

No. 32858 *Donald N. Davey and Nellie J. Davey v. The Estate of William H. Haggerty, et al.*

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RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, J., concurring:

I join in the majority opinion. I write separately to emphasize the potential for the violation of the process due to heirs at law of an estate West Virginia's *ex parte* procedures for probating a will. I believe this to be an issue ripe for consideration by the West Virginia Legislature.

Some may read the majority opinion as implying that if it were shown that the clerk of the county commission reported his *ex parte* probate of William Haggerty's alleged will to the county commission and if the county commission confirmed the clerk's probate as provided in W. Va. Code § 41-5-10 (1923), then the Appellants' action to impeach the will would have been barred by W. Va. Code § 41-5-11 (1994) (since their complaint was not filed within six months of the commission's order of confirmation). Under such a reading, the Appellant's action would be barred even if they had no knowledge of the existence of the will within that period. Since Appellant Nellie J. Davey was an heir at law of her father's estate, I would be unable to agree with such a result absent a showing of notice to Ms. Davey of the delivery of her father's supposed will to the clerk as provided in W. Va. Code § 41-5-1

(1931), or of the clerk's hearing to determine whether the will should be admitted to probate as provided in W. Va. Code § 41-5-10.

The issues in this case were framed at the circuit court level in terms of statutory time-limit bars to the Appellants' civil action to impeach the supposed will. This framing presupposes that Appellants had some duty to keep checking with the clerk's office some five and one-half years after the death of Mr. Haggerty to determine whether a supposed will which would divest Ms. Davey of her intestate share of her father's estate had been belatedly delivered to the clerk. This duty would apparently require the Davey's to perform such checks even after Mr. Haggerty's estate was administered and finalized as an intestate estate, and even after Ms. Davey and her husband had moved onto a portion of her deceased father's property, as a descendant of her father, and had lived there, making improvements, for nearly four years. That, it seems to me, constitutes an onerous and misplaced burden for an heir at law such as Ms. Davey.

This case would not have arisen as it did procedurally had our statutory law relating to *ex parte* procedures for probating a will required notice to known heirs at law of the delivery of a will to the county commission clerk or of a hearing on a motion to probate a will. Currently, W. Va. Code § 41-5-1 requires a person having custody of a will to deliver it either to the clerk of the county commission having jurisdiction of the probate or to the executor named in the will within thirty days after the death of the testator is known to such

person. If delivery is made to the named executor, he or she is required to offer the will for probate or to deliver it to the clerk within a reasonable time.

After the clerk receives the will, he or she is required by W. Va. Code § 41-5-2 (1931) to “notify by mail or otherwise the executor and the beneficiaries named in the will, of such delivery[.]” This notice is, under our current statutory law, limited in scope. The clerk is not obligated to provide any notice whatsoever to the heirs at law of the testator who would receive a share of the estate if the will were for any reason invalid or fraudulent. The rationale for notice to a named beneficiary under a will is obvious. Such a beneficiary could be deprived of a property interest if the will was not admitted to probate for some reason. An heir at law of the deceased may likewise be deprived of a property interest if, without his or her knowledge, an invalid or fraudulent will which works to the heir’s prejudice is admitted to probate. And yet, because of the limited scope for notice currently in our statutory law, an heir at law receives no statutorily-required notice, constructive or otherwise, of the delivery of a will to the clerk.

W. Va. Code § 41-5-10 provides that “[a]t, or at any time after, the production of a will, any person may move the county court [now county commission] having jurisdiction, or the clerk thereof in the vacation of the court, for the probate of such will, and the court or the clerk thereof, as the case may be, may, without notice to any party, proceed to hear and determine the motion and admit the will to probate, or reject the same.” The

phrase “without notice to any party” makes apposite the statutory description of the procedures as “*ex parte*.”¹ In contrast to the *ex parte* procedures for probating a will, probate in solemn form, as provided in W. Va. Code § 41-5-5 (1923), requires that notice be given

¹ W. Va. Code § 44-1-13 (1953), obligates the court or clerk before whom an executor or administrator qualifies to “require such executor or administrator to file his own affidavit, or the affidavit of some credible person, showing the names and, as far as possible, the addresses of the persons who would take any part of the estate of the decedent as heirs or distributees in case of the intestacy of the decedent and of the persons who are devisees and legatees under the will, if any, of the decedent, and their relationship to the decedent, and the clerk of the court shall record such affidavit in the fiduciary record, which affidavit and the record thereof shall be prima facie evidence of what is contained therein.”

W. Va. Code § 44-1-14a(a) (2002), provides that “[w]ithin thirty days of the filing of the appraisal of any estate as required in section fourteen of this article [or, according to subsection (b), within six months of the qualification of the personal representative if no appraisal is filed within the time period established pursuant to section fourteen of this article], the clerk of the county commission shall publish, once a week for two successive weeks, in a newspaper of general circulation within the county of the administration of the estate, a notice which is to include [among other things] . . . (8) A statement that any person seeking to impeach or establish a will must make a complaint in accordance with the provisions of section eleven, twelve or thirteen, article five, chapter forty-one of this code[.]” That same Code section in subsection (d) requires the personal representative “within ninety days after the date of first publication, [to] serve a copy of the notice, published pursuant to subsection (a) of this section, by first class mail, postage prepaid, or by personal service on the following persons: . . . (3) If there is not a will and the personal representative is not the sole heir, any heirs[.]”

Whether the published notice would fulfill any due process rights of heirs at law to notice that is missing in the *ex parte* probate procedures is doubtful in my mind if for no other reason than that due process requires, as interpreted in *Cary v. Riss*, 189 W. Va. 608, 433 S.E.2d 546 (1993), that “notification ‘by mail or otherwise’ shall be construed as certain to ensure actual notice.” Syllabus, *Cary*. The obligation imposed upon personal representatives in W. Va. Code § 44-1-14a(d) to serve a copy of the published notice “by first class mail, postage prepaid, or by personal service” would not by its terms include such service on heirs if there is a will.

to all heirs and persons having an interest in the will. *See Cary v. Riss*, 189 W.Va. 608, 611, 433 S.E.2d 546, 549 (1993).

This notice issue was reviewed in Chad Lovejoy, Note, *CARY v. RISS: Protecting Due Process Concerns in West Virginia Probate*, 98 W. Va. L. Rev. 687 (1996). This Note identified that heirs at law who should be considered to have an interest in the probate of a particular will were not given the due process protection of notice of the delivery of a will to the clerk or of a probate hearing simply because they were not named beneficiaries in a will. The Note suggested that the issue should receive the attention of the West Virginia Legislature.² Ten years later, the concerns expressed in this Note are present in the instant case before us.

Likewise, in Gary B. Kline, *Constitutionality of Notice in Virginia Probate and Estate Administration*, 42 Wash. & Lee L. Rev. 1325 (1985), similar notice problems were identified with respect to Virginia's statutory scheme. Therein, it was noted that Virginia also employed the traditional distinction between common form *ex parte* and solemn form *inter partes* probate. *Id.* at 1328-9. The article recognized that "Virginia's notice requirements for probate and for estate administration remain virtually unchanged from the

² Mr. Lovejoy also identified devisees and legatees under prior wills, disclaimers and the State as also having a sufficient interest in the probate of a will as to merit due process notice of a will's delivery or probate. *Id.* at 703-708.

statutes enacted almost two centuries ago.” *Id.* at 1329. Thus, “[i]f the party admitting the will to probate chooses an *ex parte* probate proceeding, the court reviews the will without summoning any interested party.” *Id.* The Virginia probate procedure, as described, was therefore very similar to ours. After an extensive review of United States Supreme Court decisions and analysis, the article concluded:

Virginia’s *ex parte* probate and requirements of published and posted notice of estate administration proceedings are constitutionally infirm because the notice provisions violate due process rights guaranteed under the fourteenth amendment. The fourteenth amendment protects property interest of interested parties [including heirs] by requiring that such parties receive adequate notice of probate and estate administration proceedings and an opportunity to be heard. The current Virginia probate and estate administration notice requirements invite due process challenges from interested parties to an estate or creditors who are known or ascertainable and do not receive notice by mail.

Id. at 1345 (footnotes omitted.)

Although West Virginia does not currently protect the property interest of heirs at law in *ex parte* probate proceedings by requiring notice, several states do. “[D]uring the last century many states amended probate notice requirements to abolish or modify *ex parte* probate and require constructive notice to interested parties before the hearing to prove the decedent’s will.” *Id.* at 1329. One such state is Oklahoma, whose probate code was before the United States Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope*, 485

U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). As described by the Court, “[u]nder Oklahoma’s Probate Code, any party interested in the estate may initiate probate proceedings by petitioning the court to have the will proved. The court is then required to set a hearing date on the petition, and to mail notice of the hearing ‘to all heirs, legatees and devisees, at their places of residence.’” 485 U.S. at 480-81 (internal citations omitted). The *Tulsa* Court cited its earlier decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950), as having “established that state action affecting property must generally be accompanied by notification of that action[.]” *Id.* at 484. In *Tulsa*, the Court observed that “when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found.” *Id.* at 486.

The need for appropriate notice of probate proceedings to heirs was also discussed by the Ohio Supreme Court in *Palazzi v. Estate of Gardner*, 512 N.E.2d 971 (1987). Therein, the court observed that:

the constitutionality of notice by publication to resident and nonresident heirs whose whereabouts are known to the applicant [seeking the probate of a will] is questionable under the doctrines announced in *Mullane* and its progeny. The continued adherence to ‘constructive notice’ where notice by mail provides ‘an efficient and inexpensive means of communication’ invites constitutional scrutiny. In response to *Mullane*, some states have acted to amend their statutes to require mailed notice of probate proceedings. The legislatures of other states have been urged by their courts and commentators to do likewise. The time appears ripe for this issue to receive the attention of the

[Ohio] General Assembly.”

512 N.E.2d at 977 (footnotes omitted.)

I believe significant due process issues are raised by West Virginia’s current statutory probate scheme. In West Virginia, heirs at law do not receive notice of the delivery of a will to a commission clerk or of a motion to probate a will. I encourage the West Virginia Legislature to join those other states which have addressed this constitutional concern and to consider amending our State’s statutory *ex parte* probate law to provide for the notice arguably required by the Fourteenth Amendment of the United States Constitution and by Article 3, Section 10, of the Constitution of West Virginia, before another case such as the instant one arises.