IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0036

SANDY M., AND SANTANA M.,
CO-GUARDIANS AND
CO-CONSERVATORS OF DONALD M.,
DEFENDANTS BELOW,

PETITIONERS

vs.

DONALD M.,
PLAINTIFF BELOW,

RESPONDENT.

Hon. James H. Young, Jr., Judge
Circuit Court of Wayne County
Civil Action No. 19-C-66

PETITIONERS' BRIEF ON APPEAL

Submitted by:

Michael S. Bailey, Esquire (WV State Bar ID # 8507)
BAILEY LEGAL SERVICES, PLLC
P.O. Box 347
Barboursville, West Virginia 25504
Tel: 304.736.0801
Fax: 304.736.0805
Email: mbailey@baileylegalservices.com
Counsel for Petitioners Here/Defendants Below

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

CASES

STATUTES

RULES

II. ASSIGNMENTS OF ERROR

1. The Circuit Court's Findings of Fact and Conclusions of Law are against the weight of the evidence here and are based on a misapplication of the law regarding lost documents, the statute of frauds, and adverse possession. As such, the lower Courts' rulings and "Final Order" should be reversed and/or remanded for entry of an Order that is consistent with this Court's findings pertaining to proper application of the controlling laws to the facts here, and/or the matter should be remanded to Circuit Court for further proceedings.

2. The Circuit Court erred in its application of the law to the facts here to award ownership of real property under a theory of a lost or stolen document when the only evidence of a lost or stolen document was Plaintiff's own self-serving testimony that a subsequent (but allegedly identical) deed was prepared by another attorney and was supposedly executed by Defendant Father despite the fact that there was no written nor documented evidence of any such deed being prepared, executed, nor recorded in violation of the statute of frauds and further despite the fact that Plaintiff's other witnesses testified that they never read nor saw the alleged subsequent executed deed. As such, the lower Courts' rulings and "Final Order" should be reversed and/or remanded for entry of an Order that is consistent with this Court's findings pertaining to proper application of the controlling laws to the facts here, and/or the matter should be remanded to Circuit Court for further proceedings.

3. The Circuit Court erred in its application of the law to the facts here to award ownership of real property under a theory of adverse possession as to the entirety of the ninety-two acres despite the fact that Plaintiff's use of the Property was with the knowledge and permission of Defendant Father. As such, the case should be reversed and/or remanded to the lower Court for further proceedings consistent with the appropriately applicable law as

determined by this Court and as established in the existing law.

4. The Circuit Court erred in its application of the law to the facts here to award ownership of real property under a theory of adverse possession as to the entirety of the ninety-two acres despite Plaintiff's own testimony that he did not use nor improve nor control any portion of the bottom half of the disputed Property. Accordingly, the case should be reversed and/or remanded to the lower Court for further proceedings consistent with the appropriately applicable law as determined by this Court and as established in the existing law.

5. The Circuit Court erred in its decision to amend the pleadings to conform to the evidence and recognize a claim for "lost or stolen document" when the first time such possible amendment was raised was in the Court's Final Order, and not on any assertions ever made by Plaintiff/Respondent, thus depriving Defendants/Petitioners of any meaningful opportunity to address the new theory of recovery or to alter their defense to rebut the theory. Accordingly, the case should be remanded to the Circuit Court for further proceedings consistent with the appropriately applicable law as determined by this Court and as established in the existing law.

III. STATEMENT OF THE CASE

This litigation involves a dispute over the legal and equitable interests in several parcels of real property located in Wayne County, West Virginia. Plaintiff Below/Respondent Son D.G.M. (Son) filed his Complaint against his Defendant Below/Petitioner Father D.M. (Father) on or about April 18, 2019 asserting that Petitioner Father transferred title to the property to Plaintiff as a gift by deed in 2012. *See* Complaint, App. Record at 3-8. Alternatively, in his Complaint, Respondent Son claims that he has adversely possessed all or part of the property since 1990. *See* Complaint,

App. Record at 3-8. Finally, Respondent Son alleges that if title did not transfer to him under either of these theories, Respondent claims that he made improvements to the property for which Petitioner Father has been unjustly enriched. *See* Complaint, App. Record at 3-8. Importantly, Petitioner Father D.M. has been deemed and declared a protected person lacking capacity by Order of the Wayne County Circuit Court (Judge Pratt) entered on or about May 22, 2018 (Civil Action No. 18-G-8) and remains as such at the time of these proceedings. Accordingly, this case is prosecuted through his co-conservators and daughters, Sandy Maynard, Santana Maynard, and C.S..[1]

Petitioner Father D.M. acquired the property which is largely at issue here by deed dated July 30, 1968, of record in the Wayne County Clerk's Office in Deed Book 379 at Page 416. *See* App. Record at 28-35. Respondent Son D.G.M. subsequently acquired an adjoining parcel of land by deed dated February 9, 1989, of record in the Wayne County Clerk's Office in Deed Book 524 at Page 738. *See* App. Record at 25-27. Sometime in 1990, with Petitioner Father D.M.'s permission, Respondent Son began work on a road across the property of his father in order to access Newcomb Creek Road from Respondent Son's adjoining property. *See* App. Record at 155-157. Moreover, with Petitioner Father D.M.'s knowledge and permission, Respondent Son D.G.M. maintained the road and also installed utilities, including specifically water, across the aforementioned property of Petitioner Father D.M. (DB 379/Pg. 416), which road and utilities serviced Respondent Son's property and residence, as well as the properties and residences belonging to Respondent Son's children. *See* App. Record at 365-372. Furthermore, with Petitioner Father D.M.'s knowledge and permission, Respondent Son D.G.M. testified that he

[1] The Court's records reflect that Petitioner Father D.M. legally adopted Santana Maynard, who is his biological granddaughter. Accordingly, through his testimony, Respondent Son D.G.M. sometimes refers to Santana Maynard as his niece, rather than his sister.

fenced in a portion of the aforementioned property of Petitioner Father D.M. (DB 379/Pg 416) and occasionally used that area upon which to allow his livestock to graze and roam. *See* App. Record at 368-372. However, there was no evidence introduced as to exactly how much or what portions of the land in question was actually fenced in. Additionally, Plaintiff never provided any reliable or admissible evidence as to his actual costs for these claimed improvements (i.e., road, water, fencing).

Petitioner Father D.M. subsequently acquired additional property which is also in controversy here by deed dated January 24, 2008, of record in the Wayne County Clerk's Office in Deed Book 656 at Page 797. *See* App. Record at 22-24. It is uncontroverted by Respondent Son's own testimony that he did not use nor improve any portion of this property, sometimes referred to in the proceedings as the bottom half. *See* App. Record at 332-335. This property also is adjacent both to Respondent Son's property and Petitioner Father D.M.'s property. Together, the property Petitioner Father D.M. purchased in 1968 (DB 379/Pg. 416) and the property he purchased in 2008 (DB 656/Pg. 797) forming a "horseshoe" of land containing roughly ninety (~90) acres of land, much of which is wooded.

The allegations in Respondent Son's Complaint are in conflict with Respondent Son's testimony and the evidence adduced during the bench trial with respect to issues of possession and control of the property in dispute. For example, Respondent Son's Complaint asserts that "[o]n or about 1989," he assisted his parents, Petitioner Father D.M. and the late Hercie Maynard, in purchasing land joining their existing property. *See* Complaint, App. Record at 3. However, it is undisputed that the Wayne County land records evidence that only Respondent Son D.G.M. purchased land in 1989 (DB 524, Pg. 738). There is no record of a real property transfer identifying Petitioner Father D.M. as grantee in the Wayne County land records between 1985 and 1999.

Respondent Son's Complaint also asserts that, in "2008," he built a home for his daughter, Tiffany Brunty, on the land he is claiming. However, Petitioner Father D.M. deeded this property to Tiffany Brunty and her husband in late 2012-early 2013, by deed recorded in Deed Book 687, Page 404. *See* App. Record at 36-39. Respondent Son confirmed his understanding of this transfer and further testified that Petitioner Father D.M. also gifted Twenty Thousand Dollars ($20,000) to Mrs. Brunty to assist in the building of her house. *See* App. Record at 285-288. Mr. and Mrs. Brunty are not parties to this litigation and Plaintiff has not claimed that Defendant's transfer of the property to the Bruntys was over Respondent Son's objection or contrary to some right or interest he (Plaintiff) has in the property. *See* App. Record at 285-288. The deed to the Bruntys was prepared by Attorney Don Jarrell. *See* App. Record at 36-39. While it reserves a life estate to Respondent Son D.G.M. and his wife, it does not otherwise reference Plaintiff in any respect. *See* App. Record at 36-39. Similarly, on or about February 5, 2013, Petitioner Father D.M. executed a deed conveying a parcel of this same land in question to Respondent Son's son Jeremy Maynard (Deed Book 687, Page 535). *See* App. Record at 40-43. This transfer also involved a portion of the property that Respondent Son D.G.M. claims he adversely possessed. Jeremy Maynard is not a named party to this litigation and Plaintiff has not claimed that Defendant's transfer of the property to Jeremy Maynard was over Respondent Son's objection or contrary to some right or interest Plaintiff has in the property. *See* App. Record at 289-296. The deed to Jeremy Maynard was prepared by Attorney Don Jarrell. *See* App. Record at 40-43. While it reserves a life estate to Respondent Son D.G.M. and his wife, it does not otherwise reference Plaintiff in any respect. *See* App. Record at 40-43.

The transfers of property to the Bruntys and to Jeremy Maynard are important because Respondent Son testified that in 2012, before any property was transferred to the Bruntys and

Jeremy Maynard, Respondent Son and Petitioner Father "walked the property" and then had a deed drafted for the land Respondent Son is now claiming. *See* App. Record at 255-265. While Respondent Son introduced an unexecuted deed prepared by Attorney Don Jarrell's office conveying the property in question as well as other property acquired by Petitioner Father D.M. in 2008 to Respondent Son, *see* App. Record at 201-205, there is no written or documented proof of any such deed being executed nor recorded.

Instead, Respondent Son testified that a second deed, identical to the deed prepared by Attorney Don Jarrell, was prepared by Attorney David Lycan, and that it was this second deed that Petitioner Father D.M. executed. *See* App. Record at 264-272. Respondent Son admits that this second deed was never recorded and that his sisters, C.S. and Sandy Maynard, took possession of the deed for safekeeping with Petitioner Father D.M.'s "Last Will and Testament." *See* App. Record at 44-49. However, Petitioner Father D.M.'s "Last Will and Testament" was not executed until 2014, some two (2) years after the second deed. *See* App. Record at 266-267. Importantly, Respondent Son testified that he confronted his sisters and Petitioner Father on the day he found out that they had allegedly retrieved the deed from Mr. Lycan's office, and, pursuant to Respondent Son's testimony, Petitioner Father knew that the deed had been retrieved and not delivered for purposes of recording and further indicated that "[a]t my death, they will give it to you." *See* App. Record at 266-267. This testimony was confirmed by witness C.S. when she testified that Respondent Son knew the same day the deed was allegedly picked up that it was not going to be recorded right away. *See* App. Record 407-408.

Other than Respondent Son's own self-serving testimony, there is no credible evidence that a deed purporting to convey the property in dispute to Respondent Son was executed by Petitioner Father D.M.. Respondent Son did not introduce any testimony from Mr. Lycan nor his secretary,

nor anyone else at his office regarding whether he prepared such a deed. Respondent Son's only other witnesses, C.S. and M.S., admittedly never read the deed purportedly prepared by Attorney David Lycan.[2] *See* App. Record at 401, 410-411. Moreover, M.S. testimony was predicated entirely upon hearsay from family members regarding what Petitioner Father D.M. intended to do with his property. In fact, M.S. testified "I've heard of this mysterious deed that was up there, taken to my – my mom and them went and got it, I heard the story about that, but I have never seen the deed with my own eyes, no." App. Record at 410-411; *see also* 415-416.

Instead, Respondent Son (and the lower Court) rely heavily upon a survey and legal description purportedly prepared by surveyor Randall Thompson (now deceased) in March 2012 and revised October 22, 2012, which identified and incorporated the deeds for Tiffany Brunty and Jeremy Maynard as set forth above. *See* App. Record at 206-208. However, the land in dispute is clearly identified as belonging to Petitioner Father D.M. on that survey, rather than Respondent Son, with references to the recorded deeds of Tiffany Brunty and Jeremy Maynard (which deeds were purportedly executed and recorded after Petitioner Father D.M. allegedly transferred title of the disputed property to Respondent Son). App. Record at 201-205, 206-208, 126-129. There is no evidence on the record that Respondent Son confronted Petitioner Father D.M. or sought a correction on the survey to reflect that the property belonged to Respondent Son. The property description purportedly drafted by Randall Thompson also makes no reference to any part of the property at issue being transferred to Respondent Son D.G.M.. *See* App. Record at 206-208.

[2] C.S. testified that she and her sister, Sandy Maynard, collected the purported second deed from Attorney David Lycan's office. C.S. admitted that as co-conservator, she opposed the Complaint Plaintiff filed in this action and never directed defense counsel to file anything to refute the Answer filed on behalf of Petitioner Father D.M.. Further, Ms. Stephens testified that she had a "change of heart" with respect to Respondent Son's claims after he showed her the survey of the property prepared by Randall Thompson. Ms. Stephens further admitted that she is currently involved in litigation adverse to her sisters, Sandy Maynard and Santana Maynard. *See* App. Record at 397-406.

Moreover, Respondent Son even included the property in question on the "Statement of Financial Resources" (which he filed with the "Petition for Appointment of a Guardian/Conservator") as belonging to Respondent Father. *See* App. Record at 230-248 (specifically p. 247 which identifies "379-416 and "656-797" on a handwritten list of real estate). *See* App. Record at 358-364.

There is no dispute that only the Respondent Son and his children (and their guests and invitees) used the road, water, and fencing which Respondent Son testified he placed on and across the property in question with Petitioner Father D.M.'s permission. *See* App. Record at 365-368. Respondent Son admitted that he has never paid any taxes or fees assessed against the property in dispute and that, at all times, Petitioner Father D.M. paid the assessed property taxes. *See* App. Record at 353-354. There are numerous other deeds prepared, executed, and recorded identifying Petitioner Father D.M. as the grantor in the Wayne County land records during the period identified herein, none of which accomplish the conveyance desired by Respondent Son here.

On October 23, 2014, Petitioner Father D.M. executed a document bearing the heading, "Last Will and Testament." Respondent Son testified that he has no intention of challenging the contents of the purported Last Will and Testament upon Petitioner Father D.M.'s death[3]. Respondent Son further testified that this purported "Last Will and Testament" does not specifically identify or address the property which Respondent Son desires as part of this suit.

Procedurally, the Complaint in this case was filed on April 18, 2019. *See* App. Record at 1, 3. The Complaint, as referenced above did not include any theory of "lost or stolen document." The Answer was then filed on May 23, 2019 denying the substantive allegations in the Complaint. *See* App. Record at 1, 9. Substantively, nothing else was done or filed on this case for the next

[3] This Court acknowledges that Petitioner Father D.M. is a protected person following a stroke he suffered in 2015. This Court cannot declare that Defendant will never regain capacity. The document purports to be the Last Will and Testament of D.M.. However, it is not the last Will and Testament until properly probated following Petitioner Father D.M.'s death.

two (2) years, until the Pretrial Conference held on July 26, 2021, at which time Plaintiff/Respondent Son admitted, through counsel, that he did not have any written, executed deed. Again, at this time, there was no mention nor evidence of the alleged second deed from David Lycans nor the survey map which identifies the property at issue. The first mention of the alleged second but "identical" deed prepared by David Lycans was included in the "Affidavit" of M.S. that was filed by Plaintiff/Respondent Son in response to Defendants/Petitioners' "Motion for Summary Judgment," nearly two and a half years after the Complaint was filed. *See* App. Record at 66-67. No deed nor legal description was ever presented before then. Additionally, it is clear from the transcript that the survey map was not produced in this matter until the date of the first bench trial, September 20, 2021. *See* App. Record at 178-186. Because of this, the bench trial was continued to November 15, 2021. At the conclusion of the Bench Trial on November 15, 2021, the Judge asked counsel to submit proposed findings of fact and conclusions of law. *See* App. Record at 420. Both the Plaintiff/Respondent, *see* App. Record at 423-428, and Defendants/Petitioners, *see* App. Record at 429-441, submitted their proposed findings and conclusions. On December 14, 2021, the lower Court issued its "Final Order," which raised for the first time the theory of the "lost or stolen document" as a grounds for recovery. *See* App. Record at 444-460. It is from this Order that this matter is being appealed.

IV. SUMMARY OF ARGUMENT

The Statute of Frauds requires certain elements for deeds to be effective in this state. The elements are that there must be 1) a writing; 2) an adequate description; 3) execution by the Grantor; and 4) delivery. Anyone seeking to claim title through any other means bears a heavy burden that must be proven by "clear, strong, and conclusive" evidence. Despite these tall standards, the lower Court here relied on a theory never discussed in the case to find that title to

property vested in Respondent Son despite the lack of an executed or recorded deed, and despite that there was no evidence of consideration, and despite the fact that there were no credible and uninterested corroborating witnesses who could verify the deed. Moreover, there were significant questions regarding the delivery element of any such alleged deed at the very least. Additionally, despite the fact that the doctrine of adverse possession requires that a party possess the property at issue, there is no dispute that the Respondent Son here clearly did not possess nor occupy a significant portion of the property in question. Despite these facts, the Circuit Court's Order against the weight of the evidence awarded the entirety of the 92 plus acres at issue to Respondent Son. The "Final Order" operated to the extreme detriment of Petitioner Father, amounted to an abuse of discretion based on clearly erroneous findings of fact and a misapplication of the controlling law to deprive and divest Petitioner Father of ownership of certain real property. Accordingly, this matter should be reversed and, if necessary, remanded for further proceedings in the lower Court.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Under the rules of this Court, it is possible that oral argument on this Petition is deemed helpful and appropriate pursuant to Rule 19 inasmuch as the case involves, *inter alia*, "(1) ... assignments of error in the application of settled law; (2) ... an unsustainable exercise of discretion where the law governing that discretion is settled; (3) ... insufficient evidence or a result against the weight of the evidence." Revised Rule of Appellate Procedure 19 (a). Thus, if this Court deems it necessary, then the Petitioners request that their right to oral argument be preserved pursuant to Rule 19. Revised Rule of Appellate Procedure 19.

VI. ARGUMENT

A. Standard of Review

"In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syl. Pt. 1, Pub. Citizen, Inc. v. First Nat'l Bank in Fairmont, 198 W.Va. 329, 480 S.E.2d 538 (1996). Walker v. Fazenbaker, No. 18-1062, 3 (W. Va. Feb. 7, 2020). Moreover, Justice Cleckley has pointed out that, in review of a Circuit Court's bench trial:

> "The deference accorded to a circuit court sitting as factfinder may evaporate if upon review of its findings the appellate court determines that: (1) a relevant factor that should have been given significant weight is not considered; (2) all proper factors, and no improper factors, are considered, but the circuit court in weighing those factors commits an error of judgment; or (3) the circuit court failed to exercise any discretion at all in issuing its decision."

Syl. Pt. 1, Brown v. Gobble, 474 S.E.2d 489 (W.Va. 1996).

In the present case, while the Court's findings of fact may be subject to a clearly erroneous standard, the final order and ultimate disposition of the case falls under an abuse of discretion standard. Moreover, as to the identification of the applicable law and its elements, particularly as it relates to the lost document theory and adverse possession, the matter is subject to *de novo* review by this Court.

B. The Lower Court's Findings of Fact and Conclusions of Law are against the weight of the evidence here and are based on a misapplication of the law regarding lost documents, the statute of frauds, and adverse possession and must be overturned.

As the lower Court points out in its "Final Order," "[f]or parol testimony to establish title to land through an alleged lost instrument, proof of its execution, contents, and loss must be

conclusive. *Drake et al., v. Parker et el.,* 122 W.Va. 145 (1940)." App. Record at 450-451. Again, the lower Court cites the case of Telluric Co. v. Bramer *et al.* 76 W.Va. 185 (1915) to confirm that these elements "must be clear, strong, and conclusive" to justify affecting something as important as title to property. App. Record at 451. However, the lower Court then disregards the body of those opinions to then find that the minimal, self-serving, and questionable evidence here to meet those high standards.

Importantly, while West Virginia law may provide that most individuals who are interested in a transaction are competent to testify about that transaction, W.Va. Code §57-3-1 provides the following exception:

> No party to any action, suit or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased, [lacking in mental capacity], against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such person, or the assignee or committee of such insane person or lunatic.

W.Va. Code §57-3-1. The competency argument was specifically pointed out in the Drake et al., v. Parker et al., 122 W.Va. 145 (1940) case upon which the lower court relies to effectively discredit the testimony of the person who was receiving the benefit of the transaction. However, the lower Court here did not appear to consider such applicable and controlling law in determining the competency of the Plaintiff/Respondent Son to testify about the property he claims to have been given, without monetary consideration, by Petitioner Father, who was undeniably recognized as a protected person, lacking capacity, in 2018 pursuant to a prior Court proceeding. This is true despite the fact that objections were raised by Petitioners' counsel at trial as to any testimony about what Petitioner Father said to Respondent Son about the land because of his current lack of capacity and status as a protected person. *See* App. Record at 176-177. The matter was even

discussed at the beginning of the bench trial as to the necessity for the court-appointed GAL from the guardianship matter but the lower Court declined the necessity of his involvement. *See* App. Record at 146-148.

In fact, of Respondent Son's only two other witnesses, one lacked credibility due to changing stories and the other had no personal knowledge of the existence of the alleged second deed other than through hearsay. Specifically, witness and Defendant co-conservator, sister C.S., initially agreed to the denial of Respondent's claims and the existence of a deed in the Answer, but then at trial, after she is admittedly engaged in a dispute with her Petitioner sisters over other aspects of Petitioner Father's Estate, she testified that her story changed because she had a "change of heart." App. Record at 397-401; 404-406. These very facts strongly favor the conclusion that her testimony lacks credibility. Moreover, C.S. admittedly did not compare the respective deeds. App. Record at 401. Furthermore, witness and nephew M.S. admittedly never saw the deed, nor legal description, nor signature, nor notary. In fact, M.S. testified specifically that "I've heard of this mysterious deed that was up there, taken to my – my mom and them went and got it, I heard the story about that, but I have never seen the deed with my own eyes, no." App. Record at 410-411; see also 415-416. These were the only witnesses offered to prove Plaintiff/Respondent Son's claim of title to the property.

Statute of Frauds

Upon review of the elements and requirements established under the Statute of Frauds, W.Va. Code § 36-1-1, this is the very type of case to which the Statute was meant to apply. One person cannot have a deed prepared by an attorney and say that it was executed but there is no proof of it – no copy, no testimony of uninterested, corroborating, and credible witnesses. West Virginia Code § 36-1-1, requires a deed or will to create any estate of inheritance or other interest

in real estate. Respondent Son does not and admittedly cannot produce any executed or recorded deed, will, purchase agreement, or other written document unequivocally conveying some enforceable right in and to the property claimed. Neither the unexecuted deed prepared by Attorney Don Jarrell, nor the survey prepared by Randall Thompson, nor the purported "Last Will and Testament" of Defendant D.M. (who is living) provide support for Plaintiff's claim to meet the exacting requirements of the Statute of Frauds. Accordingly, this Court cannot award such an interest on the basis of nothing more than Plaintiff's largely uncorroborated testimony.

Furthermore, as to the elements required for a deed, namely: 1) written instrument; 2) adequate description; 3) execution by Grantor; and 4) delivery, Respondent Son can really only conclusively establish an adequate description through the survey and legal description. What the lower Court calls a "stolen" document could just as likely have been deemed a failure of delivery. In fact, Respondent son admittedly and undisputedly never received a copy of the deed and Petitioner Father, prior to his determination of incapacity, never took any steps toward recording the deed or ensuring that Respondent Son received a copy of the deed or gave him access to the location of the deed. In fact, pursuant to Respondent Son's testimony, Petitioner Father knew that the deed had been retrieved and not delivered for purposes of recording and further indicated that "[a]t my death, they will give it to you." *See* App. Record at 266-267. This testimony was confirmed by witness C.S. when she testified that Respondent Son knew the same day the deed was allegedly picked up that it was not going to be recorded right away. *See* App. Record 407-408. Accordingly, the indispensable element of delivery is not present.

Adverse Possession

Under West Virginia law, "[t]he burden is upon the party who claims title by adverse possession to prove by clear and convincing evidence all elements essential to such title." Syl. Pt.

2, *Brown v. Gobble,* 196 W.Va. 559, 474 S.E.2d 489 (1996). Further, "[o]ne who seeks to assert title to a tract of land under the doctrine of adverse possession must prove each of the following elements for the requisite statutory period: (1) That he has held the tract adversely or hostilely; (2) that the possession has been actual; (3) That it has been open and notorious ...; (4) That possession has been exclusive; (5) That possession has been continuous; [and,] (6) That possession has been under claim of title or color of title." *Id.*, 196 W.Va. at 566. 474 S.E.2d at 496 (Quoting Syl. Pt.3, *Somon v. Murphy Fabrication and Erection Co.*, 160 W.Va. 84, 232 S.E.2d 524 (1977). The requisite statutory period is ten (10) years WV Code § 55-2-1

In the present case, regardless of any analysis regarding statutory timeframes, Plaintiff D.G.M. cannot establish at least 2 of the 4 required elements for adverse possession. First, he cannot establish that his use of the property has been exclusive or to the exclusion of the Defendant D.M. (his father). In fact, under Plaintiff's own testimony and the referenced deeds of record clearly demonstrate that Defendant D.M. conveyed various portions of his property to numerous individuals including Plaintiff's son and daughter and also paid all property taxes. Second, and utterly fatal to his claims of adverse possession, Plaintiff's claim is not hostile inasmuch as he clearly and admittedly had the blessing and permission of his father, Defendant D.M., to be on and perform each of the tasks on the property that he did. *See O'Dell v. Stegall,* 226 W.Va. 590, 611-612, 703 S.E.2d 561, 582-583 (2010). In effect, Plaintiff is asking this Court to make a ruling that children who use their parents' property with permission may gain ownership of that property by simply doing that which they have been given permission to do on the land – occupy and use it—contrary to the underlying premise of adverse possession that would "'shock that sense of [ownership] right.'" *See Id.,* 226 W.Va. at 609, 703 S.E.2d at 580 (Quoting Chief Justice Marshall's opinion in *Kirk v. Smith ex dem Penn,* 22 U.S. 241, 288, 6 L.Ed. 81 (1824).)

C. The Lower Court erred in its decision to amend the pleadings to conform to the evidence and recognize a claim for "lost or stolen document" when the first time such possible amendment was raised was in the Court's Final Order, and not on any assertions ever made by Plaintiff/Respondent, thus depriving Defendants/Petitioners of any meaningful opportunity to address the new theory of recovery or to alter their defense to rebut the theory.

On the issue of amendments to conform to the evidence, Rule 15 of the West Virginia Rules of Civil Procedure provides, in pertinent part, as follows:

> When issues not raised by the pleadings are tried by ***express or implied consent of the parties***, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues ***may be made upon motion of any party at any time***, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. ***The court may grant a continuance to enable the objecting party to meet such evidence.***

W. V. R. Civ. P. 15(b) (emphasis added). Thus, the rule addresses several issues that must be present. First, there must be "express or implied consent of the parties." Secondly, the rule clearly contemplates that the issue is raised by motion of a party, and not necessarily *sua sponte* by the Court. And thirdly, the rule implicitly contemplates notice to the parties which would then potentially permit "a continuance to enable the objecting party to meet such evidence." Each one of these elements will be addressed in turn.

Express or Implied Consent

While the lower Court found that "[t]he issue of a lost or stolen document was tried by the implied consent of the parties" based on its finding that the Defendants/Petitioners "did not object to the entry of the evidence presented on the lost or stolen deed," App. Record at 449, this finding

was clearly erroneous. Here, Respondent Son never raised the theory of lost or stolen document at ***any*** time in this case – it was not in the initial Complaint; it was never mentioned during the proceedings; it was not addressed or included in Plaintiff/Respondent's "Proposed Findings of Fact and Conclusions of Law." The theory was never explicitly even discussed during any of the proceedings. The first time this theory was raised was by the lower Court in its "Final Order," ***after*** all proceedings and hearings had been held and after the filing of all briefs, pleadings, and proposed orders. In fact, Petitioner moved for summary judgment/directed verdict on at least three (3) separate occasions in this matter for failure to meet the burden by Respondent Son on the basis of the Statute of Frauds. *See* App. Record at 53-63; 385-387; 418-419. All of these motions were denied without any discussion of the "lost or stolen document" theory of recovery being discussed. *See* App. Record at 68-70; 387; 419.

Furthermore, the lower Court specifically acknowledged at the start of the bench trial in this matter on September 20, 2021, that the only claims being considered were unjust enrichment and adverse possession: "The causes of action, I think, are contained in Count 2, which is unjust enrichment, and I take it adverse possession, somewhat, I think, is pled in Count 3." App. Record at 149-150. As to Count 1, the Court pointed out that "as I read the Complaint, it talks about Count 1, which is really to the Court a recitation of facts. It does not – after Count 1, it does not, to me – unless I'm missing somethings, state a cause of action." App. Record at 149.

Accordingly, Petitioners could not have possibly consented, even impliedly, to the amendment to conform to the evidence that the lower Court enforced to create a new theory of recovery of "lost or stolen document" when that possibility was not known, considered, nor discussed by the Court nor either of the parties prior to the entry of the "Final Order." Accordingly, because of the lower Court's failure to provide such notice before deciding the case largely on this

theory, this case should be reversed and/or the matter be remanded back to the lower Court for proper application of the above controlling law to these facts and, if necessary, further proceedings consistent with the applicable and appropriate Rules and law.

Made on Motion of Party

As set forth in detail above, the Plaintiff/Respondent never raised the issue of amendment at any point in the case. In fact, the only entity that raised the issue was the trial court after all pleadings and briefings were completed and in its "Final Order."

Continuance to Objecting Party to Meet the Amendment

Given the stage at which this issue was first raised, i.e., "Final Order" by the Court, the Petitioners never had an opportunity to even request such continuance. In fact, the Petitioners were not even made aware of the necessity to defend any such claims or theories at any point in the case. Accordingly, the lower Court's amendment was an abuse of discretion and must be reversed or set aside and remanded back to the lower Court for proper application of the above controlling law to these facts and, if necessary, further proceedings consistent with the applicable and appropriate Rules and law

Unjust Enrichment

Because the Circuit Court did not find the elements of unjust enrichment to be met and denied the Complaint on those grounds, Petitioners have not addressed this matter here as necessary for appeal.

VII. CONCLUSION

WHEREFORE, the Defendants Below/Petitioners Here, Father D.M., through his co-conservators, S.M. and S.M., respectfully requests that this Court grant his petition for appeal and reverse and/or set aside the "Final Order" of the Circuit Court inasmuch as it is inconsistent with

the law as outlined herein and as determined by this Court and, if necessary or appropriate, remand the case to the lower Court with instructions for further proceedings and any other relief this Court deems appropriate.

Respectfully Submitted,

Michael S. Bailey, Esquire (WV Bar #8507)
BAILEY LEGAL SERVICES, PLLC
P.O. Box 347
Barboursville, WV 25504
Tel: 304.736.0801
Fax: 304.736.0805
Email: mbailey@baileylegalservices.com

Counsel for Petitioners/Appellants Here/Defendants Below

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0036

SANDY M., AND SANTANA M.,
CO-GUARDIANS AND
CO-CONSERVATORS OF DONALD M.,
DEFENDANTS BELOW,

PETITIONERS

vs.

DONALD M.,
PLAINTIFF BELOW,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing **"Petitioners' Brief on Appeal"** on the following via electronic mail and by U.S. Mail on the 29th day of April 2022 to:

Cayman Jarrell, Esquire
Email: caymanjarrell@gmail.com
P.O. Box 190
Wayne, WV 25570

Michael S. Bailey