IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1998 Term

No. 25144

JANET SUE LANHAM STEVENS,
PEGGY LANHAM SALISBURY,
BETTY JEAN BAYES, AND
PATRICIA MILLER MOYERS,
Plaintiffs Below, Appellants,

v.

PAUL DOUGLAS CASDORPH,
AS EXECUTOR OF THE LAST WILL AND
TESTAMENT OF HOMER HASKELL MILLER;
PAUL DOUGLAS CASDORPH, INDIVIDUALLY;
AND PATRICIA EILEEN CASDORPH,
Defendants Below, Appellees.

Appeal from the Circuit Court of Kanawha County
Honorable Tod J. Kaufman, Judge
Civil Action No. 96-C-1816

REVERSED

Submitted: September 16, 1998
Filed: September 30, 1998

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The Opinion was delivered PER CURIAM.

JUSTICES WORKMAN and MAYNARD dissent and reserve the right to file dissenting opinions.

SYLLABUS

1. "A circuit court's entry of summary judgment is reviewed de novo." Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)

2. "A motion by each of two parties for summary judgment does not constitute a determination that there is no issue of fact to be tried; and both motions should be denied if there is actually a genuine issue as to a material fact. When both parties move for summary judgment each party concedes only that there is no issue of fact with respect to his particular motion." Syl. pt. 9, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

3. "Testamentary intent and a written instrument, executed in the manner provided by [W.Va. Code § 41-1-3], existing concurrently, are essential to the creation of a valid will." Syl. pt. 1, *Black v. Maxwell*, 131 W.Va. 247, 46 S.E.2d 804 (1948).

Per Curiam:

The plaintiffs below and appellants herein Janet Sue Lanham Stevens, Peggy Lanham Salisbury, Betty Jean Bayes, and Patricia Miller Moyers (hereinafter collectively referred to as the "Stevenses") appeal a summary judgment ruling for the defendants by the Circuit Court of Kanawha County. The Stevenses instituted this action against Patricia Eileen Casdorph and Paul Douglas Casdorph, individually and as executor of the estate of Homer Haskell Miller, defendants below and appellees herein (hereinafter referred to as "Casdorphs"), for the purpose of challenging the will of Homer Haskell Miller. The circuit court granted the Casdorphs' cross-motion for summary judgment. On appeal, this Court is asked to reverse the trial court's ruling. Following a review of the parties' arguments, the record, and the pertinent authorities, we reverse the decision of the Circuit Court of Kanawha County.

I.

FACTUAL BACKGROUND

On May 28, 1996, the Casdorphs took Mr. Homer Haskell Miller

to Shawnee Bank in Dunbar, West Virginia, so that he could execute his will.[1] Once at the bank, Mr. Miller asked Debra Pauley, a bank employee and public notary, to witness the execution of his will. After Mr. Miller signed the will, Ms. Pauley took the will to two other bank employees, Judith Waldron and Reba McGinn, for the purpose of having each of them sign the will as witnesses. Both Ms. Waldron and Ms. McGinn signed the will. However, Ms. Waldron and Ms. McGinn testified during their depositions that they did not actually see Mr. Miller place his signature on the will. Further, it is undisputed that Mr. Miller did not accompany Ms. Pauley to the separate work areas of Ms. Waldron and Ms. McGinn.

Mr. Miller died on July 28, 1996. The last will and testament of Mr. Miller, which named Mr. Paul Casdorph[2] as executor, left the bulk of his estate to the Casdorphs.[3] The Stevenses, nieces of Mr. Miller, filed the instant action to set aside the will. The Stevenses asserted in their

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[1]Mr. Miller was elderly and confined to a wheelchair.

[2]Paul Casdorph was a nephew of Mr. Miller.

[3]Mr. Miller's probated estate exceeded $400,000.00. The will devised $80,000.00 to Frank Paul Smith, a nephew of Mr. Miller. The remainder of the estate was left to the Casdorphs.

complaint that Mr. Miller's will was not executed according to the requirements set forth in W.Va. Code § 41-1-3 (1995).[4] After some discovery, all parties moved for summary judgment. The circuit court denied the Stevenses' motion for summary judgment, but granted the Casdorphs' cross motion for summary judgment. From this ruling, the Stevenses appeal to this Court.

II.

STANDARD OF REVIEW

This Court has held that "[a] circuit court's entry of summary judgment is reviewed de novo." Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In syllabus point 5 of *Wilkinson v. Searls*, 155 W.Va. 475, 184 S.E.2d 735 (1971), we indicated that "[a] motion for a summary judgment should be granted if the pleadings, exhibits and discovery depositions upon which the motion is submitted for decision disclose that the case involves no genuine issue as to any material fact and that the party who made the motion is entitled to a judgment as a matter of law." In syllabus point 9 of *Aetna Casualty & Surety Co. v. Federal Insurance*

[4]As heirs, the Stevenses would be entitled to recover from Mr. Miller's estate under the intestate laws if his will is set aside as invalidly executed.

Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963), we held that:

> A motion by each of two parties for summary judgment does not constitute a determination that there is no issue of fact to be tried; and both motions should be denied if there is actually a genuine issue as to a material fact. When both parties move for summary judgment each party concedes only that there is no issue of fact with respect to his particular motion.

III.

DISCUSSION

The Stevenses' contention is simple. They argue that all evidence indicates that Mr. Miller's will was not properly executed.

Therefore, the will should be voided. The procedural requirements at issue are contained in W.Va. Code § 41-1-3 (1997). The statute reads:

> No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly in the handwriting of the testator, *the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, and of each other*, but no form of attestation shall be necessary. (Emphasis added.)

The relevant requirements of the above statute calls for a testator to sign his/her will or acknowledge such will in the presence of at least two witnesses at the same time, and such witnesses must sign the will in the presence of the testator and each other. In the instant proceeding

the Stevenses assert, and the evidence supports, that Ms. McGinn and Ms. Waldron did not actually witness Mr. Miller signing his will. Mr. Miller made no acknowledgment of his signature on the will to either Ms. McGinn or Ms. Waldron. Likewise, Mr. Miller did not observe Ms. McGinn and Ms. Waldron sign his will as witnesses. Additionally, neither Ms. McGinn nor Ms. Waldron acknowledged to Mr. Miller that their signatures were on the will. It is also undisputed that Ms. McGinn and Ms. Waldron did not actually witness each other sign the will, nor did they acknowledge to each other that they had signed Mr. Miller's will. Despite the evidentiary lack of compliance with W.Va. Code § 41-1-3, the Casdorphs' argue that there was substantial compliance with the statute's requirements, insofar as everyone involved with the will knew what was occurring. The trial court found that there was substantial compliance with the statute because everyone knew why Mr. Miller was at the bank. The trial court further concluded there was no evidence of fraud, coercion or undue influence. Based upon the foregoing, the trial court concluded that the will should not be voided even though the technical aspects of W.Va. Code § 41-1-3 were not followed.

Our analysis begins by noting that "[t]he law favors testacy over intestacy." Syl. pt. 8, *In re Teubert's Estate*, 171 W.Va. 226, 298 S.E.2d 456 (1982). However, we clearly held in syllabus point 1 of *Black v. Maxwell*, 131 W.Va. 247, 46 S.E.2d 804 (1948), that "[t]estamentary intent and a written instrument, executed in the manner provided by [W.Va. Code § 41-1-3], existing concurrently, are essential to the creation of a valid will." *Black* establishes that mere intent by a testator to execute a written will is insufficient. The actual execution of a written will must also comply with the dictates of W.Va. Code § 41-1-3. The Casdorphs seek to have this Court establish an exception to the technical requirements of the statute. In *Wade v. Wade*, 119 W. Va. 596, 195 S.E. 339 (1938), this Court permitted a narrow exception to the stringent requirements of the W.Va. Code § 41-1-3. This narrow exception is embodied in syllabus point 1 of *Wade*:

> Where a testator acknowledges a will and his signature thereto in the presence of two competent witnesses, one of whom then subscribes his name, the other or first witness, having already subscribed the will in the presence of the testator but out of

> the presence of the second witness, may acknowledge his signature in the presence of the testator and the second witness, and such acknowledgment, if there be no indicia of fraud or misunderstanding in the proceeding, will be deemed a signing by the first witness within the requirement of Code, 41-1-3, that the witnesses must subscribe their names in the presence of the testator and of each other.

See Brammer v. Taylor, 175 W.Va. 728, 730 n.1, 338 S.E.2d 207, 215 n.1 (1985), ("[T]he witnesses' acknowledgment of their signatures ... in the presence of the testator [and in the presence of each other] is tantamount to and will be deemed a 'signing' or 'subscribing' in the presence of those persons").

Wade stands for the proposition that if a witness acknowledges his/her signature on a will in the physical presence of the other subscribing witness *and the testator*, then the will is properly witnessed within the terms of W.Va. Code § 41-1-3. In this case, none of the parties signed or

acknowledged their signatures in the presence of each other. This case meets neither the narrow exception of *Wade* nor the specific provisions of W.Va. Code § 41-1-3.

IV.

CONCLUSION

In view of the foregoing, we grant the relief sought in this appeal and reverse the circuit court's order granting the Casdorphs' cross-motion for summary judgment.

Reversed.