IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0019

TOBY E. BELL and
JANICE JOHNSON,
Defendants below, Petitioners,

v.

LEE PERKINS, et al.,
Plaintiffs below, Respondents.

RESPONDENTS' BRIEF

(Appeal from Circuit Court of Pocahontas County Civil Action No. 16-C-13(D))

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STATEMENT OF THE CASE

Okey Johnson Perkins died in the 1960's seised and possessed of a 112 acre family camp in Pocahontas County which he wanted to pass on to those members of his family who cared enough about it to help contribute to the upkeep and maintenance. Accordingly, in Paragraph III, of his *Last Will and Testament*, dated March 29, 1964, he provided as follows:

> I will, devise and bequeath unto five of my children, namely, MASON LEE PERKINS, KATHLEEN IRENE MCCLUNG, JAMES ROSS PERKINS, LUCILLE VALENTINE BELL and CECIL RAPP PERKINS, that certain hunting camp located on the Greenbrier River, in Pocahontas County, West Virginia, for their lifetime, and then to their children as their interest may appear.
>
> And be it further provided that it is my desire that this camp be used as a camp for the mutual benefit of my children and that each of the five previously named children be required to pay to LEE PERKINS, my grandson, who shall be the caretaker of this camp, the sum of One Hundred ($100.00) Dollars per year for the maintenance and upkeep of the premises; and be it further provided that in the event any of the five aforementioned children shall fail to pay the One Hundred Dollars as previously provided, then his or her interest in this property shall be divested as of the date of his or her failure to pay.
>
> And be it further provided that no profit is to be taken from this property but that it is to be used for the maintenance, upkeep and improvements of the premises for the mutual benefit of all concerned.

Order, Civil Action No. 84-C-99, January 25, 1989, pp. 2-3 [App. 28-29].[1]

This portion of Mr. Perkins' *Last Will and Testament* placed a burden upon the five children to whom he left the camp -- known as the "Perkarosa" -- to pay a $100.00 annual maintenance fee to preserve not only their life estate, but also the remainder interest devised to their respective children. However, by 1984, two of the five children, Kathleen Irene McClung and James Ross Perkins, had repeatedly failed to pay their required annual fees. Accordingly, your Petitioners herein, Toby E. Bell and Janice Johnson, together with their now deceased mother,

[1] Page references to the Appendix prepared by Petitioner appear herein as "[App. __-__]".

Lucille Bell Perry (one of the five children of Okey Johnson Perkins), and their now deceased sister, Cuba Jean Douglas (and her husband, Andrew Douglas), filed a civil action titled *Petition for Summary Judgment, Partition of Real Estate and an Accounting,* Civil Action No. 84-C-99 [App. 133-38], before the Circuit Court of Pocahontas County, West Virginia, by which they specifically requested a declaratory judgment seeking to have title to the camp divested from the two non-paying siblings and their potential heirs. Id., ¶¶ 5(B) and (C), and Prayer [App. 136, 138].

They were successful in this endeavor as evidenced by the full text of the *Order* entered by the Honorable Judge Frank E. Jolliffe in Civil Action No. 84-C-99. [App. 27-33]. Judge Jolliffe held that because the family treasurer, Lee Perkins (one of the Respondents herein, who is the son of Mason Lee Perkins),[2] presented a sworn Affidavit confirming that Kathleen Irene McClung and James Ross Perkins failed to pay the annual maintenance fees, they and their heirs were therefore divested of any title to the property. Id. at pp. 4-6 [App. 30-32]. He further confirmed that the two remaining children of Okey Johnson Perkins who were still alive at that time – Lucille Bell Perry and Cecil Rapp Perkins – had life estates in the property, and that their children, plus the children of deceased child Mason Lee Perkins, were all vested with remaindermen interests. Id. at 5-6 [App. 31-32]. The Court also found that the property could be partitioned "upon proper petition"; and, that "a disclosure of all records and assets of the property be made to each party" (which such

[2] Out of the five siblings to whom Okey Johnson Perkins left the Perkarosa, only two branches are represented in this action. The Petitioners, Toby E. Bell and Janice Johnson, are the descendants of Lucille Valentine Perry [Bell]; and, the Respondents are the descendants of Mason Lee Perkins. The descendants of Cecil Rapp Perkins subsequently sold their interests in the property to the Respondent Lee Perkins, and therefore have no further interest in it. The interests of the other two children of Okey Johnson Perkins: Kathleen McClung Perkins and James Ross Perkins, and their heirs, were divested via the ruling from Judge Jolliffe in 1989. Andrew Douglas was named as a party to this civil action below (and properly served) as the spouse of Cuba Jean Douglas, the deceased sibling of the Petitioners, Toby E. Bell and Janice Johnson. However, despite being the potential owner of any interest which she may have inherited in the property, he chose not to participate herein, and filed no responsive pleading.

disclosure had been filed in full by Lee Perkins [App. 121-28]). No party ever appealed any portion of this ruling, and it became the undisputed law of this case.

There was never any further action taken in Civil Action No. 84-C-99, as all relief requested therein had been granted except for a final partition of the property. However, the Petitioners moved forward the very next year (along with their deceased mother and sibling) with the filing of a second case by which they sought a formal partition among the three remaining branches of the family. See *Complaint*, Civil Action No. 90-C-20 [App. 145-48]. The Petitioners noted in their second case that they had obtained a declaratory judgment in the first action, and were now entitled to formally partition the property. Id. at ¶ II [App. 145-46]. However, Petitioners then did absolutely nothing to advance their partition case on the docket. And, as a result -- despite multiple warnings over the years from the Circuit Clerk of Pocahontas County [App. 149-56] -- that case was ultimately dismissed by Judge Jolliffe in 1995 for failure to prosecute. *Order*, Aug. 21, 1995 [App. 157-58].

Neither Petitioners, nor their mother, took further legal action ever again with respect to the Perkarosa. Unfortunately, their mother, Lucille Bell Perry, also failed to pay the annual maintenance fee at any point thereafter for the rest of her life. The parties had "agreed that the dues owing for 1986 and thereafter need not be paid until [Civil Action No. 84-C-99 was] resolved", *Order*, Jan. 25, 1989, p. 4 [App. 30], but that case was finalized in 1989 when Judge Jolliffe issued his final declaratory judgment ruling.

Consequently, Respondents filed the instant case in 2016; See generally, *Complaint for Declaratory Judgment* [App. 4-8]; seeking to confirm that title had been divested from Petitioners when their mother failed to pay the maintenance fee during her lifetime. And once again, family treasurer (and Respondent herein) Lee Perkins presented sworn testimony in the form of Affidavits

establishing that there had been no payment of the annual maintenance fee by Lucille Bell Perry (or anyone else from her branch of the family) since January 27, 1986; *Affidavit of Lee Perkins*, Mar. 21, 2016, p. 1, ¶ 5 [App. 9-10]; while at the same time his side of the family, and the other remaining branch (Cecil Rapp Perkins' side), had "continued to pay the annual maintenance fee as required . . . ." *Supplemental Affidavit of Lee Perkins*, Mar. 19, 2018, p. 2, ¶ 7 [App. 77].

Significantly, there is no dispute that Lucille Bell Perry did not make the required maintenance payments after 1986. Petitioners acknowledged the same outright, but claimed there had been some undefined agreement whereby she did not have to do so:

> Your defendants herein, by their affidavit, acknowledge that Lucy Bell Perry last made the payments provisions [sic] as of January 27, 1986, but by later agreement the parties hereto had agreed that no further payments would be necessary or required and that each of the parties hereto would continue maintaining their property by consent.

Response of Toby E. Bell and Janice Johnson to the Motion for Judgment on the Pleadings or in the Alternative, Motion for Summary Judgment, p. 2, ¶ 6 (verified both by Toby E. Bell and Janice Johnson) [App. 51]. However, at no point in these proceedings thereafter did Petitioners ever provide the details of any such agreement beyond these general self-serving and conclusory allegations. Furthermore, they never rebutted Lee Perkins' sworn testimony on this topic:

> 2. That I have reviewed the Response to the aforesaid Motion filed by the Defendants, Toby E. Bell and Janice Johnson, herein, and disagree with the very general allegations made therein that we ever reached some sort of agreement waiving the payment of the maintenance fee for our family camp as required under my grandfather's Will.
>
> 3. That at no time did I ever enter into any agreement with Lucille Perry, Toby E. Bell, Janice Johnson or Andrew Douglas that they would not have to pay the maintenance fee, nor did we ever even meet to discuss the same, much less put anything in writing (other than agreeing that no one had to pay while the old court case was pending which ended in 1989).

Supp. Aff. of L. Perkins, p. 1, ¶¶ 2 and 3 [App. 76]. Other than the general language in the 1989 Order that the maintenance payments were to be suspended while that case was pending, Petitioners never produced a scintilla of evidence proving any more far-reaching agreement, or explaining why the other two branches of the family resumed paying the maintenance fee after the first case was completed. Moreover, Lee Perkins testified that he was forced to sell timber to help cover the maintenance costs for Perkarosa; and, that the Petitioners no longer used the camp so he assumed they were acknowledging they no longer held any interest there. Id. at p. 2, ¶¶ 4 and 5 [App. 77].

Obviously, some short-lived lapse in payments while appeal periods ran, and a subsequent partition action was filed, would be understandable. However, as noted by Judge Dent in her ruling in this case below, Lucille Bell Perry lived until August 16, 2004, *Order Granting Plaintiffs' Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment*, Civil Action No. 16-C-13(D), Dec. 7, 2018, pp. 5-6 [App. 194-95], which was over 15 years after Judge Jolliffe issued his final ruling (and almost exactly 9 years after her partition case was dismissed for failure to prosecute). Accordingly, because Lucille Bell Perry neither paid the maintenance fee, nor took any action to partition the property, during the final 15 years of her life, Judge Dent was compelled to grant judgment to the Respondents and confirm the divestiture of title from her branch of the family.

However, contrary to Petitioners' allegations, title was not divested due to their failure, as remainderman, to pay the maintenance fee. It was expressly held to have occurred directly because Lucille Bell Perry did not make her payments:

> It is therefore ORDERED,ADJUDGED and DECREED that Plaintiffs' Renewed Motion for Judgment on the Pleadings, or in the alternative, Motion for Summary Judgment be, and the same hereby is, GRANTED, and that this matter is disposed of pursuant to Rule 56 of the West Virginia Rules of Civil Procedure as a

matter of law since there is no genuine issue of material fact that Lucille Bell Perry failed to pay the required payments. Accordingly, it is ORDERED that since Lucille Bell Perry did not make annual payments as required by the terms of the Will, as a result of such nonpayment, Lucille Bell Perry, and her heirs, have been divested of any legal right or interest in said property, known as Perkarosa Camp.

Id., p. 8 (emphasis supplied) [App. 197]. It is from this Order that Petitioners appeal.

SUMMARY OF ARGUMENT

Petitioners directly participated as the Plaintiffs in the 1984 civil action that divested title to the Perkarosa family camp from their aunt and uncle, and their heirs, because of the failure to pay an annual maintenance fee required by the *Last Will and Testament* of Okey Johnson Perkins. However, they then stood by and did nothing during the last 15 years of their mother's life as she failed to pay the same fees. They now complain that the very provision enforced by them against their other family members should not be likewise applied to their situation.

Judge Jolliffe's 1989 ruling regarding this matter completely upheld the provisions of Okey Johnson Perkins' *Last Will and Testament* regarding the Perkarosa, and therefore Petitioners' mother had to either continue paying the annual maintenance fee, or partition the property within a reasonable time thereafter. She did neither. For those reasons, Judge Dent was required to rule as she did, and to stand by the prior holding of the Court. Accordingly, her ruling confirming that the interest of Lucille Bell Perry in the Perkarosa, and that of her heirs, the Petitioners, had been divested years earlier, was entirely correct and should be upheld.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent believes that the facts and legal arguments will be adequately presented in the briefs and record on appeal, and that the decisional process would not be significantly aided by oral argument. However, if the Court determines that oral argument is appropriate, then the Respondent believes that a Rule 19 argument should be scheduled as this case involves assignments of error in the application of settled law and/or a narrow issue of law.

ARGUMENT

A. INTRODUCTION

Respondents hereby submit the following Response to the arguments advanced in Petitioners' Brief as filed herein. Although Petitioners listed three separate Assignments of Error in their Petitioners' Brief, they failed to utilize separate headings for each one in the Argument section of the Brief as required by Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure. Accordingly, Respondents will respond to the Assignments of Error in one general argument section as well.

B. STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." Painter v. Peavy, 192 W Va. 189, 451 S.E.2d 755, Syll. Pt. 1 (1994). This Court therefore reviews:

> anew the findings and conclusions of the circuit court, affording no deference to the lower court's ruling. See West Virginia Div. of Envtl. Protection v. Kingwood Coal Co., 200 W.Va. 734, 745, 490 S.E.2d 823, 834 (1997) ("'De novo refers to a plenary form of review that affords no deference to the previous decisionmaker.' " (quoting Fall River County v. South Dakota Dep't of Revenue, 1996 SD 106, ¶ 14, 552 N.W.2d 620, 624 (1996) (citations omitted))). See also West Virginia Div. of Envtl. Protection v. Kingwood Coal Co., 200 W.Va. at 745, 490 S.E.2d at 834 ("The term '*de novo*' means '"[a]new; afresh; a second time." ' " (quoting Frymier-Halloran v. Paige, 193 W.Va. 687, 693, 458 S.E.2d 780, 786 (1995)(quoting *Black's Law Dictionary* 435 (6th ed. 1990)))).

Blake v. Charleston Area Medical Center, 201 W. Va. 469, 475, 498 S.E.2d 41, 47 (1997).

C. DISCUSSION

In order to understand this case more clearly, one must first define the type of property interest which passed under the *Last Will and Testament* of Okey Johnson Perkins. Judge Jolliffe generally upheld the provisions of the *Will* via his 1989 ruling, but did not describe the property law specifics. Nevertheless, it seems clear that what Mr. Perkins left to his heirs was a fee simple determinable with an executory interest (because title can be divested due to the happening of a

future event, and then transferred to other heirs). See generally, Woman's Club of St. Albans v. James, 158 W.Va. 698, 703-05, 213 S.E.2d 469, 473 (1975).

In this instance, when the divesting condition set forth in the *Will* occurred -- the non-payment of the maintenance fee by Lucille Bell Perry -- both her title to the Perkarosa, and that of her heirs, the Petitioners, was automatically taken and given over to Respondents (and Cecil Rapp Perkins' branch of the family, which was still in the picture at that time): "[A]nd be it further provided that in the event any of the five aforementioned children shall fail to pay the One Hundred Dollars as previously provided, then his or her interest in this property shall be divested as of the date of his or her failure to pay." *Order*, Civil Action No. 84-C-99, Jan. 25, 1989, p. 3 (quoting *Last Will and Testament of Okey Johnson Perkins*) [App. 29]. No action was required on the part of anyone to make the divestiture of title happen. It did so automatically, regardless of what any other party did or did not do.

The primary thrust of Petitioners' argument in this case seems to be a mischaracterization of Judge Jolliffe's actual ruling regarding this divestiture of title. Petitioners insist that their interest in the property was taken even though the Court's 1989 ruling held that they had a vested interest, and despite the fact there was no maintenance fee payment requirement applicable to them, as remaindermen, in the *Will*. However, this argument ignores the details of Judge Jolliffe's holding.

When Judge Jolliffe divested title from Petitioners' aunt and uncle, he specifically noted that title was not just being taken from those two parties, but also from their heirs:

> "[T]he Court further finds that as a result of such nonpayment Kathleen Irene McClung, and her heirs, and James Ross Perkins, and his heirs, have been divested of any legal right or interest in said property."

Order, Civil Action No. 84-C-99, Jan. 25, 1989, p. 5 (emphasis supplied) [App. 31]. Presumably, he reached this decision because the heirs of these two siblings were simply remaindermen tied to

their respective parent's life estate interest. In other words, although they did hold vested remainder interests, such interests were still wrapped up with the interest of their parent, and subject to the occurrence of a divesting event.

Petitioners bitterly complain that their title was vested, but the reality is that vested or not it makes no difference. Judge Jolliffe confirmed their status as vested remaindermen when he carefully specified that the grandchildren comprising the three branches of the family still in the game as of 1989 all had "equal and undivided remainder interests in said property." Id., p. 6 (emphasis supplied) [App. 32]. However, regardless of the vested nature of the interest, it was still subject to divestiture if their respective parent failed to pay the required maintenance fee.

And in fact, that is exactly the manner in which they themselves specifically requested the Court to construe and apply the *Last Will and Testament of Okey Johnson Perkins* in 1989. Back then they asked: "(2) Whether the heirs-at-law of James Ross Perkins, deceased, have forfeited their right to participate in any ownership of said property by failure to pay the required sums[.]" *Petition for Summary Judgment, Partition of Real Estate and an Accounting*, Civil Action No. 84-C-99, Prayer, p. 6, ¶ 2 [App. 138]. Consequently, Judge Dent had no recourse when deciding this matter in late 2018 other than to apply the law of the case as determined by Judge Jolliffe in 1989 (which had been determined in exactly the manner which Petitioners then desired and requested). Petitioners did not appeal Judge Jolliffe's ruling, but instead embraced and enforced it, and therefore cannot now deny its effect due to res judicata and/or claim preclusion.

"Before the prosecution of a lawsuit may be barred on the basis of res judicata, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of

action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc., Syll. Pt. 2 (W.Va. 2017)(citing Blake v. Charleston Area Med. Ctr., Inc., 201 W.Va. 469, 498 S.E.2d 41, Syll. Pt. 4 (1997)). Although we are looking to bar an appeal rather than the prosecution of a lawsuit in this instance, it is quite clear that res judicata applies to defeat Petitioners' claims. The facts present here easily satisfy all three required elements. Judge Jolliffe resolved these exact same issues; between the exact same family members (plus a few more); and, the cause of action was identical (declaratory judgment seeking divestiture of title).

"For purposes of res judicata or claim preclusion, 'a cause of action' is the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief. The test to determine if the issue or cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues. If the two cases require substantially different evidence to sustain them, the second cannot be said to be the same cause of action and barred by res judicata." Dan Ryan Builders, Inc., Syll. Pt 3 (W.Va. 2017)(citing, Slider v. State Farm Mut. Auto. Ins. Co., 210 W.Va. 476, 557 S.E.2d 883, Syll. Pt. 4 (2001)). Obviously, in this instance, just as in 1989, the key question is whether one of the children of Okey Johnson Perkins failed to pay the required annual maintenance fee for Perkarosa. The basic evidence would be the same now as it was then: Was the maintenance fee paid or not?

As voluntary parties to the first civil action who elected to submit all such issues to the Judge for decision, Petitioners are now estopped from denying the effect of the Order entered in 1989. See generally, Slider v. State Farm Mut. Auto Ins. Co., 210 W.Va. 476, ___, 557

S.E.2d 883, 887 ("[R]es judicata or claim preclusion 'generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action.'" State v. Miller, 194 W.Va. 3, 9, 459 S.E.2d 114, 120 (1995) (citing Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308, 313 (1980); In re Estate of McIntosh, 144 W.Va. 583, 109S.E.2d 153 (1959)).

As the Judge of the Circuit Court of Pocahontas County in 2018, Judge Dent had no leeway or flexibility to do anything herein other than to enforce the law of the case as it was determined by her predecessor in 1989, and followed by the parties hereto for all these years. To do otherwise would be inherently unfair, most particularly to those parties whose property interests were terminated back then at the behest of the Petitioners. Judge Dent applied the law exactly as Judge Jolliffe originally construed and applied it to the devisees of Okey Johnson Perkins. It is unfortunate that this results in a divestiture of title, but Petitioners were actual participants in the original case and knew what was required of them. Moreover, they could have prevented this result simply by pursuing their partition case.[3]

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[3] Petitioners also mention waiver in a very general fashion in their Brief, but fail to acknowledge that this affirmative defense was never raised in their Answer to the Complaint filed herein as required by Rule 8(c) of the West Virginia Rules of Civil Procedure. See generally, *Answer of Toby E. Bell and Janice Johnson to the Complaint for Declaratory Judgment*, pp. 1-3 [App. 11-13]. Moreover, even if it had been properly reserved as a defense, it is still not applicable because there is simply no evidence that Respondents waived any of their rights to ask the Court for a declaratory judgment ruling on this issue, nor that they misled or caused the Petitioners to somehow change their position. To the contrary, the evidence was that Petitioners did not even use Perkarosa.

They also mention the Rule against Perpetuities in passing as well. However, since any interests created under the *Last Will and Testament of Okey Johnson Perkins* arose prior to our adoption of the Uniform Statutory Rule Against Perpetuities, W.Va. Code § 36-1A-1, et seq., West Virginia common law applies. And per Smith v. VanVoorhis, 170 W.Va. 729, ___, 296 S.E.2d 851, 854 (1982), a class of persons consisting of the heirs of a decedent, such as we have here, is a closed class under the common law Rule against Perpetuities, and therefore does not violate the same.

CONCLUSION

For the reasons set forth herein, the ruling of the Circuit Court of Pocahontas County in this matter should be upheld, and the Petitioners' appeal should be denied.

LEE PERKINS, HARRY PERKINS, JR., REM PERKINS and ANNIE MARGARET LOU PERKINS
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CERTIFICATE OF SERVICE

I, Jeffry A. Pritt, counsel for the Respondents, do hereby certify that service of the attached RESPONDENTS' BRIEF has been made upon the Petitioners both via email, and by depositing a true and correct copy of the same in the regular U.S. mail, postage prepaid, and addressed to their counsel of record as follows:

Paul S. Detch
895 Court St N
Lewisburg, WV 24901

this 13th day of August 2019.

JEFFRY A. PRITT