IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-0602

HOMER DYE,
Plaintiff Below, Petitioner,

v.

COUNTY COMMISSION OF MARION COUNTY,
Defendant Below, Respondent.

On appeal from the
Circuit Court of Marion County, West Virginia
Case No. 16-AA-3, The Honorable David R. Janes

REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR APPEAL

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COMES NOW Petitioner Homer Dye and, pursuant to Rule 10(g) of the West Virginia Rules of Appellate Procedure and the Court's previously entered Scheduling Order, hereby submits this Petitioner's Reply Brief in further support of his appeal from the Circuit Court's denial of his appeal regarding the holographic Last Will and Testament of Oras Delmus Dye. This Reply Brief responds to the Marion County Commission's Response to Homer Dye's Brief in Support of his appeal.

STATEMENT OF THE CASE

In its response brief, the Marion County Commission ("County Commission" or "Respondent") points out that the holographic Last Will and Testament of Oras Delmus Dye (hereinafter "Will") was admitted to record by the Clerk of the County Commission, in vacation. Resp't Reply Br. 2. This is correct. However, the Marion County Commission itself made a finding of fact that it admitted the Will "to probate, based upon the Affidavits of Yvonne Shaw and Alicia Healey." R. 69. Therefore, the County Commission itself adopted the admission of the Will to probate.

ARGUMENT

I. The Circuit Court erred in holding that Homer Dye received adequate notice of the intent to void the Will and that due process requirements had been provided.

In its response, the County Commission bases its argument that Homer Dye had received adequate notice of the intent to void the Will and that due process requirements had been met on four sub-arguments. First, the Respondent asserts the due process requirements were met because of a lessened need for due process due to the nature of the circumstances of the case. This is inaccurate given that the statutes surrounding probate and administration of estates have multiple situations in which notices and hearings are required. Second, the need for due process

was lessened because of the potential harm to the intestate heirs of Oras Dye. Such argument ignores the fact that the intestate heirs have not taken any action in this process and Homer Dye had a vested interest in the Estate. Third, the Respondent places the blame and burden on Homer Dye and his counsel, ignoring the fact that the Will had already been admitted to probate by the Respondent and Homer Dye had satisfied his burden. And finally, the Respondent points out other remedies that Homer Dye could have undertaken. Again, such argument is inappropriate because Homer Dye had already met his burden.

a. Statutes involving the probate of wills and the administration of estates require notice, opportunities to object, and hearings before adverse actions can be taken and Homer Dye was entitled to the same in this case.

The Respondent relies upon general analysis of due process rights in asserting that Homer Dye did in fact receive appropriate due process when the Fiduciary Supervisor acted *ex parte*. The Respondent relies upon the general principle that "'[a]pplicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case.'" Higginbotham v. Clark, 189 W. Va. 504, 505, 432 S.E.2d 774, 775, syl. pt. 2 (1993) (quoting North v. West Virginia Board of Regents, 160 W.Va. 248, 233 S.E.2d 411, syl. pt. 2 (1977)). The Respondent then concludes that there was sufficient due process because of the April 25, 2016 letter from the Fiduciary Supervisor and the availability of remedies such as a petition to probate in solemn form and declaratory judgment actions.

The Respondent's analysis ignores the due process requirements for notice and hearing in similar contexts. Pursuant to West Virginia Code § 44-3A-41, the county commission can appoint a fiduciary commissioner to oversee a controversy regarding the probate of a will. In that situation, the fiduciary commissioner will hear proof, prepare proposed findings of fact, provide those to the county commission, provide opportunities for objections, and, if objections

are made, then the county commission will hold a hearing. W. Va. Code § 44-3A-41. Within the *ex parte* procedure to admit a will to probate, a party can object before the county commission approves the entry of the will into probate. W. Va. Code § 41-5-10. The objecting party will have to file a notice of contest to the probate. Id. At such time, the clerk will issue process on such notice and the county commission will hold a hearing. Id. In terms of administration of an estate, a claimant has a right to be heard before the claim is rejected. See Hose v. Estate of Hose, 230 W. Va. 61, 67, 736 S.E.2d 61, 67 (2012) ("The general scheme of the probate statutes reflect a legislative intent that a claimant be given notice and an opportunity to be heard before a claim is rejected on the merits[]" and wherein the fiduciary supervisor could not unilaterally reject an affidavit.).

The probate and estate administration processes have multiple examples of situations in which a hearing or notice is required. In this case, the Respondent relies entirely upon a letter from the Fiduciary Supervisor, sent after the Will was admitted to probate by the County Commission, wherein the Fiduciary Supervisor says he is going to submit an order to the County Commission to void the Will. Such letter does not provide proper opportunity and notice to be heard, especially given that nothing was pending before the County Commission. The statutes envision and require additional opportunity to be heard in similar instances and the same should have been afforded to Homer Dye.

b. The lack of due process provided to Homer Dye is improperly justified by the assertion of a need to protect the intestate heirs of Oras Dye.

The Respondent also asserts that the due process afforded was proper to protect the intestate heirs of Oras Dye. At the time of the Fiduciary Supervisor's actions in October 2016 when he presented the *ex parte* order to the County Commission, Homer Dye was the legal heir of the Estate of Oras Dye. The Will had been admitted to probate by the County Commission in

February 2016. R. 69. Since that time, Homer Dye had been the legal heir of Oras Dye, notwithstanding the Fiduciary Supervisor's beliefs. Therefore, the Fiduciary Supervisor's actions sought to disinherit Homer Dye, something that the Respondent accuses Homer Dye of doing to the intestate heirs of Oras Dye.

The Respondent also has asserted that the threat of disinheritance justified the *ex parte* actions. By that logic, a notice and hearing should have been conducted. "[T]he more valuable the right sought to be deprived, the more safeguards will be interposed." Higginbotham v. Clark, 189 W. Va. 504, 505, 432 S.E.2d 774, 775, syl. pt. 2 (1993) (quoting North v. West Virginia Board of Regents, 160 W.Va. 248, 233 S.E.2d 411, syl. pt. 2 (1977)). If there was concern that Homer Dye was going to sell the real property prior to the hearing, the County Commission could have entered an order effectively creating a notice of lis pendens, notifying potential purchasers of the dispute. This would have only been a temporary deprivation of rights and therefore, an *ex parte* action would have been more justifiable. See id. ("'[A] temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.'").

The intestate heirs of Oras Dye were also not involved in the administration of the Estate and it is unclear why the Fiduciary Supervisor needed to act quickly to protect their interests. At no point in time did the intestate heirs of Oras Dye seek to set aside the Will, qualify as personal representative, or take any other step to be recognized as the heirs of the Oras Dye. Much is made of Homer Dye not responding to the Fiduciary Supervisor's April 25, 2016 letter, but the same letter was sent to the instate heirs of Oras Dye. R. 58. In that letter, the Fiduciary Supervisor stated that he was "asking them to file their written position on the Holographic Will in the next twenty (20) days." Id. No response was ever received from the intestate heirs. The

intestate heirs' failure to respond or take a formal position does not support the Respondent's conclusion that the Fiduciary Supervisor needed to act without any notice or hearing. The intestate heirs had ample opportunity to make an appearance and formally request that the Will be set aside but failed to do so. There was no need for the Fiduciary Supervisor to intervene on their behalf to resolve the failure to object via the *ex parte* order.

c. Homer Dye did not have any obligation to respond to the April 25, 2016 letter.

While the Respondent ignores the inaction of Oras Dye's intestate heirs, it makes much of Homer Dye's inaction between the April 25, 2016 letter and the Fiduciary Supervisor's actions in invalidating the Will. The Respondent never explains why Homer Dye had any obligation to respond to that letter. The Will had already been admitted to probate at the time of the letter. R. 69. Homer Dye had already complied with the requests of the Fiduciary Supervisor by providing the completed affidavits supporting the Will. R. 67-68. The Fiduciary Supervisor did not have any clear grounds to be investigating the Will. The potential avenues for setting aside the Will all involved some type of formal filing and hearing. All of these facts support the conclusion that the Homer Dye had no obligation to respond to the April 25, 2016 letter.

There is also the fact of the Fiduciary Supervisor's delay, which the Respondent never explains. The County Commission admitted the Will to probate on February 4, 2016. R. 69. The Fiduciary Supervisor did not present the order to the County Commission until October 5, 2016. R. 67-71. This was a period of eight months. The deadline for filing an appeal of an *ex parte* admission of a last will and testament is six months. W. Va. Code § 41-5-11. Assuming that a fiduciary supervisor has the power to challenge the admission of a last will and testament to probate, such office should be under the same deadlines as other parties. Given that the

Fiduciary Supervisor's submission of the *ex parte* order was outside of the six-month time-period set forth in West Virginia Code § 41-5-11, such order should be considered untimely.

d. The existence of other potential remedies, that were likely not needed, does not alleviate the Respondent's failure to provide proper due process prior to invalidating the Will.

The Respondent also identifies other remedies that Homer Dye had regarding the April 25, 2016 letter, specifically to petition to probate the Will in solemn form or file a declaratory judgment action. The Respondent does not explain why Homer Dye needed to use these remedies: the County Commission had already admitted the Will to probate. R. 69. He had already met his burden of proof on the Will. The existence of such remedies also does not alleviate the lack of notice and hearing by the County Commission in entering the *ex parte* order. Homer Dye did in fact exercise his legal remedy regarding that order by appealing the decision to the Circuit Court. The Respondent's identification of other potential remedies merely moves the burden from the Fiduciary Supervisor onto Homer Dye to prove something that had already been resolved.

Ultimately, Homer Dye was entitled to notice and hearing of the County Commission's intended actions regarding the Will. Homer Dye had lodged the Will with the Clerk of the County Commission. Upon request of the Fiduciary Supervisor, Homer Dye secured affidavits proving the authenticity of the Will. He presented those to the Clerk of the County Commission and the Will was admitted to probate. The County Commission approved this admission. Then, the Fiduciary Supervisor undertook his own independent investigation and said he was going to have an order prepared voiding the Will and present such order to the County Commission. The Fiduciary Supervisor waited months to do this and never provided a copy of the proposed order to Homer Dye. Rather, he provided the order to the County Commission, who entered it without

notifying Homer Dye or providing him a chance to object. At the time that the County Commission entered such order, Homer Dye was the legal heir of Oras Dye and before such decision was invalidated, he was entitled to notice of the same and a chance to object.

II. The Circuit Court erred in finding that the Fiduciary Supervisor and County Commission had the authority to void the Will.

One of the key arguments for Homer Dye is that the Fiduciary Supervisor did not have the authority to unilaterally prepare an *ex parte* order voiding the Will and have the County Commission enter the same. The Respondent does not disprove this argument.

The Respondent relies upon two grounds which it claims gave the Fiduciary Supervisor the authority to act as he did. First, pursuant to West Virginia Code § 44-3A-1 et seq., a fiduciary supervisor has "general supervision of all fiduciary matters and of the fiduciaries or personal representatives thereof[.]" W. Va. Code § 44-3A-2(b). Second, according to the Respondent, West Virginia Code § 41-5-10 allows the fiduciary supervisor to move to reject the probate of a last will and testament after it has been admitted to probate. That argument is not supported by the statute. Ultimately, neither argument establishes the Fiduciary Supervisor's authority to act in the manner that he did.

a. The general supervisory powers of the fiduciary supervisor do not provide authority for him to seek to void a last will and testament *ex parte* through the County Commission.

The fiduciary supervisor's general powers do not make any mention of the office's authority to act in terms of the probate of a will in the first instance. W. Va. Code § 44-3A-2. Rather, issues dealing with the admission of a will to probate are handled by the clerk of the county commission and the county commission. W. Va. Code § 41-5-10. Nothing in the statutes indicate that the fiduciary supervisor could independently investigate the probate of a will and then unilaterally seek to overturn it without notice. Notably, the Respondent does not cite to any

such statute, instead relying upon the fiduciary supervisor's general supervision powers. Resp't Reply Br. 6-7.

In terms of a fiduciary supervisor becoming involved in the probate of a will, there is a procedure in place for a fiduciary commissioner to deal with issues regarding the probate of a will and could conceivably be used by the fiduciary supervisor. Such procedure is relevant given that it does in fact provide for notice and certain due process to all parties involved. When a "controversy arises in connection with the probate of any will," the county commission may refer the matter to a fiduciary commissioner "or to a person specifically appointed to act as such commissioner[.]" W. Va. Code § 44-3A-41. Such fiduciary commissioner shall then "hear proof on the same, to make findings thereon, and to advise the commission on the law governing the decision of the matter." Id. Then, "[a]ny party may except to such commissioner's findings of fact of law, and the commission shall hear the case on the fiduciary commissioner's report and the exceptions thereto, without taking any additional evidence." Id.

When the county commission appoints a fiduciary commissioner to assist in resolving a controversy regarding the probate of a will, several things occur. First, the fiduciary commissioner is to hear proof on the issue. Id. Then, the commissioner will make findings thereon and send those findings to the county commission. Id. At that point, any party may object to those findings. Id. If an objection is made, then the county commission shall hold a hearing. Id. Such procedure is clear and allows multiple opportunities for parties to be heard. It also clearly envisions some type of procedural process involving a hearing, argument, and submission of proof.

The Respondent and Fiduciary Supervisor did not utilize a similar procedure in this case. First, the County Commission did not ask the Fiduciary Supervisor to investigate the

controversy. Second, the Fiduciary Supervisor did not schedule a hearing to hear proof on the issue. Rather, he undertook his own investigation and reached his own conclusion. He did not issue findings of fact. Instead, he sent the April 25, 2016 letter to Homer Dye and the intestate heirs of Oras Dye setting forth his belief. R. 58. Further, there is no indication that he sent the letter to the County Commission in lieu of formal findings of fact.

The Fiduciary Supervisor's April 25, 2016 letter also falls short in being considered any type of findings of fact because of its shifting of the burden of proof onto Homer Dye. In that letter, the Fiduciary Supervisor states, "Since your client has the burden of proving the Will of record was 'wholly in the handwriting of Oras Dye,' I will wait twenty (20) days before taking any action." Id. Homer Dye had already met his burden of proof by providing the affidavits and having the County Commission admit the will to probate. R. 67-69. Further, given that the Fiduciary Supervisor was inviting all parties to provide additional proof or positions, such April 25, 2016 letter could not be considered the findings of fact envisioned by West Virginia Code § 44-3A-41. At best, the letter could have been considered an opportunity to provide proof in anticipation of preparing proposed findings of fact.

It could be argued that the proposed order could be considered the requisite findings of fact. However, for whatever reason, the Fiduciary Supervisor never provided that order to Homer Dye prior to entry. R. 66. Rather, he presented it *ex parte* to the County Commission and only after it was entered did he provide a copy to Homer Dye. Id. Therefore, there was no opportunity to object, as required by West Virginia Code § 44-3A-41.

Overall, the Respondent fails to establish how the Fiduciary Supervisor had the authority to act as he did. The County Commission had admitted the Will to probate. R. 69. None of the intestate heirs of Oras Dye had objected to the Will. No controversy was pending before the

County Commission regarding the probate of the Will. Rather, the Fiduciary Supervisor sought to create the controversy. Even assuming he had such authority, he did not try and act in the capacity as a fiduciary commissioner pursuant to West Virginia Code § 44-3A-41. Rather, he simply sought to make his own investigation and decisions and then act unilaterally by having the County Commission enter his order. Such actions do not comport with the process envisioned by West Virginia Code § 44-3A-41 wherein all parties have the opportunity to be heard in a hearing and object to proposed findings of fact.

b. West Virginia Code § 41-5-10 does not provide an *ex parte* process to reject a last will and testament already admitted to probate.

The Respondent also relies upon West Virginia Code § 41-5-10 as providing an avenue for the Fiduciary Supervisor's actions. West Virginia Code § 41-5-10 sets up the *ex parte* procedure for probate. In that procedure, after a will is produced, "any person may move the county court having jurisdiction, or the clerk thereof in the vacation of the court, for the probate of such will[.]" W. Va. Code § 41-5-10. At that time, "without notice to any party," the clerk may "proceed to hear and determine the motion and admit the will to probate, or reject the same." Id. Then, "[t]he probate of, or refusal to probate, any will, so made by the clerk, shall be reported by him to the court at its next regular session, and, if no objection be made thereto, and none appear to the court, the court shall confirm the same." Id.

The Respondent seems to argue that the Fiduciary Supervisor could use this process to reject the probate of the Will. Resp't Reply Br. 7. However, this process is only available in the first instance regarding the probate of a will. After Homer Dye lodged the Will, he was advised that he needed affidavits establishing that the Will was whole in the handwriting of Oras Dye. R. 53. He secured those affidavits and submitted them to the Clerk of the County Commission. R. 67-69. At that point, Homer Dye moved, pursuant to West Virginia Code § 41-5-10, for the

admission of the Will to probate. Id. The County Commission admitted the Will to probate on February 4, 2016. R. 69. At that point, the Will was admitted to probate.

Nothing in West Virginia Code § 41-5-10 provides for a second *ex parte* motion to reject a will already admitted to probate. Rather, after a will has been admitted to probate pursuant to West Virginia Code § 41-5-10, an individual's recourse is to seek impeach via West Virginia Code § 41-5-11. There is no assertion by the Respondent that this procedure was utilized.

West Virginia Code § 41-5-10 does provide a method for objecting to a will before it is entered into probate by the county commission, but again, this procedure was not followed. Assuming that the Fiduciary Supervisor did have an objection prior to February 4, 2016, when the County Commission entered the Will into probate, he had a mechanism to have that objection heard. In that case, the Fiduciary Supervisor would have needed to file a notice of contest of the probate of will. W. Va. Code § 41-5-10. At which point, "process on such notice shall be issued and the proceeding thereafter shall be heard before the county court only, and in all respects in the same manner as if the will had been offered for probate in solemn form" Id.

The process provided for objecting to a will was not followed in this case. No issuance of process was made. In fact, no one was notified that the County Commission itself was even considering entry of an order. Rather, the only notice was the Fiduciary Supervisor stating in a letter that he intended to present an order to the County Commission. R. 58. Months later, he did this without providing a copy to Homer Dye. R. 67. As far as Homer Dye is aware, no hearing was ever held. Therefore, nothing about the actions of the Fiduciary Supervisor or the County Commission comport with the process to objecting to probate of a will that was been accepted by the clerk in vacation. This is another example of the County Commission shortchanging the due process owed to Homer Dye.

The Respondent also argues that Homer Dye's position is nonsensical because it prevents a county commission and fiduciary supervisor from rectifying a mistake by a staff person in admitting a will to probate. This is incorrect. The County Commission has the power to reject the probate of such will at its next scheduled meeting; otherwise, it shall approve the probate of such will. W. Va. Code § 41-5-10. The County Commission did not do this, as it admits it admitted the Will to probate. R. 69.

In claiming Homer Dye's position is nonsensical, the Respondent does not establish why its position is reasonable. The Respondent claims that Homer Dye was presented with multiple notices to respond to the Fiduciary Supervisor's actions. The only true notice of the Fiduciary Supervisor's intention was the April 25, 2016 letter. This letter did not share any of the hallmarks of the processes envisioned in West Virginia Code §§ 44-3A-41 or 41-5-10. It did not provide for the issuance of findings of fact, notice, hearing, or opportunity to appear. Rather, it improperly attempted to shift the burden of proof to Homer Dye to prove a will that had already been admitted to probate. Then, the Fiduciary Supervisor did not take any action for months until he provided an order *ex parte* to the County Commission to enter.

CONCLUSION

Homer Dye was the legally recognized heir of the Estate of Oras Dye, pursuant to the holographic Will of Oras Dye. Such will had been admitted to probate by the Clerk of the County Commission, in vacation, and then approved by the County Commission. Afterwards, the Fiduciary Supervisor began investigating whether such will was valid and believed that it was not. He notified Homer Dye and the intestate heirs of his belief and his intent to prepare an order voiding the will. Months later, the Fiduciary Supervisor, without notice or providing a copy of the proposed order to Homer Dye, had the County Commission enter such order. As a

party with a vested interest in the Estate of Oras Dye, Homer Dye was entitled to some type of notice and an opportunity to object to the entry of the order. None were provided.

Based upon the foregoing, Homer Dye requests that the Court reverse the Circuit Court's denial of his appeal. In so doing, the Court should hold that the Order Voiding Will of Record entered by the County Commission is void and unenforceable due to the lack of notice and hearing prior to its entry. Further, the Court should hold that such order was beyond the scope of the County Commission's authority. Finally, the Court should hold that the County Commission's actions were untimely. Upon remand, the Court should direct the Circuit Court to grant Homer Dye's appeal and hold that the Will is valid and enforceable.

Dated this 4th day of January, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of January, 2021, the foregoing ***Petitioner's Brief In Support Of Petition For Appeal*** were deposited in the U.S. Mail, first class postage prepaid, addressed to all other parties to this appeal as follows:

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