

NO. 15-0726

IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

OCT 29 2015

CHARLESTON, WEST VIRGINIA

**RUSSELL W. MASON, Executor of the Estate of Christine Ebert,
Plaintiff Below, Petitioner**

v.

**CHRISTINE TORRELLAS, as Ancillary Administratrix
of the Estate of Christine Ebert,
Defendant Below, Respondent**

PETITIONER'S BRIEF

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PETITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

I. ASSIGNMENTS OF ERROR

A. IN CONSTRUING THE COMPLAINT IN THE LIGHT MOST FAVORABLE TO PETITIONER, THE LOWER COURT ERRED BY GRANTING RESPONDENT'S 12(b)(6) MOTION TO DISMISS AS PETITIONER CAN PROVE FACTS THAT THE DECEDENT'S DOMICILE AT THE TIME OF HER DEATH WAS WEST VIRGINIA, THE SITUS OF THE PROPERTY AT ISSUE IS LOCATED IN WEST VIRGINIA AND THEREFORE JURISDICTION OVER THE WILL CONTEST WAS PROPER IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

II. KIND OF PROCEEDING AND THE NATURE OF THE RULINGS IN THE LOWER TRIBUNAL

The present matter arises from the dismissal of a Complaint filed on February 24, 2015 by the Petitioner, Russell Mason, in the Circuit Court of Mineral County, West Virginia. The Complaint challenged a foreign will administered in New York and executed by Christine Ebert ten (10) days prior to her death in 2014 while hospitalized for multiple health issues while temporarily visiting her sister in New York. The Complaint alleged Mrs. Ebert lacked the requisite testamentary capacity to execute the New York will and that Respondent engaged in fraud and undue influence. [JA, p. 2] Petitioner was seeking to set aside the New York will and enforce a 2012 West Virginia will executed by the decedent in Keyser, West Virginia at the law office of Stagers & Stagers.

The Respondent filed a 12(b)(6) motion to dismiss the Complaint alleging Petitioner had failed to state a claim upon which relief can be granted by primarily asserting West Virginia lacked jurisdiction over the case. [JA, p. 11] Briefs were submitted to the lower court and oral arguments were heard by the Honorable Phil Jordan on June 16, 2015. [JA, p. 11, 22]; June 16, 2015 hearing transcript Petitioner primarily asserted West Virginia did have jurisdiction to hear

the case because the decedent was domiciled in West Virginia and that all of her real estate and personal property that is subject of the Petitioner's Complaint is located in West Virginia, *inter alia*. After a brief hearing and considering the matter, Judge Jordan granted Respondent's motion and entered an Order of Dismissal¹ on June 24, 2015. The Plaintiff now appeals on the issue of whether the Circuit Court erred by granting Respondent's 12(b)(6) motion to dismiss and whether West Virginia has proper jurisdiction over the will contest.

III. STATEMENT OF THE CASE

Christine Ebert was born on January 23, 1928 in Germany, spent the majority of life in West Virginia and died on February 11, 2014 at Winthrop University Hospital in New York. Mrs. Ebert was returned to her home state of West Virginia and was laid to rest next to her husband who predeceased her in death in Scherr, West Virginia. Mrs. Ebert had no children, but did have three siblings, including a sister who lived in New York, *to-wit*; Irene Ketelsen. Mrs. Ebert resided in Elk Garden, West Virginia for many years. She also owned a home on Jackson Street in Keyser, West Virginia, which was to serve as her domicile in the future due to inclement weather in Elk Garden. Mrs. Ebert also owned a vacation property in Pine Island, Florida, where she would typically stay during the cold winter months.

On November 12, 2012, while of sound mind and free of undue influence, Mrs. Ebert executed her Last Will and Testament [hereinafter "West Virginia will"] at the Law Office of Stagers & Stagers in Keyser, West Virginia. [JA, p. 29] Petitioner, Russell Mason, was

¹ Due to the fact that the case was dismissed on a 12(b)(6) motion and was just in its infancy, the record below is almost non-existent. The joint appendix only contains the complaint, briefs, New York will, West Virginia will and order of dismissal. Accordingly, most of the factual allegations as set forth by Petitioner is mere proffer based upon information and belief and without citation.

named as the executor in article twelve of the will. Pursuant to the West Virginia will, Mrs. Ebert made the following specific bequests, *to-wit*;

1. Trustees of Hartmansville [West Virginia] United Methodist Church - \$3,000.00 for building improvements.
2. Trustees of the Scherr-Idleman Cemetery [West Virginia] - \$2,000.00 for the care of her grave site.
3. Irene Ketelsen – household contents, Pine Island, Florida real estate, and residue of estate.
4. Sue Heavener – Jackson Street, Keyser, West Virginia real estate.
5. **Russell Mason** – car lot located on Route 220 in Keyser, West Virginia, farm machinery, West Virginia Works and Sewer System bond.

Every year sometime between Thanksgiving and Christmas, Mrs. Ebert would visit her sister, Irene Ketelson, in New York for several weeks prior to leaving for Florida in the winter. While visiting her sister in December of 2013, Mrs. Ebert became ill and was hospitalized at Winthrop University Hospital. Suffering from multiple illnesses while hospitalized in New York, eighty-six (86) year old Mrs. Ebert executed a second Last Will and Testament [hereinafter “New York will”] on January 30, 2014. [JA, p. 33] Said New York will revoked all wills previously made. Just a few days after executing the New York will, Mrs. Ebert died on February 11, 2014. [JA, p. 10]

Pursuant to the New York will, Irene Ketelson was the sole beneficiary. Specifically, the second paragraph of the New York stated,

I give all the rest, residue and remainder of my property and estate, both Real and personal, of every kind and wherever located, to which I shall Be in any manner entitled at the time of death (collectively referred to As my “residuary estate”), to my sister, IRENE KETELSEN

Furthermore, Irene Ketelson's daughter, Christine Torrellas, was appointed executrix and the residuary beneficiary in the event her mother predeceased the testatrix. The dispositions by Mrs. Ebert of her real and personal property under the first West Virginia will are inconsistent with those in the subsequent New York will.

A verified Petition for Probate and Letters Testamentary were filed in the Surrogate Court of New York by Respondent Christine Torrellas on April 14, 2014 relative to the New York will. Respondent failed to give constructive or formal notice to the Petitioner of the New York will administration with knowledge that decedent had previously executed the West Virginia will naming Petitioner as a beneficiary in violation of the rules of the New York Surrogate Court. *N.Y. Surr. Ct. Proc. Act* § 1409 Respondent essentially had an ex parte, unilateral and uncontested proceeding in New York Surrogate Court. The New York Surrogate Court in a perfunctory manner "rubber stamped" the New York will. Petitioner filed parallel proceedings in West Virginia on June 6, 2014, pursuant to the West Virginia will. The West Virginia proceedings were closed on July 24, 2015 after the New York will was recorded in Mineral County, West Virginia.

IV. STANDARD OF REVIEW

In reviewing a circuit court's order granting a motion to dismiss a complaint this Honorable Court applies a *de novo* standard of review. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W.Va. 770, 461 S.E.2d 516 (1995)

V. SUMMARY OF ARGUMENT

The Circuit Court of Mineral County, West Virginia had proper jurisdiction to hear Petitioner's will contest case on the issue of testamentary capacity, fraud and undue influence regardless of the fact that Mrs. Ebert's executed a foreign will that was administered in New

York. The Full Faith and Credit Clause of the United States Constitution does not preclude a West Virginia court from addressing testamentary capacity since Mrs. Ebert was domiciled in West Virginia at the time of her death and the property at issue is located in West Virginia.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner states that the assignments of error raised in the Petition are proper for consideration by oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure.

VII. ARGUMENT

A. IN CONSTRUING THE COMPLAINT IN THE LIGHT MOST FAVORABLE TO PETITIONER, THE LOWER COURT ERRED BY GRANTING RESPONDENT'S 12(b)(6) MOTION TO DISMISS AS PETITIONER CAN PROVE FACTS THAT THE DECEDENT'S DOMICILE AT THE TIME OF HER DEATH WAS WEST VIRGINIA, THE SITUS OF THE PROPERTY AT ISSUE IS LOCATED IN WEST VIRGINIA AND THEREFORE JURISDICTION OVER THE WILL CONTEST WAS PROPER IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

A trial court on a Rule 12(b)(6) motion shall not dismiss a complaint unless it appears beyond a doubt that a plaintiff can prove no set of facts in support of his or her claim. *Conley v. Gibson*, 355 U.S. 41 (1957). The trial court is to construe the complaint in the light most favorable to the plaintiff. *Price v. Halstead*, 177 W.Va. 593, 355 S.E.2d 380 (1987)

In the case *sub judice*, the dispositive issue as to whether Petitioner can prove no set of facts in support of his Complaint is whether West Virginia has proper jurisdiction. Petitioner submits for the reasons set forth herein that West Virginia does have jurisdiction and that it was error for the lower court to grant Respondent's 12(b)(6) motion to dismiss.

The issue of whether West Virginia has jurisdiction over Petitioner's Complaint depends on what state Mrs. Ebert was domiciled in at the time of her death and where the property at issue is located. *See In re Chadwick's will*, 80 N.J.Eq. 471, 85 A. 266 (1912) [holding "neither

the Prerogative Court, nor any of the Surrogates of this State, have general jurisdiction to admit to probate the last will and testament of a nonresident, having a domicile at the date of his death in another state...”]; See W.Va. Code § 51-5-13 [...that the will was duly executed and admitted to probate as a will of personality in the state or country of the testator’s domicile, and shall admit such copy to probate as a will of personalty in this state;...]; See W.Va. Code § 41-5-4 [The county court shall have jurisdiction of the probate of wills according to the following rules: (a) In the county wherein the testator, at the time of his death, had a mansion house or known place of residence...]; See *In re Estate of Solen Brady Briggs, Sr., Deceased*, 148 W.Va. 294, 297, 134 S.E.2d 737 (1964) [The general rule is that a determination of the validity or invalidity of a will by a court of the testator’s domicile is not conclusive on that question in relation to real estate situated in another state, either upon principles of *res judicata* or the full faith and credit provision.]

In a case directly on point, a trial court in Kentucky ruled that it lacked jurisdiction to hear a will contest case regarding a will of a Florida resident which was previously probated in Florida and offered for ancillary probate in Kentucky. *Marr v. Hendrix*, 952 S.W.2d 693 (1997) On appeal, it was held that local courts have residual jurisdiction with respect to real estate located in Kentucky to entertain such actions and decide those issues pertaining to the underlying validity of the will that were not raised and resolved in the foreign jurisdiction. *Id.* The Court reasoned that there are two aspects to the validity of a will, *to-wit*; formality of execution and testamentary integrity. *Id.* at 694 The finding of validity by the Florida court related to execution only. The Florida court did not address testamentary integrity. Accordingly, the Kentucky court held that testamentary integrity may be raised in Kentucky pertaining to real estate located therein. The Kentucky court went on to further hold that the Full Faith and Credit

Clause of the Federal Constitution does not require every law or judgment of a foreign state to be given effect by a Kentucky court, especially in matters involving local sovereignty and title to realty. *Id.* at 695; *Gaskins v. Gaskins*, 311 Ky. 59, 223 S.W.2d 374 (1949) The Kentucky court reasoned that “disposition of property is governed by the law of the state where the property is located, rather than by the law of a foreign probate decree pertaining to an invalid will does not violate the full faith and credit clause. *Marr* at 695; *Foster v. Kraugh*, 107 Colo. 389, 113 P.2d 666 (1941); 80 Am.Jur.2d Wills § 1062 (1975) The public policy and reasoning of the Kentucky court is directly on point, *to-wit*;

[p]recluding any type of contest whatsoever of the will on the issue of testamentary capacity in the state in which the property is located invites mischief. As in the case sub judice, shortly before death, an aged testator may be transported to a distant foreign jurisdiction where the will is probated and the estate closed before intended heirs are aware of the death. The will is probated in the foreign jurisdiction without full notice to the intended heirs. Ancillary administration is not instituted in Kentucky until expiration of the statute of limitations in the foreign jurisdiction. Time, geographical distance, and other adverse factors will likely negate opportunities for the intended heirs to contest the issue of testamentary capacity. *Marr* at 695

The situs of the real estate at issue as alleged in the Complaint by Petitioner Russell Mason is in Mineral County, West Virginia. Certainly, the Mineral County Circuit Court would have *in rem* jurisdiction to hear claims relating to such property according to the Kentucky court. *See also Cable v. Cable*, 132 W.Va. 620, 629, 53 S.E.2d 637 (1949)

Although not dispositive according to the Kentucky court, jurisdiction in West Virginia is further supported by the fact that Mrs. Ebert was domiciled in West Virginia. The Respondent’s 12(b)(6) motion should have been denied by Judge Jordan and a proper hearing should have been held on the issue of Mrs. Ebert’s domicile. The issue of domicile is a two prong test that takes into consideration both physical presence and intention of remaining. *Lotz v. Atamaniuk*, 172 W.Va. 116, 304 S.E.2d 20 (1983) The lower court failed to consider any evidence on domicile.

Petitioner submits sufficient facts exist in support of Petitioner's claim that Mrs. Ebert was a West Virginia resident. Mrs. Ebert maintained her residence in Elk Garden, West Virginia, paid West Virginia taxes, held a West Virginia license, banked at M&T Bank in Keyser, West Virginia, and owned other property in West Virginia. Most importantly, Mrs. Ebert's death certificate² states she was a West Virginia resident. [JA, p. 10]

In summary, since the issue of testamentary integrity was never addressed in New York Surrogate Court, Mrs. Ebert was domiciled in West Virginia and the property at issue is located in West Virginia it was error for the lower court to find West Virginia lacked jurisdiction of Petitioner's will contest complaint.

² The informant for the New York death certificate is the Respondent's mother and sole beneficiary under the New York will, Irene Ketelson, who provided Mrs. Ebert's residence as Mineral County, West Virginia.

VIII. CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for all the reasons set forth above, the Petitioner prays for the following relief from this Honorable Court:

- a) A hearing;
- b) That the Court reverse the June 24, 2015 Order of Dismissal Order and remand the matter to Circuit Court for further proceedings;
- c) That the Court grant any further relief that it deems necessary.

**RUSSELL MASON
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CERTIFICATE OF SERVICE

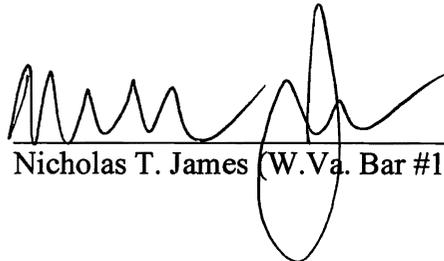
I HEREBY CERTIFY that on the **28th day of October, 2015**, I served a copy of the foregoing Petitioner's Brief and Appendix on the following by U.S. Mail, postage prepaid:

Mary Jane Smith, Reporter
150 Armstrong Street
Keyser, WV 26726

Krista Dixon, Clerk
Mineral County Circuit Court
150 Armstrong Street
Keyser, WV 26726

Rory L. Perry, II (Original and 10 copies of Petition & Original and 5 copies of Appendix)
Clerk of Court
State Capitol Building, Room 317
Charleston, West Virginia 25305

Charles Johns, Esquire
400 White Oaks Boulevard
Bridgeport, WV 26330



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