

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

JULIA BARNHART-CABLE, in her
capacity as Administratrix
of the Estate of Scott M. Cable,
deceased,

Petitioner,

Civil Action No. 18-C-424
Judge Webster

v.

ALEC J. CABLE, KENZIE CABLE,
NOAH D. CABLE, QUIN CABLE,
a minor, JEAN SHANNON LANE,
SCOTT E. HOLROYD, REBECCA
ANN VANDEVENDER, SCOTT E.
ELSWICK, and ROSSANA CABLE.

Respondents.

**ORDER GRANTING SUMMARY JUDGMENT
TO RESPONDENT ROSSANA CABLE**

This matter came on for a hearing via Microsoft Teams on October 14, 2021, on Respondent Rossana Cable's Motion for Summary Judgment and the response in opposition thereto filed by Respondents Alec J. Cable, Noah D. Cable, and Jean Shannon Lane. Petitioner appeared along with her counsel, John F. Hussell, IV. Respondent Rossana Cable appeared by her counsel, Mark W. Kelley. Respondents Alec J. Cable, Noah D. Cable, and Jean Shannon Lane appeared by their counsel, J. Mark Adkins. Respondent Scott E. Holroyd appeared by his counsel, Frederick Holroyd. Respondent

Rebecca Ann Vandevender appeared by her counsel, Jefferson Triplett. Respondent Scott E. Elswick did not appear.¹

I. FACTS AND PROCEDURAL HISTORY

Many of the facts in this case are not in dispute.

On August 8, 2011, Scott Cable ("Scott") and Respondent Rossana Cable ("Rossana") were married in Kanawha County, West Virginia. The couple initially resided in Kanawha County.

In November 2014, S&E Properties, LLC,² a West Virginia limited liability company owned by Scott sold a commercial building in Nitro, West Virginia to Providence Holdings, LLC. Providence Holdings paid for the parcel, at least in part, with a Promissory Note. After the sale of the building, the monthly payments on the Promissory Note were essentially Petitioner's sole source of income.

In the Spring of 2015, Scott and Rossana Cable left West Virginia. Respondent Rossana Cable contends that the parties moved to California, but she concedes that Scott Cable spent a significant amount of time living in Mexico, especially after he

¹Mr. Elswick did not file an answer to the *Petition for Declaratory Relief* and has not participated at all in this case.

²S&E Properties, LLC was administratively dissolved by the West Virginia Secretary of State on September 10, 2008.

was involved in a serious automobile accident in Mexico in late 2015. The *Petition for Declaratory Relief* asserts that Scott Cable died a resident of West Virginia. In the only brief filed in opposition to the *Motion for Summary Judgment*, Respondents Alec J. Cable, Kenzie Cable, Quin Cable, and Jean Shannon Lane seemed to concede that Scott Cable permanently moved away from West Virginia in 2015, but contend that Mr. Cable moved to Mexico and not to California.

Scott Cable died in Mexico on June 21, 2017. After his death, the United States Department of State issued a *Report of a Death of a U.S. Citizen or U.S. Non-Citizen National Abroad*. The Report listed Mr. Cable's address as "P.O. Box 489, Nitro, West Virginia." A document adduced during discovery shows that this P.O. Box was the address on file with the Department of State when Mr. Cable was applying for his passport.³

By *Order Admitting Estate to Probate* of the County Commission of Kanawha County, West Virginia dated September 28, 2017, the Commission appointed Petitioner Julia Barhart-Cable, Scott Cable's ex-wife, as administratrix of Scott's Estate. The Order reflects that, based on information provided by Petitioner,

³The Report shows that the passport was issued in 2013, prior to Mr. Cable's move from West Virginia.

Scott died intestate a resident of Mexico, and falsely claimed that Scott died owning assets in West Virginia. Petitioner then used her appointment to obtain control of a bank account Scott's personal bank account with Chase Bank account (...9899), and then apparently arranged for Provident Holdings to make future payments on the Promissory Note to her. The evidence presented demonstrates that the statements of the bank account seized by Ms. Barnhart-Cable were mailed to a California address.

In November 2017, Respondent Rossana Cable submitted Scott Cable's Will and Testament (hereafter, "Will") for probate in the Superior Court of Riverside County, California. That will names Respondent Rossana Cable as Scott's sole beneficiary if she survives him, which she did. By the Order of Judge Thomas H. Cahraman dated November 17, 2017, the Superior Court of the County of Riverside, California, admitted Mr. Cable's Will to Probate. Importantly, no person has contested the validity of the Will or its admission to probate in California. Respondent Jean Shannon Lane filed a claim in the California probate and that claim is currently in litigation there.⁴

Thereafter, Respondent Rossana Cable's California

⁴The California court has stayed that litigation pending the outcome of this proceeding.

counsel notified the Office of the Fiduciary Supervisor of Kanawha County of the California probate.

In response, on March 26, 2018, Petitioner filed her *Petition for Declaratory Relief* seeking a declaratory judgment that, *inter alia*, "Scott M. Cable was a resident of Kanawha County, West Virginia at the time of his death" and "the estate of Scott M. Cable is to be Administered in Kanawha County, West Virginia, in accordance with West Virginia law." This, despite Petitioner's previous representation to the Kanawha County Commission that Scott died a resident of Mexico.

On August 6, 2018, Rossana filed *Respondent's Motion to Dismiss, Motion for Judgment on the Pleadings, or in the Alternative Appointment of a Curator* (hereafter, "Motion to Dismiss"). By Order entered on December 13, 2018, this Court held the *Motion to Dismiss* in abeyance pending discovery. Thereafter, the parties engaged in discovery.

The December 13, 2018 Order also froze the probate assets and permitted a company named Diamond Ventures to intervene procedurally to protect its claim to an assignment of the Providence Holdings, LLC note.

In June of 2020, Providence Holdings, LC refinanced the note payable to Scott Cable's company, S&E Properties, LLC,

resulting in the balance of the note being paid in full. By *Order* of this Court entered on June 8, 2020, the Court appointed a Special Commissioner to execute documents related to the refinance, authorized the Special Commissioner to pay Diamond Ventures its compromised claim, and directed the Special Commissioner to lodge the remaining proceeds with the Circuit Clerk of Kanawha County.⁵

After discovery was completed, Respondent Rossana Cable filed her *Motion for Summary Judgment* and accompanying memorandum of law on or about April 21, 2021. The brief asserted that the evidence overwhelmingly demonstrates that Scott Cable died a resident of California, where his will has been probated, and that there is no legal basis for a probate in West Virginia because none of the bases listed in W. Va. Code § 41-5-4 apply in this case.⁶ Particular evidence that is compelling to the Court's

⁵Diamond Ventures was subsequently dismissed from this action by *Order* entered on May 28, 2021.

⁶That section reads:

The county court [now county commission] shall have jurisdiction of the probate of wills according to the following rules:

(a) In the county wherein the testator, at the time of his death, had a mansion house or known place of residence; or

(b) If he had no such house or place of residence, then in the county wherein any real estate devised thereby is

decision will be discussed below.

The only parties to file a brief in opposition were Respondents Alec J. Cable, Noah D. Cable, and Jean Shannon Lane. That brief asserted that Scott Cable died a resident of Mexico, not California. The brief did not address Rossana Cable's argument that probate was nonetheless improper in Kanawha County, West Virginia. Thus, no other party filed a brief alleging that probate was proper in Kanawha County, West Virginia.

After the briefs were filed, this Court granted a motion filed by Respondents Alec J. Cable, Noah D. Cable, and Jean Shannon Lane for mediation. The parties met for a mediation on September 21, 2021, but mediation was not successful. Accordingly, the Motion for Summary Judgment is ripe for a decision.

II. DISCUSSION

Rule 56(c) of the W. Va. Rules of Civil Procedure

situated; or

(c) If there be no real estate devised thereby, and the testator had no such house or place of residence, then in the county wherein he died, or in any county wherein he had any property at the time of his death; or

(d) If he died out of this State, his will or an authenticated copy thereof, may be admitted to probate in any county in this State, wherein there is property devised or bequeathed thereby.

provides that the Court "shall" enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W.V.R.Civ.P. 56(c).

"The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. pt. 3, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

"Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." Syl. pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

"Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the

nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

Here, based upon the evidence presented, the Court concludes that the facts as whole do not reveal a genuine issue of material fact. The facts as a whole, in the Court's opinion, could not lead a rational trier of fact to find for the non-moving party. The Court finds compelling that Scott and Rossana Cable moved from West Virginia to California 2015, albeit in different residences. Scott Cable acquired a California identification card in July of 2015. After establishing a company called "Loco Swagg" in West Virginia in 2014, he later changed the address of the company with the West Virginia Secretary of State to California. He filed a California *Resident* income tax return in California for 2016.

In terms of residing in West Virginia, there was a proffer that Scott Cable either had not returned to West Virginia or had only been to West Virginia one time after he and Rossana Cable left in 2015. No evidence has been presented that Scott Cable had an ongoing presence in West Virginia or conducted any business in West Virginia after 2015. The fact that there may be a dispute over whether Scott Cable may have had property, real or

personal, in West Virginia is not enough for this Court to declare that there is a genuine issue of material fact as to where he intended to live.⁷

The Court notes that when Petitioner sought to open a probate in Kanawha County, it was represented that Scott Cable lived in Mexico and that he died intestate, when in fact he did have a will which has been duly admitted to probate in California. While Scott Cable may have resided for a significant amount of time in Mexico, the Court finds that the evidence is compelling that Scott Cable was a California resident.

The briefs in this case include numerous documents and evidence adduced through discovery. While the documents could potentially call into question whether Scott Cable was a resident of Mexico or California, the evidence of West Virginia residency in the record all predate his move from West Virginia in 2015. This evidence consists of West Virginia voter's registration card dated March 20, 2013, a passport that was issued November 20, 2013, a letter agreement with Providence Holdings dated November 6, 2014,

⁷Petitioner asserted during oral argument that Scott Cable had an interest in real property in West Virginia by virtue of a deed of trust existing at his death. However, Petitioner did not file a brief in opposition to Rossana Cable's *Motion for Summary Judgment* and the one brief that was filed did not address this issue.

the 2015 email chain between Scott Cable and his brother Greg Cable, and a United States Department Report of Death of a U.S. Citizen which contained Scott Cable's Nitro, West Virginia address from his 2013 passport application.

However, Scott Cable's last will and testament was admitted to probate in California in November 2017. No party introduced any evidence that any person has challenged that will in California. Indeed, Respondent Shannon Lane is involved in litigation in the California probate over an estate claim, but she has not challenged the validity of the will or the propriety of probate in California. In that proceeding Respondent Rossana Cable has been duly appointed as Executor of Scott Cable's estate.

Based on the foregoing, the Court concludes that the probate of Scott Cable's estate is not appropriate in West Virginia, and that the probate of Scott Cable's estate is appropriate in California, where his last will and testament has been duly probated.

It is accordingly, **ORDERED, ADJUDGED and DECREED**, as follows:

1. Respondent Rossana Cable's *Motion for Summary Judgment* be, and hereby is, **GRANTED**.
2. The Kanawha County Commission is **DIRECTED** to enter

an Order revoking the letters testamentary issued to Petitioner Julia Barnhart-Cable and terminating the administration of the Estate of Scott M. Cable formerly granted in Kanawha County and in the State of West Virginia as a nullity.

3. Petitioner is **ORDERED** to:

a. Prepare and file at her sole cost and expense a full and complete final accounting with the Kanawha County Fiduciary Supervisor within 60 days from the entry of this Order; and

b. Transfer, pay, and deliver all assets of the Estate of Scott M. Cable, or the decedent, in her possession or control to Rossana Cable, Executor of the Estate of Scott M. Cable, deceased, as appointed by the State of California, at the following address: Rossana Cable, 3192 Corona Ave., Norco, CA 92860.

4. The Circuit Clerk is directed to transmit all funds previously lodged with the Clerk to Rossana Cable, Executor of the Estate of Scott M. Cable, deceased, as appointed by the State of California, at the above address.

5. Notwithstanding the foregoing, items 2 through 4 above shall be **STAYED** pending a decision by any other party to appeal this decision to the West Virginia Supreme Court. If no party files a *Notice of Appeal* within 30 days of the entry of this

Order, the **STAY** Ordered herein shall automatically be lifted.

If a *Notice of Appeal* is timely filed, the **STAY** shall continue until such appeal is decided by the West Virginia Supreme Court.

The Court notes that this order was prepared and circulated according to the W. Va. Trial Court rules, and it incorporates the objections received where the Court deemed the objections appropriate. The Court preserves parties' respective objections to adverse rulings herein.

The Clerk of Court is **ORDERED** to transmit a copy of this Order, duly certified, to counsel of record as follows:

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ENTERED: January 21, 2022

Carrie L. Webster

Carrie L. Webster, Judge

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 21
DAY OF January 2022
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA