

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA *ex rel.*, DENITA D. BERG,
Petitioner

Vs.)

Docketing No.: 22-_____

THE HONORABLE LYNN A. NELSON, Judge of the Circuit Court of Grant County, West Virginia;
JOSEPH BERG, JASON BERG, AND JENNIFER BERG,
Respondents

From the Circuit Court of Grant County,
West Virginia
Civil Action No. 19-C-20

PETITION FOR WRIT OF PROHIBITION

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QUESTIONS PRESENTED

1. Whether a Circuit Judge can appoint a "Special Commissioner" to inventory and appraise personal property that is the subject of a law suit?
2. Whether a Circuit Judge can direct a "Special Commissioner" to sell personal property when the ownership has not been proven?
3. Whether a Circuit Judge can direct a "Special Commissioner" to sell personal property prior to a judgment for damages?

STATEMENT OF CASE

Pursuant to West Virginia Rules of Appellate Procedure, Rule 16(a), Petitioner brings this cause of action under the original jurisdiction of the Supreme Court. The underlying case in the lower tribunal is in such an unusual posture the Petitioner is left without any recourse but to file this Petition.

Darvin Ray Berg departed this life on January 8, 2018. The Decedent was survived by his wife of 29 years, Denita D. Berg Petitioner herein, and three children from a prior marriage, Joseph Berg, Jason Berg and Jennifer Ford Respondents herein. The Decedent died intestate and his Estate was probated in Grant County. Petitioner qualified as the Administratrix, engaged Counsel to assist in the Probate, and completed the task of Probating the Estate. The Estate was closed and the County Commission entered an Order closing the Estate and relieve the Personal Representative from any further obligations. No appeal was taken from the Probate and the time period in which to appeal lapsed.

Counsel for the Respondents then began writing letter and contacting the County Clerk requesting the Estate be reopened and a Fiduciary Commissioner be appointed. No Petition was ever filed to reopen the Estate. The County Clerk reopened the Estate and appointed a Fiduciary Commissioner, Bradley Goldizen. This action was never ratified by the County Commission. The Fiduciary Commissioner began holding hearings, questioning the Petitioner

who was without counsel, and entering Orders. All actions were without proper authority. Petitioner then engaged the undersigned counsel who filed a "Writ of Mandamus" in the Circuit Court of Grant County requesting the Court Order the Estate closed. Respondents were served a copy as a courtesy, they filed a motion to intervene and a hearing was held on the Rule to show cause. The Circuit Court granted the Writ and the Estate was again closed.

Respondents then filed a law suit alleging Fraud against the Petitioner in the Probate of the Estate. (See Appendix at Page 1.) Basically, the Respondent's argue that the Petitioner failed to include all property on the Appraisalment and that they had no notice of the filing of the appraisalment therefore they could not object. Petitioner filed a motion to dismiss arguing that the Estate was final, the alleged acts were against the Personal Representative and the individual was the one served and named in the Complaint, and the Complaint did not satisfy the particularity requirement as contained in Rule 9(b) of the West Virginia Rules of Civil Procedure. A Hearing was held and the Circuit Court wished the matter be briefed. Briefs were filed and the Circuit Court denied the Motion and appointed a "Special Commissioner" as requested by Respondents. (See Appendix at Page 49.)

Petitioner filed a Motion for Relief from the Order. (See Appendix at Page 50.) Respondents filed a Response. (See Appendix at Page 55.) A Hearing was held and the Circuit Court entered an Order denying the Petitioner's request. (See Appendix at Page 58.) It should be noted that no copy of a signed Order has been found by the undersigned. The Petitioner then Answered the Complaint. (See Appendix at Page 61.)

The Parties began exchanging discovery and the Special Commissioner filed a report with the Circuit Court. The Special Commissioner did come view the property at issue.

Petitioner had never denied the existence of the property. It should be noted that the Respondents have claimed that the Petitioner admitted the property was not properly probated. This is not true. The Petitioner admitted that she still had possession of the property they were talking about. The ownership of some of the property was disputed. The Special Commissioner made no effort to determine the fair market value of the items of property, did not check or ask to see if the items even worked, and just googled replacement costs of new property. Respondents had no knowledge of the ownership of the property other than it was at their father and step-mother's property. Respondents had no knowledge of the working condition of the property. Respondents had no knowledge regarding the acquisition of the property.

Petitioner never got her day in Court to determine ownership. All property was either jointly titled or acquired by them during the marriage with marital funds. She possessed the law portion of the Decedent's contractor's license, kept the books and did all the payroll. In her mind everything they had was theirs. There were only a few items that were considered to only be his and she accounted for that in the probate. It is not novel that an untimely death often results in an insolvent estate. It is not novel that when a couple acquires assets during a marriage there are not many probate assets when the first passes. There is no evidence that the Decedent considered certain assets to be his solely at the time of his death other than an old 4-wheeler and a couple utility trailers. Decedent did not title anything only in his name or make a will declaring individual ownership of any specific asset. The legal presumption would be that the personal property was jointly owned.

Petitioner then filed a Motion for Summary Judgment with a Memorandum. (See Appendix at Page 66.) Respondents filed a Response to the Motion. The matter was then set for hearing. At the hearing the Circuit Court declared it would not rule on the Motion without taking evidence. The matter was set for an evidentiary hearing on the Motion for Summary Judgment. (See Appendix at page 102.)

On the 15th day of September 2021, the matter came on for hearing. Petitioner stated the properly supported motion for Summary Judgment shifted the burden to the Respondent to prove that there was a material issue of fact or that they did have evidence to support the essential elements of the claim, that being the fraudulent intent. Respondent's pleadings continued to make the statement of the fraudulent intent and lies, but there was no proof to support the statements. Respondent called witnesses and introduced evidence. All witnesses were cross-examined by Petitioner. The Respondent then rested on their defense. At this time the Circuit Court stated that it was not of the opinion that the Petitioner had any fraudulent intent. The Petitioner was never given opportunity to present any evidence or witnesses because the Circuit Court had ruled there was no fraudulent intent. Based upon this ruling an essential element of the Respondent's claim was not satisfied and it stood to reason that the matter would now be dismissed summarily. There was no need to put on any further evidence. The hearing was completed.

The Circuit Court then entered an Order on September 27, 2021 granting Summary Judgment in favor of Respondents. This ruling was contrary to the statements made from the bench. (See Appendix at Page 104.) The Circuit Court made findings of fact that were not correct or not supported by the record. The Circuit Court stated that "to aid the Court in

determining the probate assets held by Decedent Berg at the time of his death, Bradley Goldizen, as appointed as a special commissioner in this case to finish the work he started as fiduciary commissioner and compile a list of assets for the Court. (See Appendix at Page 107, paragraph 8.) The Circuit Court then ruled on the matter under the legal theory of “Constructive Fraud” which was never advanced by Respondents, noticed to Petitioner, or defended against. The Circuit Court quoted the law that “based on our precedent, essentially in order for a plaintiff to prove constructive fraud, he or she must prove the consequences of actual fraud, but does not have to prove fraudulent intent. Horton v. Prof. Bureau of Collections of Maryland, Inc., 238 W.Va. 310, 314, 794 S.E.2d 395, 399 (2016). (See Appendix at Page 109.) The Circuit Court went on to reason that although there was not fraudulent intent it could not allow a fraudulent result. The problem is the Circuit Court failed to make any determination on the remainder of the elements of Fraud. There was never an adjudication as to how the act DAMAGED the Respondents. Instead, the Circuit Court went straight to trying to fashion a remedy. (See Appendix at page 110, paragraph 15.) The Circuit Court declared that some items of property were in dispute as to ownership and ordered a hearing to determine ownership. The Circuit Court ordered the rest of the property on the Special Commissioners Report to be sold even though this matter had not been fully adjudicated and Petitioner was not given opportunity to present evidence on this issue. (See Appendix at Page 111, paragraphs 15, 16 and 17.)

Petitioner then made motion for a new trial or to alter or amend the judgment stating the errors at law. (See Appendix at page 113.) Respondents filed a response to the motion.

(See Appendix at page 120.) The motion was noticed to be heard at the next scheduled hearing which was for the purpose of establishing the contested ownership.

A hearing was held and the matter began with the argument of Petitioner regarding the motion for a new trial or to alter or amend the judgement. No evidence was taken. The motion was denied. The Court ruled that all property on the Special Commissioners list not jointly titled would be sold. The undersigned really doesn't know what to say about how this went down other than he has never seen jurisprudence work like this. An Order was entered on December 13, 2021. (See appendix at page 125.)

At this point the Petitioner was not sure how to proceed. There was no final order that was appealable. There was no issue ripe for an interlocutory appeal as the ruling was still not dispositive as to damages. There still was no order awarding damages. The Circuit Court was basically ordering property to be sold so that the Respondents would have a value to use to establish damages. This is not how the law works. Petitioner hoped that time would maybe settle things down and Respondents may become reasonable in a resolution, this was not the case as the Circuit Court had been giving them everything they asked for in the case. The Circuit Court had entered a stay on the record but the Order does not reflect a stay.

Respondents then filed a motion to lift stay. A hearing was held. Petitioner continued to argue that this case was in a horrible posture as a result of the Circuit Court's rulings, was not yet appealable, that there was no authority for the Court to sale personal property absent a judgment and basically, she did not know what to do next other than file something with the Supreme Court. The Circuit Court lifted the stay, admitted that it wasn't sure what it was doing

and welcomed something being filed in the Supreme Court. An Order lifting stay was entered on September 29, 2022. (See Appendix at Page 126.)

Petitioner was not inclined to file such an extraordinary writ as this. Careful consideration was given. The Special Commissioner appeared at here home on November 14 demanding all property and stated that the sale would occur on December 10. The Circuit Court has clearly taken on the position of assisting the Respondents in the prosecution of this matter. Petitioner is left with no recourse other than to request aid from this Honorable Court.

SUMMARY OF ARGUMENT

This matter was brought as a "Fraud" action with a prayer for the Court to sale the property that was in the Estate of Darvin Ray Berg and then split the net proceeds between the parties. (See Appendix at Page 6.) The law suit was against Denita D. Berg the individual and not in her capacity at the personal representative of the estate. The time period to appeal the probate had expired, the Circuit Court ruled on this in the mandamus action below; however, the Respondents continue to attempt to challenge the probate.

There are several issues related to this such at the providing to the addresses as reasonably known but that would be for purposes of an appeal on the merits. The only real issue on the merits relevant to this Petition are the elements of Fraud. It is well settled law that the elements of Fraud are:

1. The act claimed is fraudulent,
2. The fraudulent act was material and false and the Plaintiff relied on the false act, the Plaintiff was justified in relying on the false act, AND
3. The Plaintiff was damaged by the false act.

It matters not if the cause of action of Fraud or Constructive Fraud the fact is that there must still be damages.

It is also well settled in the law that the Plaintiff bears the burden of proof in establishing the elements of the cause of action and the Court is to remain impartial and rule upon the evidence submitted by the parties that is admissible. These basic principles of jurisprudence cannot be argued otherwise.

This cause of action relates to the writ of prohibition and therefore the many errors of law relating to the merits is not included in this Petition.

This Petition for a Writ of Prohibition relates to the Circuit Court exceeding its legitimate powers and the result will damage the Petitioner in a way that is not correctable on appeal. The Circuit Court's appointment of a Special Commissioner for purposes beyond its function and an impartial trier of fact was improper as a matter of law. The Circuit Court's Order that personal property be sold without affording Petitioner an opportunity to present evidence and prior to a judgment is improper as a matter of law. The Circuit Court's orders have done nothing but assist the Respondents in the prosecution of their case and this is highly improper as a matter of law.

Through the repeated filing of motions and arguments in court the Circuit Court has been made aware of the issues now presented. The sale of the property has now been scheduled and the Petitioner has no other remedy at law other than to Petition for this Writ.

STATEMENT REGARDING ORAL ARGUMENT

No oral argument is necessary in this matter pursuant to the West Virginia Rules of Appellate Procedure, Rule 18(a)(4).

ARGUMENT

Under West Virginia Code §53-1-1, a Writ of Prohibition shall lie as a matter of right “in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.”

“In determining whether to entertain and issue a writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

The undersigned apologizes in advance for the lack of citations in the following argument. The problem is this matter is so far off the reservation there are no cases on point.

No matter what words the undersigned entered into fastcase, the result was nothing close to this fact pattern. The undersigned has a lot of citations and statutes on the merits of the case, but none on this Petition for a Writ of Prohibition. If they are out there the undersigned was not able to find them.

The questions presented are as follows:

1. Whether a Circuit Judge can appoint a "Special Commissioner" to inventory and appraise personal property that is the subject of a law suit?

Special Commissioners have been used by the Courts in the interest of judicial economy for years. There is no specific rule of law that permits the tradition, other than some obscure statutes on abandoned lands, but the act has been upheld under the theory that "Courts have an inherent power to provide themselves with appropriate instruments required for performance of their duties." Under this purpose permission Courts of equity have appointed "Special Commissioners to perform tasks as decreed by the Court. This means that after judgment land is to be sold, the special commissioner will be appointed to execute the deed and give effect to the decree of the Court. The special commissioner is an extension of the Court and is performing a duty of the Court by virtue of the power granted to the Court to the Special Commissioner. To be clear, a special commissioner is appointed to give effect to a court order AFTER judgment. Where in the universe of civil litigation is the Circuit Court permitted to appoint a Special Commissioner to help one side prosecute or defend its case with all the powers of the Circuit Court?

In the present case a special commissioner was appointed in the beginning of the case to "determine the quantity, location, status, and estimated value of the assets owned by Darwin

Berg at the date of his death and to submit a report to this court regarding the same.” (See Appendix at page 49, number 2.) This act by the Circuit Court almost shocks the conscience.

It was not the function of the Circuit Court to “determine the quantity, location, status, and estimated value of the assets owned by Darvin Berg at the date of his death.” That was the burden of the Respondents in the prosecution of the case. It was irregular and improper for the Circuit Court to appoint a special commissioner to essentially investigate and create evidence to assist the Respondent in the prosecution of their case. This was both unfair and highly prejudicial to the Defendant, Petitioner herein. Petitioner argued below that this benefits the Respondents, not the Court. This does not foster any duty of the Circuit Court. This is not contemplated by the Rule of Law and does not square with the fundamentals of justice. (See Appendix Page 51 – 52) This argument was ignored and overruled by the Circuit Court.

The Special Commissioner made no independent determination of the property owned by the Estate of Darvin Ray Berg at the time of his death. Instead, he took the list prepared by Respondents and provided a replacement value. He made not consideration on the condition of the property or the ownership. His values are EXTREMELY elevated and have done nothing but muddy the water on the damage issue in this matter. The Petitioner was never given opportunity to establish the ownership of the property. The Petitioner was never given opportunity to submit evidence disputing the values of the property.

The appointment of a special commissioner to essentially create evidence for the Respondent clearly exceeds the legitimate power of the Circuit Court. If the Special Commissioner sells the property, whose ownership has not been fully adjudicated, prior to a Judgment the Petitioner will be damaged or prejudiced in a way that is not correctable on

appeal. This Order of the Circuit Court is clearly erroneous as a matter of law. Plain and simple, the power given to this Special Commissioner was NOT the function of the Circuit Court. The Court then gave the report great weight without looking behind it to see if the special commissioner did anything to determine ownership. This is just WRONG.

Petitioner should be awarded a writ of prohibition directing the Circuit Judge to remove the Special Commissioner, rescind his authority and strike from the record his report.

2. Whether a Circuit Judge can direct a "Special Commissioner" to sell personal property when the ownership has not been proven?

The argument above regarding the appointment of the Special Commissioner is incorporated herein. *In Arguendo*, that a Special Commissioner is a proper appointment and the Circuit Court's function is to assist the Respondents in the prosecution of their cause of action there is no way that the property can be sold before ownership is fully determined. Where in the universe of civil litigation is the Circuit Court authorized to sell property prior to a determination of ownership and without giving a party the opportunity to be heard?

In a fact pattern where the appointment of a Special Commissioner is proper, it is AFTER judgment. At that time the Special Commissioner may be necessary to sell property. In the present case we still don't have a judgment. In the present case the Petitioner never was permitted to put on any evidence to establish ownership of the property. The Court took the report of the unlawful Special Commissioner, who got his information from Respondents and used the fact that the items EXIST as ownership being solely vested in the Decedent. This is a violation of the Petitioner's Due Process rights that she was never given opportunity to present

evidence and now property that she claims and can prove absolute ownership in will be sold prior to a judgment. (See Appendix Page 113 – 119.) It is now the order of the Circuit Court that the entire lists provided by Respondents be sold and then the Court will “determine distribution of the proceeds.” (See Appendix at Page 125, number 5 and at page 128, number 5.) This overlooks the fact that the Circuit Court is order property be sold, without judgment, against the wishes of the lawful owner for the purpose of assisting the Respondents in establishing damages.

The appointment of a special commissioner to sell property without giving the Respondent an opportunity to present evidence regarding ownership clearly exceeds the legitimate power of the Circuit Court. If the Special Commissioner sells the property, whose ownership has not been fully adjudicated, prior to a Judgment the Petitioner will be damaged or prejudiced in a way that is not correctable on appeal. This Order of the Circuit Court is clearly erroneous as a matter of law. Plain and simple, selling property prior to the determination of ownership is not a proper function of the Circuit Court. The Court gave the report great weight without looking behind it to see if the special commissioner did anything to determine ownership. The Court set the matter for further determination regarding ownership and then declined to permit the introduction of any evidence. This is just WRONG.

Petitioner should be awarded a writ of prohibition directing the Circuit Judge to remove the Special Commissioner, rescind his authority and strike from the record his report.

3. Whether a Circuit Judge can direct a “Special Commissioner” to sell personal property prior to a judgment for damages?

It must be noted that this cause of action is for monetary damages. Element (3) of Fraud requires the Respondents establish damage as a result of the act. It was clearly argued at the Evidentiary Hearing that Respondents would only be entitled to 50% of the Probate Assets after all claims and fees are paid. There was a claim against the estate for \$50,249.12 and an advancement of money for expenses by Respondent in the amount of \$17,625.72. (See Appendix at Page 106, paragraph 6.) This does not factor in additional costs that may be allowable in the Probate of the Estate. Many of the assets listed on Respondents lists were not owned by Darvin Ray Berg. Most were jointly owned by Darvin Ray Berg and Petitioner. The personal property to be sold will not come close to resulting in a solvent estate that will have funds available for distribution to Respondents. The Circuit Court cannot Order money to be paid to Respondents without first satisfying the legal claim that was filed in the Estate. To do so would be committing a fraud upon that lawful creditor.

Normally the taking and selling of property to satisfy a judgment is done by the extraordinary writ of Execution. This is done only after a Judgment. Where in the universe of the Law can a Circuit Court order property be sold without a judgment being entered? In the present case the remedy is money damages, not the taking and selling of property. (See Appendix at Page 116.) The Circuit Court has taken the position that this is a remedy. (See Appendix at Page 110, paragraph 15.) This is not proper.

Respondents bore the burden of proving damages. Respondents had to prove the ownership interest, value of property and then subtract legitimate Estate expenses and claims. This has not been done. Just like when the Circuit Court appointed the Special Commissioner to

create evidence for the Respondents, now the Circuit Court is ordering a way for them to prove their damages.

Remember the Circuit Court did opine that Petitioner had no fraudulent intent. The Circuit Court did recognize that she had help from competent counsel and the Clerk's in the courthouse. The Circuit Court just didn't like the result. The Circuit Court made no consideration of the fact that the Petitioner had given the Respondents some property that was their fathers. The Circuit Court made no consideration of the fact that two of the Respondents had purchased some tools from the Petitioner after the estate was final thus there was some acknowledgement of ownership. Now imagine how this grieving widow feels when the Circuit Court is going to have her lawnmower sold to help her adversaries prove their case. Imagine how she feels when the Circuit Court orders the Tractor she paid for or guns that were given to her as a gift sold to help her adversaries prove their case. Imagine that all stepladders, extension cords and household tools she has are going to be sold. There still isn't a judgment. She surely doesn't have much faith in the justice system. Imagine trying to explain this to her.

The appointment of a special commissioner to sell property without a judgment clearly exceeds the legitimate power of the Circuit Court. If the Special Commissioner sells the property, whose ownership has not been fully adjudicated, prior to a Judgment the Petitioner will be damaged or prejudiced in a way that is not correctable on appeal. This Order of the Circuit Court is clearly erroneous as a matter of law. Plain and simple, the power given to this Special Commissioner was NOT a power possessed by the Circuit Court. The Circuit Court has no idea what the property is worth because the Respondents failed to prove this so the Circuit

Court is going to order the property sold and then determine what to do with the money. It could be possible that the Court will give nothing to Respondents, but that doesn't change the fact that Petitioner's property was unlawfully sold. This is just WRONG.

Petitioner should be awarded a writ of prohibition directing the Circuit Judge to remove the Special Commissioner, rescind his authority and strike from the record his report.

CONCLUSION

The appointment of a Special Commissioner by the Circuit Court to obtain and submit evidence served no legitimate purpose or function of an impartial trier of fact. The Order of the Circuit Court directing property be sold without affording a party the opportunity to be heard on the issue of ownership exceeded a legitimate power. The Order of the Circuit Court directing a Special Commissioner so sell property prior to a judgment exceeded a legitimate power. The sale is scheduled for December 10, 2022. Once the sale occurs not remedy on appeal will be adequate. All of these Orders of the Circuit Court are clearly erroneous as a matter of law.

Respondents request this Honorable Court afford the following relief;

1. Issue a Rule to show Cause whether the writ shall be granted;
2. Issue the Writ of Prohibition and direct the Circuit Court to remove the Special Commissioner, rescind his authority and strike from the record his report;

Respectfully Submitted,



Jason R. Sites
West Virginia Bar # 8638
Counsel for Respondents

CERTIFICATE OF SERVICE

I, Jason R. Sites, hereby certify that I served a true copy of the foregoing Petition for a Writ of Prohibition along with the attached Appendix upon the Honorable Lynn A. Nelson at his address of 101 West Street, Keyser, WV 26726 via hand delivery and Nathan H. Walters, Esq., Counsel for Respondents, via e-service, on this the 18th day of November, 2022.




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Counsel for Petitioner

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF MINERAL, to-wit

DENITA D. BERG, the Petitioner named in the foregoing Petition for a Writ of Prohibition, being first duly sworn, says that the facts and allegations therein contained are true except so far as they are herein stated to be on information, and that, so far as they are herein stated to be on information, they believe them to be true.


DENITA D. BERG

Taken, sworn and subscribed to before me by DENITA D. BERG this 17th day of November, 2022.

My Commission Expires:

July 29, 2027
(Affix Notarial Seal)


NOTARY PUBLIC