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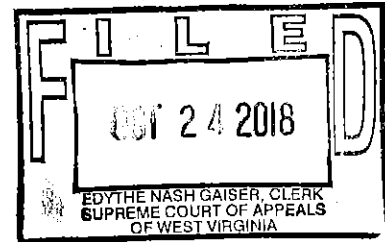
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In the Supreme Court of Appeals of West Virginia

Mark Andrew Gomez, Executor of the Estate of Aurelio Rafael Gomez, MD., deceased,
Defendant/Third-Party Plaintiff & Counter Claimant Below, Petitioner

And

David Brent Gomez and
Robert Brian Gomez,
Defendants Below



vs.) No. 18-0426

Andrea Gomez Smith and Matthew Eric Gomez, D.O.
Plaintiffs and Counter Defendants Below, Respondent

**Petitioner's Reply to Joint Response Brief of Respondents Western Surety
Company, Kayla Addison and Empower Retirement**

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CASES

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Gray v. Binder, et al., Case No: 161419 Virginia Supreme Court (Nov. 2, 2017)

McClure v. McClure, 184 W. Va. 649, 403 S.E.2d 197 (1991)

Welsh v. Welsh, 136 W. Va. 914, 69 S.E.2d 34 (1952)

White v. Berryman (1992)

STATUTES

W.Va. Code §31D-3-302

W.Va. Code §44-1-22

W.Va. Code §44-1-23

See W.Va. Code §44-13-4

LAW REVIEWS AND PUBLICATIONS

5 Key Differences Between Insurance and Surety Bonds, by Yutz Merkle Insurance, (May 4, 2012) at;
<https://www.yutzmerkle.com/blog/5-key-differences-between-insurance-and-surety-bonds>

Bond Myths - Bonds versus Liability Insurance, Bill West, AMIS/Alliance Marketing & Insurance Services at: http://www.amisinsurance.com/content/bonds_vs_liability_insurance.php

Fiduciary Bonds: When Good Principals Go Bad, Tammy N. Giroux, Eleventh Annual Northeast Surety and Fidelity Claims Conference (2000)

Still Laying Claim: An Update to Developments in Will Contest Litigation in West Virginia, 119 W.Va. L. Rev. Online 17 (2016)

Reply to Respondents' Argument Regarding Assignment of Error 1

The plain language of WVa Code §44-1-22, *Suits by and against*, states “A personal representative may sue or be sued upon any judgment for or against, or any contract of or with, his decedent.”

The plain language of WVa Code §44-1-23, *Actions for goods carried away, waste or damage to estate of or by decedent*, states, “A civil action may be maintained by or against a personal representative for the taking or carrying away of any goods, or for the waste or destruction of, or damage to, any estate of or by his decedent.”

These statutes do not require the personal representative Executor to employ an attorney to pursue these suits and civil action. Neither does W.Va. Code §31D-3-302. *General powers*, which states “every corporation ... has the same powers as an individual to do all things necessary and convenient to carry out its business and affairs, including, without limitation, power (1) to sue or be sued, complain and defend in its corporate name;” Despite such plenary corporate independence by statute, this Court requires corporations to be represented by a licensed attorney in circuit court. The Respondents argue that an estate is analogous to a corporation and the requirement that the Estate must be represented in circuit court by an attorney.

As stated in Petitioner's Appellate Brief, corporations and estates are fundamentally different. Both have their own separate and distinct bodies of law. Moreover, in West Virginia probate estates have their own exclusive forum for administration, with established statutory procedure for probating Wills and resolving conflicts, to wit: the Office of Probate Commissioner also called “County Court.”

West Virginia Code, Chapter 44 sets forth the statutory framework of probate in West Virginia.

The term “personal representative” is special and unique in West Virginia law. The term applies only to matters of probate and decedent's claims. When the decedent is intestate, the personal representative is appointed by the County Court to handle the decedent's affairs. When the decedent dies with a Will, the personal representative is called the Testator and the Probate Commissioner will appoint the Executor nominated by the Testator in the Will. If the Testator trusted the nominated Executor to handle his or her financial affairs after death as directed, the

Testator's Will may direct the named Executor to serve without the posting of a surety bond.

Interestingly, partial history of the West Virginia probate system is found in a recent case resolved by the Virginia Supreme Court. Chief Justice Lemons gives this Court insight into the origins of the current office of County Fiduciary Commissioner probate offices in the opinion of *Gray v. Binder, et al.*, Case No: 161419 Virginia Supreme Court (Nov. 2, 2017):

"The office of the Commissioner of Accounts is unique to Virginia and West Virginia.

Frank O. Brown, Jr., Virginia Practice: Probate Handbook, § 2:11 (2014). Since their creation, Virginia circuit courts have been vested with jurisdiction over fiduciary matters, including the administration of estates. See Code § 64.2-1200 et seq.; see also John M. Patton & Conway Robinson, Report of The Revisors of The Code of Virginia (January 8, 1849), tit. 39, ch. 132, at 676-88 (Richmond, Samuel Shepherd 1849). It would be "impracticable" for circuit courts to perform every aspect of estate administration. *Shipman v. Fletcher*, 91 Va. 473, 477, 22 S.E. 458, 459 (1895). The Commonwealth established the office of the Commissioner of Accounts "to afford a prompt, certain, efficient, and inexpensive method" for the settlement of fiduciaries' accounts and the distribution of estates. *Carter v. Skillman*, 108 Va. 204, 207, 60 S.E. 775, 776 (1908).

This office evolved from the long-established position of the Commissioner in Chancery. Judicial Council of Virginia, Manual for Commissioners of Accounts 235 (5th ed. 2014). "A commissioner in chancery is an officer appointed by the chancellor to aid him in the proper and expeditious performance of his official duties." *Raiford v. Raiford*, 193 Va. 221, 226, 68 S.E.2d 888, 891 (1952). "A good commissioner is the right arm of the court, and his services are indispensable to the due administration of justice." *Id.* at 226, 68 S.E.2d at 892 (citing *Hartman v. Evans*, 38 W.Va. 669, 677, 18 S.E. 810, 813 (1893)). As we held in *Bowers v. Bowers*, 70 Va. (29 Gratt.) 697, 700 (1878), "the office of commissioner in chancery is one of the most important known in the administration of justice." Nonetheless, commissioners serve to assist the court, not to supplant it. *Shipman*, 91 Va. at 477, 22 S.E. at 459-60." *Id.* at 6-7.

In 1974, the West Virginia Legislature abolished the office of the Commissioner of Accounts, restructured probate procedure, created the County Office of Fiduciary Commissioner, and required the Fiduciary Commission to be a licenced attorney. (See *Still Laying Claim: An Update to Developments in Will Contest Litigation in West Virginia*, 119 W.Va. L. Rev. Online 17 (2016) at FN 178). Despite this modernization from ancient origins, the County Office of Fiduciary Commissioner continues to be “indispensable to the due administration of justice.”

In this case, the Kanawha County’s Office of Fiduciary Commissioner has overseen all aspects of the probate of the Last Will and Testament of Aurelio Rafael Gomez. The Estate is all but closed except for the Will Contest of 17-P-402. (PAVol2-68) The trial record is devoid of creditor claims. The beneficiaries of the Will have participated in every aspect of probate (PA-209-217) and made private settlement of the Estate (PAVol2-17), said settlement being on file with the Kanawha County Clerk. (See WV Code §44-13-4)

Empower Retirement’s failure to honor the Probate Commissioner’s Order

Upon his appointment as Executor Mark Gomez made an Estate claim for \$75,000 of retirement funds held by Empower Retirement on Rafael’s behalf. On July 12, 2017, the death benefit team of Defendant Empower Retirement sent letter correspondence to Executor Mark Gomez informing him that the team had determined that the Estate of Aurelio Rafael Gomez was the proper entity due the proceeds of two (2) deferred compensation account Rafael earned during his employment with the State of West Virginia. Despite this determination, Empower Retirement “went silent” and refused to distribute the funds to the Estate of Aurelio Rafael Gomez.

According to Empower Retirement, they refused to release the accounts to the Estate because of a letter written by attorney Richard F. Neely on behalf of disowned heir and revoked administratrix, Andrea Smith Gomez. Despite the Order of the Probate Commissioner appointing Mark Gomez as Executor, Empower Retirement asserted that there were conflicting claims to the proceeds. Finding no other recourse for the release of the retirement funds, the Executor made a third party complaint against Empower in the disowned heir’s Will Contest of Kanawha 17-P-402. Empower responded with a motion for interpleader of the funds into the trial court.

This out of state corporation, refused to engage with Mark Gomez and afford him the “full faith and credit” as a duly nominated and appointed Executor of as Ordered by the Kanawha County

Fiduciary. While local counsel was arguing that there were conflicting claims to the proceeds they held, the death benefit team released the smaller account proceeds to A.R. Gomez” and mailed to the Executor for deposit into the Estate’s bank account. (Transcript of June 26, 2018 hearing)

Empower Retirement now argues that the pro se Executor cannot make an appearance in the Kanawha Circuit Court to represent the Estate as he is not a licensed West Virginia attorney. Your Petitioner shows that Empower Retirement has forced the Estate to pursue a circuit court action because of its refusal to honor the Fiduciary Commissioner’s Order. Disingenuously, Empower Retirement demands that the Executor hire a licensed attorney to represent the Estate while knowing that they hold the only monetary funds of the Estate that could be used for that purpose. By refusing to honor the Fiduciary Commissioner’s Order of appointment and the “prompt, certain, efficient, and inexpensive method” for the settlement of fiduciaries’ accounts and the distribution of estates” of the County Court, Empower Retirement has expanded this simple and routine legal matter into the slow moving, uncertain, complex and expensive litigation in the circuit court. It is unfair, unconscionable and contrary to justice that the refusal of a financial company to honor West Virginia Fiduciary Commissioners’ Orders would require the an Estate to expend funds to employ an attorneys to represent the Estate in the Circuit Court due to that legal analogy that an estate operates as a corporation.

Western Surety Company’s Failure to Investigate and Protect the Obligee Estate

When Andrea Gomez Smith became the administratrix of the Estate of Aurelio Rafael Gomez, she posted a \$500,000 bond issued by Western Surety. West Virginia is scant on appellate opinions regarding demands upon probate fiduciary bonds. Perhaps because the surety bonds doing business in the State follow established and customary procedures when a claim is made and they are paid outside of circuit court legal action. Your Petitioner points to the writings of experts in the business of issuing bonds and insurance as resources.

A surety bond is not liability insurance. A surety bond operates as a line of credit insuring that the bonded individual faithfully performs his or her fiduciary duties and if there is a failure of

faithful performance, the bond provides the funds to make the obligee whole. Surety bonds protect the interests and investments of the consumer while general liability insurance protects the insured, from the financial effects of lawsuits. The primary difference between liability insurance and bonds is which party gets financially restored. Insurance protects the insured against risk whereas a bond protects the obligee. Further, when a claim is paid the insurance company usually doesn't expect to be repaid by the insured. However, as a surety bond is a form of credit, so the principal is responsible to pay any Claims. *5 Key Differences Between Insurance and Surety Bonds*, by Yutz Merkle Insurance, (May 4, 2012) at;

<https://www.yutzmerkle.com/blog/5-key-differences-between-insurance-and-surety-bonds/>

If the bonding company pays a claim made against the bonded individual , it expects the bonded individual to pay back to the bonding company the full amount it paid to the claimant. That is why bonding companies focus on the applicant's credit rating, while liability insurance companies look at the insured's business services to determine their risk of being sued. See *Bond Myths - Bonds versus Liability Insurance*, Bill West, AMIS/Alliance Marketing & Insurance Services at: http://www.amisinsurance.com/content/bonds_vs_liability_insurance.php

The Surety places itself at risk for damages in an amount exceeding the penal sum if the Surety does not diligently undertake its investigation and make a determination of the validity of the demand on the Bond. See *Fiduciary Bonds: When Good Principals Go Bad*, Tammy N. Giroux, Eleventh Annual Northeast Surety and Fidelity Claims Conference (2000). "An interested party in a Guardianship or Estate may decide to provide notification to the Surety early in the controversy so the Surety has adequate time to conduct an independent investigation as to the merits of any purported wrongdoing. *Id.* at p.5 No matter what stage in the proceeding the Surety receives

notification of purported wrongdoing, the Surety should immediately contact all parties and attorneys involved and request a reasonable amount of time to conduct an independent investigation.” *Id.* at p. 6.

The trial record is devoid of any such independent investigation being conducted by Western Surety. Further, Western Surety has failed to notify the County Probate Fiduciary or the Estate, as obligees, regarding the results of their independent investigation.

However, it is said there are many ways to skin a catfish and in fact, a formal investigation has been made into these matters via the Circuit Court litigation. Your Petitioner shows by sworn affidavits and pleadings the following facts to be the uncontested regarding the claim upon the surety bond.

In Kanawha Civil Action No. 17-C-1292, a demand for the return of certain jewelry belonging to the Estate was made against the bonded revoked administratrix, Andrea Gomez Smith. Attorney Gary Pullin, representing Western Surety, sufficiently framed the issue for the trial court.

· · · · · MR. PULLIN: What they are actually saying is
·2· · that long before Dr. Gomez's death, in fact, following the
·3· · death of Mrs. Gomez, Dr. Gomez's wife, that Andrea Gomez
·4· · went into the home and took certain property, primarily
·5· · jewelry. And, of course, Andrea Gomez maintains that this
·6· · was jewelry that her mother gave to her. But Mark Gomez is
·7· · maintaining, as the executor of the estate, that this was
·8· · actually, even though Dr. Gomez was alive and well at the
·9· · time that this occurred, that this jewelry should be part
10· · of the estate.
11· · · · · So when he filed his civil action for demand for
12· · return of estate property, he's essentially referring to

13 · · items of jewelry that are in the possession of Andrea Smith
14 · · based upon jewelry that she says was given to her by her
15 · · mother upon her mother's death.
16 · · · · · THE COURT: And he claims it's rightfully the
17 · · property of the estate?
18 · · · · · MR. PULLIN: Yes, that's his claim is that it
19 · · should be property of the estate. Because it should have
20 · · gone from Mrs. Gomez to Dr. Gomez. And then when Dr. Gomez
21 · · died that jewelry would have been part of his estate.

The trial records supports the Estate's claims against Andrea Gomez Smith and her surety company. In his affidavit, Robert Gomez testifies to the following:

"On the night of November 5, 2015, Matthew Gomez ("Rickie") and Andrea Smith ("Andrea") were at the 737 Lower Donnally Road family home when they told Rafael ("Dad") that they "wanted to go through the safe to see what was in it."
Rickie asked Dad where the key to the safe was hidden.
Dad did not know and told him that they could do it later.

Rickie insisted asking Dad again and again and he finally told Rickie to call David.
(David Gomez)

Rickie immediately called David and David told Rickie where the key was hidden.
I heard Rickie tell David, "Dad wants to know where the key is to the safe."
I saw Rickie give the phone to Dad and Dad talked with David while Rickie went to get the key.

Andrea was pacing in the kitchen and was just "kind of out of it. " Both Rickie and Andrea were drinking.

In just a few seconds, Rickie had the safe open and Andrea was in the room instructing him to put everything on the bed.

I watched Rickie as he pulled the boxes out of the safe and present each piece to Andrea telling her "how beautiful it was" and how she "deserved it". He even wanted her to model it.

I went back to the kitchen and sat with Dad and I told him, "I don't think it is a good time

to be going through the safe”.

Dad responded, “We can do it later.”

I said, “You should really not do anything now and wait a couple of months”.

Dad put his face in his hands and started sobbing.

The sobbing lasted a few minutes and then he kept saying “your mother is gone”.

Dad went to his room to go to sleep.” (PA-298-301)

In her *Motion to Dismiss* (PA-302-306) filed in 17-C-1292, Andrea Gomez Smith defends herself asserting that she was given “her mother’s jewelry two days after her death by her father Rafael, who was under the laws of intestate succession was the sole and absolute owner of the jewelry at that time.” (PA-304)

Transfer of Margaret’s property, after she had died intestate, was a legal impossibility until Rafael was appointed Administrator of Margaret’s Estate and the Fiduciary Commissioner approved distribution. Contrary to Andrea Gomez Smith’s assertion, Rafael was not “the sole and absolute owner of the jewelry at that time.” Further, Andrea Gomez Smith has offered no evidence that Rafael actually delivered the jewelry to her. Robert Gomez’s affidavit testimony proves otherwise, “I was with Dad the whole time on November 5, 2015 and can attest that he never gave this collection of jewelry to Andrea Smith.” (PA-301). According to the uncontroverted testimony in the trial record, Andrea Gomez Smith gained access to the safe by nefarious means and “made several trips to her Mercedes to load the boxes of jewelry” after Rafael already had gone to bed. (PA-300)

The uncontroverted affidavit testimony of David B. Gomez, O.D., “So a couple of days after her death, Matthew called me, I let my guard down and they did what my Mother feared. They robbed her safe of all jewelry, coins and her diamond wedding ring. The plaintiff Matthew later told us that the value of this property was to be something over \$100,000.” (PA-71)

When Rafael became the Administrator of Margaret’s Estate, he wrote in his own

handwriting a letter dated June 15, 2016 demanding the return of Margaret's, and now his, by intestate succession, collection of jewelry.¹ (PA-72)

When Andrea Smith Gomez became the Administratrix of Rafael's Estate, she had a fiduciary duty to marshal the assets of the estate. Part of Rafael's Estate was the jewelry collection having a value of "something over \$100,000." In an ironic twist, the fiduciary was duty bound to collect the disputed jewelry from herself and turn it over to the Estate which she now managed. Apparently, Administratrix Smith failed to notify Western Surety of her revocation as fiduciary (PA-289) or the Notice of Demand Upon Fiduciary Bond filed on June 30, 2017 filed with the Fiduciary Commissioner (PA-295) as Western Surety failed to conduct an independent investigation of the claim before the filing of the circuit court jewelry case.

Western Surety has offered no defense on Andrea Gomez Smith's behalf. Western Surety has alleged that the Executor is engaged in the unauthorized practice of law, a tort in West Virginia. (See *Dijkstra v. Carenbauer Home Loan Center, et al.* 5:11-CV-152, U.S.D.C, Northern District of West Virginia (2014). However, Western Surety offers no argument or testimony as to how it was harmed or damaged by the notice of the Kanawha civil actions. In Western Surety's particular case, whether this Court finds that a lay Executor may represent himself not only in the County Court but in the Circuit Court as well, or not, the verified claims against Andrea Gomez Smith do not evaporate. Pursuant to established and customary surety bond law, Western Surety owes a duty of investigation and settlement to the obligees of the bond, the Kanawha Fiduciary Commissioner and

¹In this letter, Rafael informed Andrea Beth Gomez Smith that he had made a Will and demanded that she deliver the jewelry to his Will attorney, Robert Fletcher. It is notable that Andrea Gomez Smith provided sworn affidavit to the Kanawha Fiduciary Commissioner that she had no knowledge of the existence of a Will when she applied to become the Administratrix of Rafael's Estate.

the Executor of the Estate.

Third Party Defendant Kayla Addison

Defendant Kayla Addison was served with process on December 20, 2017. Between service and Addison's responsive pleading, 17-P-402 was removed to the local federal district court. Defendant Addison filed her responsive pleadings on January 9, 2018, but failed to address the legal issue before the District Court, to wit: remand. In fact the case was remanded to the Kanawha Circuit Court. (PA-171-175)

However, once the case was remanded, Defendant Addison fail to file a timely responsive pleading in the Kanawha Circuit Court. (PA-15-16) On January 18, 2018, Mark Gomez sent a letter to Addison's attorneys advising them, "Please find attached a file-stamped copy of the pleadings I entered into the Kanawha Circuit Court yesterday. Of course, you are not included on the certificate of service as you have yet to file an appearance on Kayla's behalf. However, I send these pleadings out of respect, professionalism and fair play" and "As stated above, when you properly file your client's responsive pleading in Kanawha Circuit Court, I will include you on certificates of service." (PA-176-178)

Ignoring the respectful reminder, Defendant Addison's attorneys failed to file any pleadings with the Kanawha Circuit Court. Eleven days later, on January 29, 2018, Mark Gomez, individually, and as the Executor of the Estate filed their *Motion for Default Judgment Against Kayla Addison as to Liability*. (PA-124-125)

In their Joint Response Brief, Respondents take exception that your petitioner missed the deadline to file his Appellant brief on August 17, 2018 pursuant to the original Scheduling Order of this Court. Your Petitioner filed his Appellate Brief on August 20, 2018 and requested this Court

to allow late filing. This Court accepted your Petitioner's Appellate Brief and reissued and amended its Scheduling Order to allow Respondents an additional three days to file their briefs.

The Respondents argue that the late filing "is yet but more evidence in support of the Circuit Court's holding" that a *pro se* Executor cannot represent the Estate in Circuit Court. (Joint Response, p. 29)

The Respondents' argument would have been stronger if they had not taken full advantage of the remedy offered by this Court and filed their pleadings three days after the deadline of the original scheduling order. However, these attorneys devoted much written argument to this issue that seems to have been promptly resolved by this Court. These attorneys argue deadlines should not be missed by *pro se* litigants and demand good cause reasons be set forth for this dereliction. They are serious about such matters! Except when it pertains to them.

Kayla Addison's attorneys allowed her case to fall into default. (PA-126-127)

"An attorney's negligence will not serve as the basis for setting aside a default judgment on grounds of "excusable neglect."^{2 3} Syl Pt. 8, White v. Berryman (1992)

Nation-wide corporation Great-West Life and Annuity Insurance Company doing business in West Virginia as Empower "'inadvertently' failed to respond to the Third Party Complaint within

² Respondents devoted 43 lines of footnote in their *Joint Response* explaining why Kayla Addison is not in default. Now calling the Petitioner's assertion "that Addison did not file a responsive pleading in 17-P-402" as "patently false", is belied by the Docket Sheet (PA-15-17) of said case.

³ Respondent Addison failed to present this legal argument that filings in the federal court survive and are considered automatically filed in state court on remand to the trial court but now briefs the issue in 43 line Footnote 15. While asserting that "Petitioner's failure to understand this point of procedure certainly adds additional support" to "not permit executors to *pro se* represent estates in legal proceedings, it should be noted that Respondent Addison's attorneys' footnote brief fails to cite this Court's opinion or that of the Federal Fourth Circuit Court of Appeals on this legal issue. Apparently it is another issue of first impression in West Virginia.

the timeframe allowed by the Rules. . .” By footnote, Empower’s counsel attempted to explain the dereliction.⁴

Continuing its mistakes, the corporation released one of the two deferred compensation accounts to Mark Gomez as Executor when its local attorneys argue that they cannot release the funds or face double liability due to conflicting claims. Empower’s counsel informed the trial court, “ “The smaller account, there was a mistake made by my client and it's actually already been paid, so that's not even at issue here today. . .” (June 26, 2018 Transcript, p.7)

And then there is the issue of Empower Retirement filing a new interpleader action (Kanawha Civil Action No. 18-C-497) while the 17-P-402 Will Contest, with the same parties and subject matter, was pending and noticing and conducting a hearing in said new 18-C-497 case on June 26, 2018 after this Court had issued its *Order Granting Stay* of all proceedings in 17-P402 and 17-C-1292 in the Kanawha Circuit Court.

Constitutional Origins

“It has long been settled that “where a personal representative has been shown to have acted in violation of his or her fiduciary duties, he or she may be removed for cause. We authorized such removal by the circuit court in Syllabus Point 4 of *Welsh v. Welsh*, 136 W. Va. 914, 69 S.E.2d 34 (1952)” *McClure v. McClure*, 184 W. Va. 649, 403 S.E.2d 197 (1991)

In Syllabus Point 2, we recognized the constitutional authority of county courts with regard to probate matters:

⁴ At FN1 “Empower contends that its failure to respond to the Third-Party was in error and a result of excusable neglect within the meaning of Rule 60 of the West Virginia Rules of Civil Procedure.” Empower offers no evidence of excusal neglect but “reserves the right to argue and offer evidence of excusable neglect ” at a later time. (PA-219)

"Under Article VIII, Section 24 of the Constitution of this State, county courts have jurisdiction and, as courts of record, are vested with judicial powers in all matters of probate, the appointment and qualification of personal representatives, guardians, committees, and curators, and the settlement of their accounts, and in all matters relating to apprentices."

"We will not speculate as to why Joseph Richardson was not inclined to pursue this wrongful death claim because the record is not developed as to those reasons. As we noted in *McClure*, "[w]e have been sensitive to problems that may occur between the beneficiaries of a wrongful death suit and the personal representative." *McClure*, 184 W. Va. at 654, 403 S.E.2d at 202. It is because of that sensitivity that we concluded in *McClure* that upon a proper factual showing, a circuit court would be authorized to remove a personal representative and direct the appointment of a different person to act in that capacity." *McClure* at 654.

"Linger and its progeny protect a personal representative who is properly qualified from collateral attacks on whether there was a proper qualification. However, where a personal representative has been shown to have acted in violation of his or her fiduciary duties, he or she may be removed for cause. We authorized such removal by the circuit court in Syllabus Point 4 of *Welsh v. Welsh*, 136 W. Va. 914, 69 S.E.2d 34 (1952):

The position and appointment of a personal representative is a matter of Constitutional concern. Pursuant to Article VIII, Section 24 of the Constitution of this West Virginia, "the county courts have jurisdiction and, as courts of record, are vested with judicial powers in all matters of probate, the appointment and qualification of personal representatives"

During the normal course of probate administration, all matters are handled by the county fiduciary commissioner. During the normal course of probate administration in the County Court, the personal representative acts on behalf of the Estate and is deemed trusted to represent the interests of the Will beneficiaries in a forum that affords “a prompt, certain, efficient, and inexpensive method” of probate administration. However, there are times when the probate administration is appealed or an asserted non-probate state court claim requires jurisdiction by a court of equity, and the circuit court assumes jurisdiction.

The Respondents argue that a personal representative must be, or be represented by a licensed West Virginia attorney to represent the Estate in the circuit courts. So what happened to the trust and inherent fiduciary duty to protect the heirs and beneficiaries when the probate case ends up in the Circuit Court? The Respondents argue that then inherent powers of the personal representative is lost based solely on the judicial forum.

There Already Exists a Reasonable Remedy Without a Plenary Prohibition on Executors Proceeding in Circuit Court Without a Lawyer

Your Petitioner shows that this State has a probate procedure that is ancient in origin and is a “prompt, certain, efficient, and inexpensive method” for the settlement of fiduciaries’ accounts and the distribution of estates.” *Gray v. Binder* (2017). The County Court accepts as personal representative persons from all walks of life and experience. The County Court allows appointed personal representatives to represent the interests of the Estate and its beneficiaries. The nomination by the Testator and direction that he or she serve without bond in his or her Last Will and Testament is evidence of a special trust and confidence that the Testator has in the Executor that he or she will act as the Testator if they were living.

When it is necessary for the Estate to sue or be sued (W.Va. Code §44-1-22) or bring a “civil action” for taking Estate property (W.Va. Code §44-1-23), in Circuit Court the trust of the Testator and the appointment of the Executor by the Fiduciary Commissioner of the County Court are not negated and become null and void. The appointment continues until the Fiduciary Commissioner removes the Executor from the position. However, if the Circuit Court should find that the Executor is “incompetent” to handle litigation in the Circuit Court, “the circuit court would be authorized to remove her and direct the appointment of a new person to act as the personal representative.” *McClure v. McClure*, 184 W. Va. 649, 403 S.E.2d 197 (1991)

Your *pro se* Petitioner argues that being a licensed attorney does not make one immune from procedural gaffes and “mistakes” in the Circuit Court. You Petitioner shows that he has competently litigated this case thus far. In contrast, the licensed attorney representing the Respondent have found themselves to be in default without offer of excusable neglect, making double filings meriting estoppel, (Pages 10-12, above) and failing to offer a scintilla of evidence at summary judgment.

Rather than destroy the integrity of the established and unique probate process of West Virginia by requiring attorneys to represent Estates by judicial fiat, this Court should allow the question of competence of the Executor in Circuit Court litigation be evaluated and handled by the trial judge as the trial judge is in the position to observe such competence and skill and is able to make such judicial determinations and finding of fact from first-hand observations.

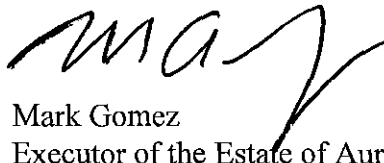
Assignment of Error No. 2

Respondents Western Surety Company, Defendant Great-West Life and Annuity Insurance and Defendant Addison state that they “have no argument to present to this point” regarding Assignment of Error No. 2, thus your Petitioner does not offer further argument.

Conclusion

For the reasons stated herein, your Petitioner shows that a *pro se* Executor is a position of trust and fiduciary responsibility that does not depend upon which forum of the judiciary the Estate finds itself. If an Executor is required to litigate matters in the Circuit Court, the trial judge is the best finder of fact and law to determine whether the Executor may competently represent the Estate in Circuit Court. This remedy gives respect and deference to the Probate Fiduciary that appointed the personal representative, honors the wishes of the Testator, does not vilify the *pro se* Executor and allows the circuit court judge to exercise judgment as to the litigation competence of the *pro se* personal representative.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark Gomez', with a stylized flourish extending from the end.

Mark Gomez
Executor of the Estate of Aurelio Rafael Gomez