No. 25144 -- Janet Sue Lanham Stevens, Peggy Lanham Salisbury, Betty Jean Bayes, and Patricia Miller Moyers v. Paul Douglas Casdorph, as Executor of the Last Will and Testament o Homer Haskell Miller; Paul Douglas Casdorph, Individually; and Patricia Eileen Casdorph

Workman, J., dissenting:

The majority once more takes a very technocratic approach to the law, slavishly worshiping form over substance. In so doing, they not only create a harsh and inequitable result wholly contrary to the indisputable intent of Mr. Homer Haskell Miller, but also a rule of law that is against the spirit and intent of our whole body of law relating to the making of wills.

There is absolutely no claim of incapacity or fraud or undue influence, nor any allegation by any party that Mr. Miller did not consciously, intentionally, and with full legal capacity convey his property as specified in his will. The challenge to the will is based solely upon the allegation that Mr. Miller did not comply with the requirement of West Virginia Code 41-1-3[1] that the signature shall be made or the will acknowledged by

[1]West Virginia Code § 43-1-3 provides as follows:

> 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

the testator in the presence of at least two competent witnesses, present at the same time. The lower court, in its very thorough findings of fact, indicated that Mr. Miller had been transported to the bank by his nephew Mr. Casdorph and the nephew's wife. Mr. Miller, disabled and confined to a wheelchair, was a shareholder in the Shawnee Bank in Dunbar, West Virginia, with whom all those present were personally familiar. When Mr. Miller executed his will in the bank lobby, the typed will was placed on Ms. Pauley's desk, and Mr. Miller instructed Ms. Pauley that he wished to have his will signed, witnessed, and acknowledged. After Mr. Miller's signature had been placed upon the will with Ms. Pauley watching, Ms. Pauley walked the will over to the tellers' area in the same small lobby of the bank. Ms. Pauley explained that Mr. Miller wanted Ms. Waldron to sign the will as a witness. The same process was used to obtain the signature of Ms. McGinn. Sitting in his wheelchair, Mr. Miller did not move from Ms. Pauley's desk during the process of obtaining the witness signatures. The lower court concluded that the will was valid and that Ms. Waldron and Ms. McGinn signed and acknowledged the will "in the presence" of Mr. Miller.

> testator, and of each other, but no form of attestation shall be necessary.

In Wade v. Wade, 119 W. Va. 596, 195 S.E. 339 (1938), we addressed the validity of a will challenged for such technicalities[2] and observed that "a narrow, rigid construction of the statute should not be allowed to stand in the way of right and justice, or be permitted to defeat a testator's disposition of his property." 119 W. Va. at ___, 195 S.E.2d at ___. We upheld the validity of the challenged will in Wade, noting that "each case must rest on its own facts and circumstances to which the court must look to determine whether there was a subscribing by the witnesses in the presence of the testator; that substantial compliance with the statute is all that is required. . . ." Id. at ___, 195 S.E. at 340. A contrary result, we emphasized, "would be based on illiberal and inflexible construction of the statute, giving preeminence to letter and not to spirit, and resulting in the thwarting of the intentions of testators even under circumstances where no possibility of fraud or impropriety exists." Id. at ___, 195 S.E. at 341.

[2]We concluded as follows in syllabus point one 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.

The majority's conclusion is precisely what was envisioned and forewarned in 1938 by the drafters of the Wade opinion: illiberal and inflexible construction, giving preeminence to the letter of the law and ignoring the spirit of the entire body of testamentary law, resulting in the thwarting of Mr. Miller's unequivocal wishes. In In re Estate of Shaff, 125 Or. 288, 266 P. 630 (1928), the court encountered an argument that the attesting witness had not signed the will in the presence of the testator. The evidence demonstrated that the witnesses had signed the document at the request of the testator, and the court reasoned:

> While it is the duty of the court[s] to observe carefully the spirit and intent of the statute, they will not adopt a strained and technical construction to defeat a will where the capacity and intention is plain and where by fair and reasonable intendment the statute may be held to have been complied with, and such is the case here.

Id. at 298, 266 P. 630.

We also specified, in syllabus point two of Wade, that "[w]hether witnesses to a will have subscribed the same in the presence of the testator and of each other, as required by statute, is a question of fact to be determined in each case from the circumstances thereof." Summary judgment is inappropriate where there is a dispute regarding the conclusions to be drawn from evidentiary facts. Williams v. Precision Coil, Inc., 194 W. Va. ___, 59, 459 S.E.2d ___, 336. Thus, the majority could have legitimately concluded that summary judgment was inappropriate and that the issue of

compliance with the statute was a question of fact to be determined by the jury. I could have accepted such reasoning far more readily than that employed by the majority in its swift eradication of Mr. Miller's legal right to convey his estate in the manner of his own conscious choosing.

The majority strains the logical definition of "in the presence" as used in the operative statute. The legal concept of "presence" in this context encompasses far more than simply watching the signing of the will, which is the technical, narrow interpretation of the word apparently relied upon by the majority. Where the attestation of the will by the witnesses occurred within the same room as the testator, there is, at the very minimum, prima facie evidence that the attestation occurred within the "presence" of the testator. See 20 Michie's Jurisprudence, Wills § 34 (1993); Annotation, What constitutes the presence of the testator in the witnessing of his will, 75 A.L.R.2d 318 (1961).

In re Demaris' Estate, 110 P.2d 571 (1941), involved a challenge to a will signed by a very ill gentleman, witnessed in another room by a physician and his wife thirty minutes after the testator signed the will. The court grappled with the question of whether the witnesses had complied with the statutory requirement that the witnesses sign in the presence of the testator. Id. at ___. The court rejected a strict interpretation of the language of the statute, recognizing that the purpose of requiring the presence of the

witnesses was to protect a testator against substitution and fraud. Id. at ___. Rather, the court determined that “presence" did not demand that the witnesses sign within the sight of the testator, if other senses would enable the testator to know that the witnesses were near and to understand what the witnesses were doing. Id. The court concluded that "the circumstances repel any thought of fraud and speak cogently of the integrity of the instrument under review. The signatures of all three persons are conceded. The circumstances of the attestation are free from dispute." 110 P.2d at ___.

To hold the will invalid on a strictly technical flaw would "be to observe the letter of the statute as interpreted strictly, and fail to give heed to the statute's obvious purpose. Thus, the statute would be turned against those for whose protection it had been written."
110 P.2d at ___.

The majority embraces the line of least resistance. The easy, most convenient answer is to say that the formal, technical requirements have not been met and that the will is therefore invalid. End of inquiry. Yet that result is patently absurd. That manner of statutory application is inconsistent with the underlying purposes of the statute. Where a statute is enacted to protect and sanctify the execution of a will to prevent substitution or fraud, this Court’s application of that statute should further such

underlying policy, not impede it. When, in our efforts to strictly apply legislative language, we abandon common sense and reason in favor of technicalities, we are the ones committing the injustice.

I am authorized to state that Justice Maynard joins in this dissent.