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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET No. 20-0602

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**HOMER DYE**

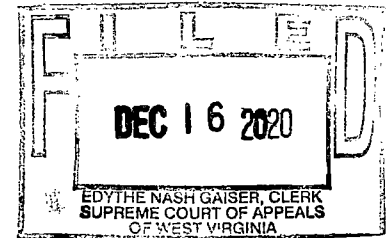
Plaintiff Below, Petitioner

V.)

Appeal From Final order  
of the Circuit Court of Marion County  
(16-AA-3)

**COUNTY COMMISSION OF  
MARION COUNTY**

Defendant Below, Respondent



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**Respondent's Reply Brief**

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## PRELIMINARY STATEMENT

Petitioner's "Statement of the Case", on page 1 of the Brief states that "Oras Dye signed the Will and it was witnessed by Home Dye and Amber McClain". Such a statement discloses the Petitioner and his Counsel have no understanding of a holographic will under West Virginia law. A valid holographic will must be "wholly in the handwriting" of the Testator, not just signed by the Testator. Further, if the holographic will is wholly in the handwriting of the Testator no witness signatures are necessary. It appears that Petitioner wants it both ways in this matter. He argues that the Will was valid because it was printed and signed by the Testator and witnessed. However, it can't be both ways. The Will of Oras Dye was either a holographic Will totally in his handwriting or it was a Will that required witnesses. Either way the Will is flawed and invalid. It is not a holographic Will since it is not wholly in the Testator's handwriting a it cannot be a Will admitted to probate since Homer Dye was a witness and beneficiary and the other attesting witness died before the Will was brought forth.

Petitioner and his counsel failed to take any action before the Office of the Fiduciary Supervisor and the Marion County Commission, despite being given months to do so. Petitioner and his counsel knew the Will of Oras Dye was not "wholly in the handwriting" of Oras Dye and could not be directly probated before the Marion County Commission. As such, Petitioner and his counsel admit that they willfully took no action concerning the void will before Fiduciary Supervisor and the Marion County Commission. Petitioner and his counsel now come before this Court asking to indirectly probate a void will due to their inaction over the years because now all legal time limits to challenge the will of Oras Dye have expired. The Circuit Court of Marion County refused to reward the conduct of the Petitioner and his counsel which would disinherit the six children of Oras Dye.

This Court must now review the conduct of Petitioner and his counsel and decide if such conduct merits the disinheritance of the six children of Oras Dye.

### **STATEMENT OF THE CASE**

Respondent takes issue with the following particulars in Petitioner's Statement of The Case.

Petitioner alleges that the purported holographic Will of Oras Dye was presented to the Office of the Fiduciary Supervisor and that the office accepted the Will and admitted it to probate. The correct facts are that the Will and the proofs of the holographic Will of Alicia Healy and Yvonne Shaw were given to the Marion County Clerk and the Will was admitted to record by the Clerk, in vacation. Subsequent to the admission of the Will to record, the Fiduciary Supervisor decided to conduct an investigation of the purported holographic Will.

### **SUMMARY OF ARGUMENT**

A fundamental principle of law is that you cannot do indirectly what you cannot do directly. That, however, is exactly what Petitioner seeks to do in this matter.

Counsel for Petitioner asserts a procedural due process argument, claiming that his client was denied the right to hearing before the County Commission of Marion County, West Virginia or the right in any way to protest and be heard before the Will of Oras Dye was declared void by Order of the County Commission of Marion County, West Virginia.

Respondent contends that Homer Dye had more than adequate opportunity to contest the actions of the Fiduciary Supervisor and the County Commission and either failed to act or purposefully chose not to act until it was too late. Now, all other legal remedies either have been exhausted or are no longer available.

Respondent further contends that the Fiduciary Supervisor of Marion County, West Virginia and the County Commission of Marion County, West Virginia acted within their constitutional and statutory authority in declaring the will of Oras D. Dye void.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Respondent concurs with the position of Petitioner that oral argument is unnecessary in this case and concurs with Petitioner's citation of W.Va. R. App. P 18(a)(4) as the basis for that conclusion.

### **ARGUMENT**

#### **I. THE CIRCUIT COURT DID NOT ERR IN HOLDING THAT HOMER DYE RECEIVED ADEQUATE NOTICE TO SATISFY DUE PROCESS REQUIREMENTS.**

This Court has generally approached the issue of due process upon a case-by-case basis while setting forth some common standards for a determination of due process rights. In *State ex rel White v. Todt*, 197 W. Va. 334, 475 S. E. 2d 426 (1996), this court wrote:

[w]hen due process applies, it must be determined what process is due and consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been impaired by government action.

Further, as the Circuit Court below noted, this Court has addressed the issue of due process in the case of *Higginbotham v. Clark*, 189 W.Va 504, 432 S.E. 2d.(1993). There the Court said, "[a]pplicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case." *Id* at Syllabus Pt. 2 So, while in many circumstances a formal hearing can be an integral part of due process, it does not have to be. In the instant case this Court must first determine the nature of the government function and the

private interest that has been impaired by government action and then what process was due Petitioner. Clearly, the nature of the government function at issue is the expeditious yet just settlement of estates. The private interest impaired by the actions of the Fiduciary Supervisor, if any, would be ability of Homer Dye to administer the estate of Oras Dye and benefit from the assets of the estate to the exclusion of Oras Dye's children.

To determine if due process was afforded under the particular circumstances of this case the Court must compare and contrast the conduct and inaction of the Petitioner and the harm to the children of Oras D. Dye if their Father's real estate was lost; they would have lost their inheritance if their Father's real estate had been sold to a third party under a void Will. After being told the Will of Oras D. Dye was going to be voided, Petitioner and his Counsel had many opportunities to protest and at least two legal remedies at their disposal. They took no action whatsoever.

Legal counsel is expected to act with "reasonable diligence". Black's Law Dictionary 523 (9th Ed. 2009) defines "reasonable diligence" as a fair degree of diligence expected from someone of ordinary prudence under circumstance like those at issue. In this case, the Fiduciary Supervisor repeatedly notified all interested parties of his investigation, the process of the investigation, and the issues concerning the purported holographic will of Oras D. Dye. Consistent with his "gate-keeping functions", the Fiduciary Supervisor notified petitioner's Counsel that he was meeting with the County Prosecutor to void the Will of Oras D. Dye. Counsel did nothing to protest or otherwise indicate disapproval of the intended action of the Fiduciary Supervisor.

Petitioner's assertion that he was not afforded due process conveniently ignores the most important fact of this case, and the one on which the Circuit Court of Marion County based its

denial of Petitioner's appeal; the only reason this matter is before this Court is Petitioner's failure to take any action whatsoever, after receiving the notice from the Fiduciary Supervisor by letter dated April 25, 2016 of his intent to submit to the County Commission an order voiding the Will of Oras Dye. In his argument, Counsel blissfully ignores the fact that he filed no response with the Fiduciary Supervisor or the County Commission, after being given a reasonable opportunity to advance his Client's case. After being given notice of the Fiduciary Supervisor's intent to have the Will set aside as void, Petitioner did nothing for five months. For five months Petitioner remained silent, he failed to file any response whatsoever in the months of May, June, July, August, or September of 2016.

Additionally, after the Fiduciary Supervisor gave notice of his intent to submit the Order to the County Commission voiding the will and even after the Order was entered Petitioner could have filed a Petition to Probate the Will in Solemn Form. W.Va. Code 41-5-5 That did not happen in May, June, July, August, or September of 2016.

In addition, Petitioner could have filed for Declaratory Relief before the Circuit Court of Marion County. W.Va. Code 55-13-1 However, Petitioner failed to file with the Circuit Court for Declaratory Relief in May, June, July, August, or September of 2016. The letter of the Fiduciary Supervisor of April 25, 2016, told the Petitioner and his Counsel the Fiduciary Supervisor was in the process of meeting with the County Prosecutor to void the Hand Printed Will, and disclosed the information gathered by the Fiduciary Supervisor. Nonetheless, the Petitioner took no action on the disputed Hand Printed Will for more than five (5) months, instead choosing to place the real estate of Oras D. Dye up for sale. It was only after Petitioner learned that the Will had been voided and notated as such in the records of the County Clerk that he took any action.



Petitioner and his Counsel had reasonable opportunities to avail themselves of remedies before the Fiduciary Supervisor and the Marion County Commission, which satisfied all procedural due process concerns in the particular case. Since the Petitioner and his Counsel declined to avail themselves of the legal remedies by their own conduct, this Court should readily conclude Petitioner has not been deprived of due process of law. State ex rel Southland Properties, LLC, v. Janes, 811 W. Va.273 (2018).

**II. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE FIDUCIARY SUPERVISOR AND COUNTY COMMISSION HAD THE AUTHORITY TO VOID THE WILL OF ORAS DYE**

Petitioner's challenges the power or statutory authority of the Fiduciary Supervisor and County Commission in exercising their "gate-keeping functions" with Marion County probate. The County Commission has exclusive jurisdiction of "all matters" probate. W. Va. Code 7-1-3, as amended. The office of Fiduciary Supervisor was created "to aid and assist the county commission in the proper and expeditious performance of the duties of such commissions with respect to the administration of estates..." W.Va. Code 44-3A-2. Further, the legislature of the state has determined that "[t]he fiduciary supervisor shall have general supervision of all fiduciary matters and of the fiduciaries or personal representatives thereof and of all fiduciary commissioners and of all matters referred to such commissioners and shall make all ex parte settlements of the accounts of such fiduciaries except as to those matters referred to fiduciary commissioners for settlement." W.Va. Code 44-3A-3. Thus, the Fiduciary Supervisor has, by extension of the authority of the County Commission and by statute, authority of all matters probate in a county.

West Virginia Code §41-5-10 provides in pertinent part:

At, 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. (Emphasis added)

This section of the code allows for a Will to be probated or rejected for probate on an ex parte basis. No notice is required to any party. That is exactly what the Fiduciary Supervisor did in the case before the Court. By the authority of the statutory provision granting him general supervision over all fiduciary matters in the county he undertook, without notice to any party, the determination of the validity of the Will of Oras Dye, albeit after the ministerial act of the Clerk's office of accepting the will for probate.

Petitioner appears to argue that once the will of Oras Dye was accepted by the staff of the Clerk's office, the authority of the Fiduciary Supervisor to take action regarding the validity of the Will ended. The right of general supervision and authority regarding all fiduciary matters in a county lie with the Fiduciary Supervisor of the county, not members of the staff of the Clerk of the County Commission. The Fiduciary had not only the right, but also the statutory duty and obligation to determine the validity of the Will.

Petitioner's position amounts to an argument that if a member of the County Clerk's Staff mistakenly records a void or voidable probate document, the Fiduciary Supervisor and the County Commission are not able to take action to correct the error without some formal legal proceeding. Such a nonsensical argument belies the facts of this particular case. When the Fiduciary Supervisor discovered an issue with the hand printed Will of Oras D. Dye all actions he took action with repeated notices to all interested parties, inviting all parties to participate in

the resolution of the issues. The Petitioner and his Counsel failed to participate and must now bear the cost of their inaction.

It is also important to note that at the time the Fiduciary Supervisor took action this matter was a pending estate, not a closed estate. This is not the situation where the Fiduciary Supervisor opened a closed estate and set aside a Will. The estate was still within the jurisdiction of the Fiduciary Supervisor and his obligation to ensure efficient and just administration was ongoing.

### **CONCLUSION AND REQUEST FOR RELIEF**

For the reasons set forth herein Respondent requests that this Court affirm the Circuit Court's Order Denying Homer Dye's Petition of Appeal of Decision of Marion County Commission and Order that the purported holographic Will of Oras Dye be declared void.

Signed: 

Charles A. Shields (WV Bar # 4640)  
Counsel of Record for Respondent Marion County  
Commission

## CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of December 2020, a true and accurate copy of the foregoing **Respondent's Reply Brief** was deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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