage rule to typewritten instruments with handwritten notations.

Third, petitioners' argument that the Decedent's testamentary intent is irrelevant has no merit as testamentary intent is of paramount importance in cases regarding the interpretation of testamentary instruments.

Finally, if petitioners' argument that post-execution notations on the attachment to the will invalidate the attachment, then post-execution notations on the will should also be deemed to invalidate the will, which means that the Decedent's Estate will pass by intestacy.

Accordingly, petitioners' appeal has no merit and the Circuit Court's ruling that the notations on both the Will and Exhibit A were surplusage should be affirmed. Alternatively, if post-execution on the attachment to the will invalidate the attachment, then post-execution notations on the Will should be deemed to invalidate the Will and the Decedent's property should pass by intestacy.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Cyfers Family do not believe oral argument in this case is necessary, but that it can be decided by memorandum decision as even a cursory examination of the Decedent's Will, which is attached as **Exhibit A**, conclusively demonstrates that the Circuit Court was correct in ruling that the handwritten notations on both the Will and Exhibit A were surplusage and the Decedent's testamentary intent was clearly reflected on the face of the Will and Exhibit A.

IV. ARGUMENT

A. The Standard of Review of Petitioners' Appeal of Summary Judgment is *De Novo*.

The Cyfers Family concurs that the standard of review in this appeal from an award of summary judgment is *de novo*. Petitioners' Brief at 6. The Cyfers Family does dispute, however, Ms. Cyfers' reference to the impropriety of an award of summary judgment where there are contested issues of fact. *Id.* As noted in the petitioners' brief, this case was resolved on summary judgment because both sides stipulated that there were no genuine issues of material . Petitioners' Brief at 6. Consequently, petitioners do not argue that this Court should set aside the judgment because there are genuine issues of material fact or because the Circuit Court's factual findings were unsupported by the evidence, but only that the Circuit Court erred in resolving uncontested facts against them. Petitioners' Brief at 12.

B. Because Petitioners Have Conceded that the Decedent Prepared Exhibit A and Attached it to Her Last Will and Testament at the Time of its Execution, the Circuit Court Did Not Err in Considering Both the Will and Exhibit A as the Decedent's Last Will and Testament.

As previously noted, petitioners now concede that, "The Decedent did prepare an Exhibit 'A.'" Petitioners' Brief at 3. So, petitioners do not contest the fact that when the Decedent executed her Will attached to that Will and incorporated by reference was Exhibit A.

Petitioners' brief also concedes that not only are there handwritten notations on Exhibit A apparently made after the Will was executed, but that there are handwritten notations on the Will made after the Will was executed. Petitioners' Brief at 2 ("The Will itself contains hand-written notations dated after the execution of the Will.")⁸

Nevertheless, petitioners argue that because Exhibit A is an attachment, it is to be thrown away even though the Will incorporates it by specific reference and the Decedent's former Will was structured in the same manner, and the intended beneficiaries of the Decedent get nothing and Ms. Cyfers, as residuary beneficiary, gets everything. Fortunately for the Cyfers Family, not only would this violate every basic notion of fairness, it is not the law.

1. Decedent's Will Incorporated Exhibit A By Reference Which Petitioners Do Not Dispute Was In Existence At the Time She Executed the Will and Became Part of the Will Upon its Execution.

"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).

"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

⁸ Of course, if handwritten notations on Exhibit A cast doubt on whether all of its contents were there at the time of execution of the Will, then the entire Will is invalid because Exhibit A was part and parcel of the Will. See *Harmer v. Boggess*, 137 W. Va. 590, 73 S.E.2d 264 (1952)(property attempted to be devised and bequeathed by invalid residuary clause passes as in case of intestacy). At that point, the Decedent's property will pass by the laws of intestacy not to Ms. Cyfers, but to the statutory heirs of the decedent, who are the Cyfers Family, not Ms. Cyfers

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).

“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).⁹

In this case, “Exhibit A” (a) is repeatedly referenced in the Will; (b) is attached to the Will; (c) is written in the Decedent’s handwriting; and (d) the Decedent’s prior Will, executed in 1999, also had an “Exhibit A” attached indicating her wishes. App. 288-295. Petitioners argue that handwritten notations on Exhibit A place into doubt whether it existed at the time the Will was executed in its present form, but there is no genuine issue of material fact regarding this question and, indeed, it was Ms. Cyfers who as Co-Executor submitted the Will with Exhibit A to probate and listed as distributees the individuals identified on Exhibit A.

2. Petitioners Presented No Evidence that the Decedent Intended to Revoke Either the Will or Exhibit A by Making Non-Testamentary Notations on Both After the Will Was Executed.

The only evidence relied upon by petitioners 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 Decedent's testamentary intent.

First, the burden of proving the proper execution of a will rests upon the person proposing its validity and enforcement. *In re Siler's Estate*, 155 W. Va. 743, 753, 187 S.E.2d

⁹ 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); see also W.W. Allen, *Validity of Will Written on Disconnected Sheets*, 38 A.L.R.2d 477 § 2 (1954).

606, 614 (1972). Here, as petitioners do not dispute that there was an Exhibit A attached to the Will at the time of its execution, there is no question it was properly executed and Exhibit A, as a matter of law, because part and parcel of the Will at the time of its execution.

Second, once the validity of the execution of a will has been established, the burden of proving its revocation rests upon the person asserting that it was revoked by its maker. Syl. pt. 3, in part, *Canterberry v. Canterbury*, 120 W. Va. 310, 197 S.E. 809 (1938). Here, petitioners offered no evidence that by either the notations on the Will after its execution regarding the Decedent's payment of funeral expenses or regarding the gifting of a motor vehicle to Ms. Cyfers or the notations on Exhibit A explaining the Decedent's testamentary intent were intended by the Decedent to effectuate a revocation of either the Will or Exhibit A.

3. Post-Execution Alterations on a Will That Do Not Change the Sense of the Will Do Not Invalidate It.

Alterations on a will or any other document attached thereto which becomes part of the will at time of its execution, including the striking out of certain words and the insertion of others, that do not change the sense of the will do not invalidate the will irrespective of whether the alterations were made before or after its execution. 79 Am. Jur. 2d *Wills* § 526 (2012); see also 95 C.J.S. *Wills* § 218 (2012)(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). Alterations made after execution of a will are of no effect unless the will is later re-executed or republished and the will must be enforced as though no changes had been made.¹⁰

¹⁰ *Technical Advice Memorandum*, 1979 WL 58448 (Internal Revenue Service); 2 PAGE ON WILLS § 22.3 (1960); L.S. Tellier, *Effect of Testator's Attempted Physical Alteration of Will After Execution*, 24 A.L.R. 2d 514 (1951); W.W. Allen, *Interlineations and Changes Appearing on Face of Will*, 34 A.L.R. 2d 620 (1954); *Powling v. Gilliland*, 286 Ill. 530, 122 N.E. 70 (1919).

Unattested changes to a will after its execution are to be disregarded and the will is valid as originally written if the original intention of the maker of the will can be ascertained. If unsigned, unattested changes do not alter the legal effect of the will, and are made merely with purpose of better identifying individuals, the alterations are immaterial and the will, with changes intact, may be deemed valid and enforceable. 79 Am. Jur. 2d *Wills* § 522 (2012).

Finally, “Handwritten strikeouts and interlineations in will were not valid codicils and thus did not revoke the instrument as a will, as there was no showing that the testatrix intended to revoke the will or that the testatrix, or someone she directed, wrote the strikeouts or interlineations. *In re Estate of Speers*, 2008 Ok. 16, 179 P.3d 1265 (Okla. 2008).” Id. at § 521.¹¹

Here, as the Circuit Court properly determined, none of the post-execution entries changed the sense of the Will and are to be disregarded as the intention of the Decedent can be readily ascertained by even a cursory examination of the Will and Exhibit A. App. 410-423.

4. Because the Decedent’s Testamentary Intent Can Readily Be Ascertained by Examination of the Will and Exhibit A and Because None of the Post-Execution Entries Were Testamentary in Nature, the Circuit Court Properly Rejected Petitioners’ Effort to Sever Exhibit A from the Will.

Only where a will is too vague and uncertain to enforce should the maker’s obvious intent with respect to 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). Here, because the Will and Exhibit A, which

¹¹ See also *Matter of Estate of McGrew*, 906 S.W.2d 53 (Tex. Ct. App. 1995)(marks on will made by testator's relative, who borrowed will as form to use for her own, did not render will invalid; testator's purpose and intent was unambiguous); *Matter of Estate of Land*, 204 A.D.2d 64, 611 N.Y.S.2d 833 (1994)(while it was irregular for testator to initial, out of presence of attorney who prepared will, subsequent change in clause relating to particular bequest, under the circumstances it was clear what was intended, and correction of typographical error was not sufficient basis to deny probate, in case in which testator had made the same bequest of the same property in prior will); *Diaz v. Duncan*, 406 N.E.2d 991 (Ind. Ct. App. 1980)(immaterial alterations of a will, even though made by a beneficiary, are of no consequence).

petitioners now concede was in existence at the time of execution, is not too vague or uncertain to enforce because of post-execution notations on both the Will and Exhibit A which are surplusage, the Decedent's obvious testamentary intent should be vindicated.

5. None of the Legal Authority Relied Upon by Petitioners Has Any Application to this Appeal.

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

Rather than holding, as Ms. Cyfers argues, that the deeds were not incorporated by reference, this 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*. Accordingly, *Wible* undermines the position of Ms. Cyfers.

Certainly, the Cyfers Family does not disagree with the proposition that "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." Petitioners' Brief at 7. But petitioners now concede that Exhibit A was in existence at the time the Decedent executed the Will. So, petitioners' argument makes little sense.

In her brief, Ms. Cyfers also cites *Triplett's Executor v. Triplett*, 161 Va. 906, 172 S.E. 162 (1934), but the viability of that case was called into question in *Technical Advice Memorandum*, 1979 WL 5844, in which it was noted:

Triplett went on to hold that the evidence in the case supported a finding that the alternations were made after execution of the will and that, therefore, 'no part of the will may be admitted to probate as a will attested by witnesses.' This conclusion, however, would appear to be in conflict with the Virginia Supreme Court's decision in *Thompson v. Royall*, 175 S.E. 784 (Va. 1934), decided just nine months after *Triplett*. In *Thompson*, the court cites with approval the following language from an Illinois case, *Powling v. Gilliland*, 286 Ill 530, 122 N.E. 70, 3 ALR 829 (1919):

The great weight of authority is to the effect that the mere writing upon a will which does not in any wise physically obliterate or cancel the same is insufficient to work a destruction of a will by cancellation, even though the writing may express an intention to revoke and cancel. * * * To hold otherwise would be to give to words written in pencil, and not attested to by witnesses nor executed in the manner provided by the statute, the same effect as if they had been so attested.

Thus, interlineations made by a testator after execution are of no effect unless the will is subsequently re-executed or republished, and the will must be admitted to probate as though the changes had never been made. *Thompson v. Royalls, supra*. See also 2 PAGE ON WILLS, section 22.3 (1960); Anno., 24 A.L.R. 2d 514 (1951); Anno., 34 A.L.R. 2d 620 (1952).

(Emphasis supplied).

Of course, this is the heart of the Cyfers Family's argument, i.e., whether the Decedent made interlineations on the attachment to her Will is irrelevant as long as her testamentary intent can be reasonably determined. Again, Ms. Cyfers is trying to impose upon the Cyfers Family a burden that simply does not exist. Consequently, there is no merit in petitioners' argument that Exhibit A should be disregarded and the Circuit Court's judgment should be affirmed.

C. Because Petitioners Have Conceded that Both the Will and Exhibit A Contain Post-Execution Notations and Because None of those Post-Execution Notations Create Any Doubt as to the Decedent's Testamentary Intent, But Only Explain the Decedent's Testamentary Intent, the Circuit Court Did Not Err in Ruling that the Notations on Both the Will and Exhibit A Are Surplusage.

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

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.

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.

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.*

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.*

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.

First, this 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.

Second, this 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).

Finally, even though Mr. Teubert’s documents were ambiguous, this 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 right hand 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.

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.

"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). "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. (Footnotes omitted).

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

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.

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 the Decedent's intent and to dispose of her property.

With respect to the argument by petitioners 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 Cyfers Family notes that the Will, which under which defendant, Cathy Cyfers, seeks to recover as residuary beneficiary, contains a date, August 17, 2007, written in the Decedent's handwriting in blue ink, which is over a year after the Will was executed. **Exhibit A.**

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

As previously noted, the first notation by the Decedent 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!!" *Id.* This notation has no impact on any testamentary disposition, but is surplusage; merely noting the fact that after the Will was executed, the Decedent took care of her funeral arrangements which are referenced in the Will.

The second notation by the Decedent 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." *Id.* Again, this notation has no impact on any testamentary disposition, but is surplusage, merely noting the Decedent's

wish that Ms. Cyfers receive the Decedent's truck, which was given to her before the Decedent's death, and her preference that two of her relatives buy her house from her estate upon her death.

The third notation on Exhibit A by Ms. Miller in blue ink, relied upon by Ms. Cyfers to try to wrestle the estate away from the Decedent's intended beneficiaries, 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." Id. Again, this notation has no impact on any testamentary disposition, but is surplusage, merely explaining why on Exhibit A immediately above this entry the Decedent 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." Id. 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. Id.

Finally, the other notations in the Decedent's handwriting which are both in blue and black ink, have no impact on any testamentary disposition, but are surplusage. 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." Id.

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. *Id.* There is absolutely no evidence other than the non-testamentary notation entered on November 29, 2006, that the Decedent made any notation on Exhibit A to the Will which changed her testamentary intent regarding property owed by the Decedent at the time of her death. There is also absolutely no evidence that other than the notations that are dated after execution of the Will, that any of the notations on either the Will or Exhibit A not referencing post-execution circumstances, such as the payment of funeral expenses, the gifting of a vehicle to Ms. Cyfers, or the gifting of tens of thousands of dollars to Ms. Cyfers and her husband, were made after the Will was executed with Exhibit A attached on August 15, 2006.

Petitioners' representation that Mr. Griffith who drafted and witnessed both the Decedent's 1999 and 2006 Wills could not say "that Exhibit 'A' in its present form was not in existence as of the date of the execution of the Will," Petitioners' Brief at 8, is completely misleading. It was stipulated that neither the Will nor Exhibit A were in the same form upon the Decedent's death as they were at the time of their execution. There is a handwritten notation on the face of the Will made more than a year after its execution that Ms. Cyfers asked the Circuit Court and is asking this Court to ignore and there is a handwritten notation on the face of Exhibit A to the Will that was made about two months after its execution. So, the fact that Mr. Griffith agrees with the undisputed facts is hardly news and hardly justification for ignoring the Decedent's obvious testamentary intent.¹²

¹² Indeed, Mr. Griffith, who drafted the Will in this case, testified that the only change to the Will he could identify was inclusion of the one sentence, "I love you Delores (11-19-06)," App. 95, and the Circuit Court was wise not to frustrate the Decedent's obvious intent because she decided, apparently after executing the Will with Exhibit A, referenced therein, to place a note memorializing her affections.

As a last-gasp argument, Ms. Cyfers argues that because *Teubert* was a holographic will case, the surplusage rule only applies to holographic wills. Petitioners' Brief at 10. Like the rest of her legal arguments, however, Ms. Cyfers is simply wrong.

The surplusage rule applies to all wills, whether holographic or typewritten. The question is whether "holographic," i.e., handwritten notations on a testamentary instrument, is surplusage, not whether the testamentary instrument itself is holographic or typewritten., and one does not have to venture far to refute Ms. Cyfers' arguments to the contrary.

As previously noted, the testamentary documents in the *Teubert* case itself were both typewritten and handwritten – the same as the testamentary documents in the instant case. Indeed, the *Teubert* case is listed in a leading annotation on holographic wills as one where "the courts held or recognized that a holographic will was not rendered invalid by the presence of typewritten matter in the body of the will." Jay M. Zitter, *Requirement That Holographic Will, or its Material Provisions, Be Entirely in Testator's Handwriting as Affected by Appearance of Some Printed or Written Matter Not in Testator's Handwriting*, 37 A.L.R.4th 528 § 7[a] (1985).

Moreover, *Charleston Nat. Bank v. Thru the Bible Radio Network*, 203 W. Va. 345, 507 S.E.2d 708 (1998), is cited in this same annotation for the proposition, "Testator's holographic will was a valid, despite presence of typewritten portion, where typed portion merely provided address for named beneficiary that was already partially provided in will." *Id.* at § 8.¹³

Other courts have applied the surplusage rule in circumstances similar to this case.

¹³ See also *Re Estate Schuh*, 17 Ariz. App. 172, 496 P.2d 598 (1972)(the fact that letterhead and some additional material were printed did not invalidate a document as a holographic will, because the printed material was surplusage and could be excluded by the court without affecting the handwritten material); *Fairweather v Nord*, 388 S.W.2d 122 (Ky. 1965)(that an instrument, which was a completion of a printed form, constituted a valid holographic will, since that portion of the instrument written by the testatrix in her handwriting was complete in itself, and the printed words were mere surplusage).

In *In re Estate of Hunsicker*, 2010 WL 5596712 at *1. (Pa. Com. Pl.), for example, the court was presented with post-execution handwritten notations on a typewritten will and a codicil to the will entirely in the decedent's handwriting. Specifically rejecting the argument advanced by Ms. Cyfers in this case, the court held:

Here, both the will and codicil proposed to probate are in writing and signed by the decedent. However, the registrar found that the decedent revoked his will by certain handwritten notations contained therein and it was subsequently replaced by the codicil. We don't agree.

Although the will contains interlineations and handwritten notations, the substance of the residuary disposition of decedent's estate is not affected and the codicil maintains an orderly connection to the will. In the will, all the rest, residue and remainder of decedent's estate is left to his brother. Clearly what is written on the codicil is part of the residue of the decedent's estate and this, also, goes to the brother. The only items missing in the will would be the alternate beneficiary designations that were deleted from the original will.

In the items he deleted from his original will, the alternate beneficiaries are his two nieces and Mr. Steltzman. Under our findings, Mr. Steltzman still receives his specific bequest and the nieces receive the residuary as daughters of decedent's brother.

Although the will contains interlineations and handwritten notations, the substance of the residuary disposition of decedent's estate is not affected and the codicil maintains an orderly connection to the will.

Similarly, in *Eckstein v. Estate of Dunn*, 174 Vt. 575, 816 A.2d 494 (2002), the Vermont Supreme Court held that because a court's primary objective is to discern the testator's intent, a testator's will, which contained handwritten red ink deletions, revisions and notations, was not facially invalid, although undated and including numerous handwritten alterations, where record indicated will was clearly signed by testator and properly witnessed by three competent, non-beneficiary witnesses; record indicated testator's desire to change her estate plan was unequivocally expressed; handwriting expert and testator's attorney testified alterations were in

testator's handwriting; and although many alterations were without explanation and left dispositive provisions ambiguous, ambiguities were not sufficient to render will invalid.¹⁴

For example, interlineations made after execution of a will which do not affect its validity include (a) identification of certain female devisees by their married names; (b) correction of the designation of the residence of a legatee; and (c) filling in the blanks or completing the sense of the instrument. 79 Am. Jur. 2d *Wills* § 526 (Footnotes omitted).

Consequently, the Circuit Court was correct in rejecting Ms. Cyfers' argument that non-testamentary handwritten notations on a typewritten will may be disregarded as surplusage and the testamentary intent of the Decedent vindicated.

D. Because Testamentary Intent is Paramount, the Circuit Court Did Not Err in Considering the Decedent's Testamentary Intent in Interpreting the Will and Exhibit A.

The weakness of petitioners' arguments is no more amply illustrated than in their final argument that it was error for the Circuit Court to consider the Decedent's testamentary intent. Petitioners' Brief at 11-12.

Ms. Cyfers knows it was the Decedent's testamentary intent that her Estate be distributed in accordance with her Will with Exhibit A attached. Ms. Cyfers knows that it was not the Decedent's intent to disinherit her own siblings, her husband's siblings, and other close family members. Ms. Cyfers knows that it was not the Decedent's intent to give Ms. Cyfers advances on her inheritance in terms of the truck and checking account, but to essentially give to Ms.

¹⁴ See also *Clark v. National Bank of Commerce*, 304 Ark. 352, 355, 802 S.W.2d 452, 454 (1991)("We have held, and it appears to be the general rule, that non-testamentary, nondispositive language appearing below the signature of the maker of a will, will not invalidate the instrument."); 79 Am. Jur. 2d *Wills* § 526 (2012)("Alterations in the form of the will do not require explanation nor is it necessary to show that the striking out of words and the interlineation of others, which do not change the sense of a will, took place before the will was executed. Such alterations do not affect the validity of the will, irrespective of the time they were made.")(Footnote omitted).

Cyfers, by naming her residuary beneficiary and by making a notation on Exhibit A to the Will a couple of months later explaining her bequests.

Rather, Ms. Cyfers wants to take advantage of a problem she helped create in soliciting and receiving advances on her inheritance and to invalidate Exhibit A but not the Will even though both contain handwritten notations dated after the Will was executed.

“[T]he intention of the testator,” however, “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).

“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).

“The intention of the testator,” this Court has held, “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).

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*, *supra*.

In *Hobbs v. Brenneman*, 94 W. Va. 320, 326, 118 S.E. 546, 549 (1923), this 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.

Here, other than speculation, supposition, and conjecture, which are insufficient for a rational fact-finder, *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 about two months after the Will was executed giving reasons why the Decedent 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 the Decedent intended her Estate to be divided upon her death.

V. CROSS-ASSIGNMENT OF ERROR

A. If the Attachment to the Will is to Be Invalidated Because the Decedent Made Post-Execution Notations on the Face of an Attachment to the Will, then the Will Should Be Invalidated Because the Evidence is Undisputed that the Decedent Made Post-Execution Notations on the Face of the Will.

As previously discussed, with respect to the argument by Ms. Cyfers that Exhibit A should be disregarded because it contains a date, November 29, 2006, in the Decedent's handwriting in blue ink, which was three months after the Will was executed, the Cyfers Family notes that the Will, which under which Ms. Cyfers seeks to recover as residuary beneficiary, contains a date, August 17, 2007, written in the Decedent's handwriting in blue ink, which is over a year after the Will was executed. **Exhibit A.**

If the Circuit Court's ruling is incorrect that notations on Exhibit A to the Will can be disregarded as surplusage if the Decedent's intent can still be discerned from an examination of the Will and Exhibit A, then the Cyfers Family argued below that notations on the Will should not be disregarded but rather, both the Will and Exhibit A should be invalidated and the

Decedent's Estate should pass by intestacy rather than passing nearly in its entirety to Cathy Cyfers as residuary beneficiary. App. 538 ("to the extent that the interlineations are material and the remainder of the decedent's testamentary intent cannot be determined, both the Will and Exhibit A are invalid and all of the decedent's Estate will pass by the laws of intestacy."); see also App. 557-558.

Accordingly, if this Court determines that post-execution notations on Exhibit A invalidates Exhibit A, then this Court rule that similar post-execution notations on the Will invalidates the Will and remand for directions for the Decedent's Estate to be administered under the laws of intestacy.

V. CONCLUSION

WHEREFORE, respondents, Jack Cyfers, Helen Cyfers, Roger Cyfers, Dottie Cyfers, and Wayne Cyfers, respectfully request that this Court affirm the judgment of the Circuit Court, or in the alternative, to reverse the judgment of the Circuit Court and remand with directions for the Decedent's Estate to be administered under the laws of intestacy.

JACK CYFERS, HELEN CYFERS,
ROGER CYFERS, DOTTIE
CYFERS, and WAYNE CYFERS

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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do certify that on 28 May 2013 I served the foregoing BRIEF OF THE RESPONDENTS AND CROSS-ASSIGNMENT OF ERROR on all counsel of record and unrepresented parties by depositing a true copy thereof in the US mail postage prepaid and addressed as follows:

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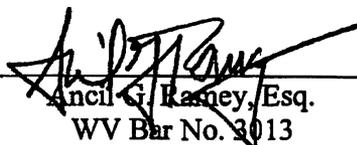
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