

**INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

ICA EFiled: Mar 09 2023  
02:19PM EST  
Transaction ID 69308505

---

**No. 22-ICA-269**

---

Jeffrey Darago,  
Plaintiff Below, Petitioner

vs.)

Rodney Darago and Cathy Reeser,  
Defendants Below, Defendants

---

**Appeal from the Circuit Court of Monroe County  
Honorable Robert Irons, Judge  
Civil Action No. CC-32-2021-AA-1**

---

**PETITIONER'S BRIEF**

John H. Bryan (W. Va. Bar No. 10259)  
411 Main Street  
P.O. Box 366  
Union, WV 24983  
(304) 772-4999  
Fax: (304) 772-4998  
[jhb@johnbryanlaw.com](mailto:jhb@johnbryanlaw.com)  
**Counsel for Petitioner**

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES.....ii**

**ASSIGNMENTS OF ERROR.....1**

**STATEMENT OF THE CASE.....1**

**SUMMARY OF THE ARGUMENT.....3,4**

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....4**

**ARGUMENT..... 4, 5,6,7,8,9,10**

A. THE CIRCUIT COURT ERRED BY AFFIRMING THE COUNTY COMMISSION’S REFUSAL TO ACCEPT AND APPROVE THE RECOMMENDATIONS OF THE FIDUCIARY COMMISSIONER

B. THE CIRCUIT COURT ERRED BY FAILING TO ENFORCE THE CLEAR AND AND EXPRESS INTENTION OF THE TESTATOR, OSCAR DARAGO, AS SET FORTH IN HIS WILL.....

C. THE CIRCUIT COURT ERRED BY CONCLUDING THAT THE RESOLUTION OF THE ISSUE RESTED ON THE DATE THAT THE TITLE TO THE PIPELINE EASEMENT PASSED TO MOUNTAIN VALLEY PIPELINE

D. THE CIRCUIT COURT ERRED BY FAILING TO REMAND THE MATTER BACK TO THE MONROE COUNTY COMMISSION FOR FURTHER PROCEEDINGS INASMUCH AS, IN ITS ORDER,

THE COURT SPECIFICALLY STATED THAT THE FILE BEFORE THE MONROE COUNTY COMMISSION DID NOT CONTAIN MUCH INFORMATION CONCERNING THE MATTER, OR THE BASIS FOR THE COMMISSION’S DECISION.

**CONCLUSION.....11**  
**CERTIFICATE OF SERVICE.....12**

## TABLE OF AUTHORITIES

### **Cases**

<u>Walker v. West Virginia Ethics Com'n</u> , 201 W. Va. 108, 492 S. E. 2d 167 (1997).....	5
<u>Emmert v. Old National Bank of Martinsburg</u> , W. Va., 246 S.E. 2d 236, 241 (1978).....	6,8
<u>Keller v. Keller</u> , 287 S. E. 2d 508, 169 W. Va. 372 (W. Va. 1982).....	9

### **West Virginia Rules of Appellate Procedure**

West Virginia Rule of Appellate Procedure 18(a)(3).....	4
West Virginia Rules of Appellate Procedure 18(a)(4).....	4
West Virginia Rule of Appellate Procedure 19(a).....	4

## ASSIGNMENTS OF ERROR

1. The Circuit Court erred by affirming the County Commission's refusal to accept and approve the recommendations of the Fiduciary Commissioner.
2. The Circuit Court erred by failing to enforce the clear and express intention of the Testator, Oscar Darago, as set forth in his will.
3. The Circuit Court erred by concluding that the resolution of the issue rested upon the date that the title to the pipeline easement passed to Mountain Valley Pipeline.
4. The Circuit Court erred by failing to remand the matter back to the Monroe County Commission for further proceedings inasmuch as, in its Order, the Court specifically stated that the file before the Monroe County Commission did not contain much information concerning the matter, or the basis for the Commission's decision.

## **STATEMENT OF THE CASE**

This appeal arises out of a contested matter involving the estate of Oscar Darago, and ownership of the proceeds from the sale of a pipeline right of way and easement located on certain estate property. All parties to this appeal are children of the decedent, Oscar Darago, and Petitioner is the Executor of the aforementioned estate.

In his will, which was executed on April 10, 2008, Oscar Darago, specifically devised his real estate to the Respondent, Rodney Darago. The will further provided that certain personal assets, namely a Merrill Lynch Fund, and any bank accounts solely in Testator's name at his death were to be given to his three children to be divided equally between them. Oscar Darago

died on November 24, 2018.

Prior to Oscar Darago's death, he had entered into a contract with Lollar Law, PLLC, and Stevens & Stevens, PLLC to represent him in regard to eminent domain proceedings and lawsuit filed by Mountain Valley Pipeline which was pending in federal court at the time. He entered into this contract on or about December 1, 2017. The contract anticipated a future payout of settlement proceeds in an award of money damages, to Oscar Darago, less attorney's fees and expenses. The easement in question was over the real estate devised to Respondent, Rodney Darago.

The settlement with Mountain Valley Pipeline was consummated on or about March 4, 2019, and during the administration of the estate, Petitioner, in his capacity as Executor, approved the settlement. The estate then received the sum of \$53,484.18 as the proceeds of the settlement. This money was deposited into an estate account, and Petitioner, in accordance with the provisions of the will, intended to divide the proceeds three ways among the residuary legatees of the estate, namely Jeffery Darago, Rodney Darago, and Cathy Reeser. At this time, Respondent initially agreed to dividing the proceeds in this fashion. Subsequently, Respondent, Rodney Darago, changed his mind and objected to a proposed final settlement which made that disposition of the settlement proceeds, and the matter ultimately came on for hearing before the Fiduciary Commissioner, Susan Cobb. In her recommendation to the Monroe County Commission, Ms. Cobb submitted that the proposed final settlement was correct, and that the sales proceeds should pass under the residuary provisions of the will as a personal asset of the

decedent, and not as real estate.

Respondent, Rodney Darago objected to Ms. Cobb's recommendation, and a hearing was held before the Monroe County Commission. The Commission disregarded the recommendation of the Fiduciary Commissioner and ruled that Respondent, Rodney Darago should receive the settlement proceeds as part of the real estate he had inherited. The Commission proceeded to order Petitioner to immediately pay Respondent, Rodney Darago, the sum of \$53,484.18.

Petitioner appealed the decision of the Monroe County Commission to the Monroe County Circuit Court. By order dated, November 9, 2022, the Circuit Court affirmed the December 2, 2020 order of the Monroe County Commission. It is from that order that Petitioner now appeals.

Accordingly, Petitioner is seeking reversal of the Monroe County Circuit Court's November 9, 2022 Order, and that the matter be remanded with instruction for the Court to adopt the recommendation of the Fiduciary Commissioner.

### **SUMMARY OF THE ARGUMENT**

Petitioner asserts that the Circuit Court committed reversible error by affirming the County Commission's Order which refused to accept and approve the recommendation of the Fiduciary Commissioner. Among other issues, the Recommendation Order submitted by the Fiduciary Commissioner addressed whether the settlement proceeds from the Mountain Valley Pipeline right of way and easement be left in the estate and be divided equally between all three of decedent's children under the residuary provisions of the will, or rather paid directly to

Respondent.

Following a well reasoned analysis, the Fiduciary Commissioner recommended that the proceeds in question remain in the estate account and be divided pursuant to the will's residuary clause equally between the three children. The Fiduciary Commissioner correctly determined that the decedent's will did not intend that Respondent, Rodney Darago, alone receive the sale proceeds to the exclusion of the remaining beneficiaries. She found that, to the contrary, the will clearly provided that it was the Testator's intention that liquid assets, such as the pipeline easement settlement proceeds, were to be divided equally between the children, which was also the initial understanding and agreement of the beneficiaries.

Accordingly, this Court should reverse the Circuit Court's "Order Affirming County Commission", and remand the matter back to the Circuit Court with instructions to adopt the recommendations of the Fiduciary Commissioner.

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

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3), Petitioner asserts that oral argument is necessary pursuant to West Virginia Rules of Appellate Procedure 18(a)(4), the decisional process would be significantly aided by oral argument. Furthermore, Petitioner asserts that the matter should be set for oral argument under West Virginia Rule of Appellate Procedure 19(a) as this case involves a narrow issue of law.

### **ARGUMENT**

#### **1. The Circuit Court Erred by affirming the County Commission's refusal to accept**



**and approve the recommendations of the Fiduciary Commissioner.**

The Circuit Court below committed reversible error by affirming the Monroe County Commission's refusal to accept and approve the recommendations of the Fiduciary Commissioner. The West Virginia Supreme Court has held that the findings of a circuit court are reviewed under the clearly erroneous standard, and application of law to the facts under and abuse of discretion standard. Questions of law are reviewed *de novo*. Walker v. West Virginia Ethics Com'n, 201 W. Va. 108, 492 S. E. 2d 167 (1997).

Here, Oscar Darago's will was clear and unambiguous. It provided for the specific bequest of the Testator's real estate to the Respondent, Rodney Darago. It further provided that bank accounts which were solely in Testator's name to be divided equally between the Testator's children. The will also provided for the entire residue of his estate, with the exception of personal property, to be divided "equally, share and share alike" to his remaining three children. It is clear that it was the express intention of the Testator that all liquid assets, with the exception of the "Merrill Lynch Fund", be divided equally between his three children, including any forthcoming future assets as anticipated by the residuary clause.

The Testator's intentions were thus very specific. Certain tracts of real estate, along with certain personal property, were to go to certain children; the Merrill Lynch Fund was to be divided 25%, 25%, and 50%, respectively; and everything else, including any future liquid assets anticipated, would fall into the residuary clause to be divided equally between the three children. The proceeds of the Mountain View Pipeline settlement were anticipated by Oscar Darago prior

to his death as evidenced by the actions he undertook. The Testator did not specifically provide otherwise in his will, those proceeds would fall into the checking account provision, assuming they were received during his life, or else in the residuary clause provision, as in the instant situation. The Testator could have specifically expressed his intention that Rodney Darago receive the settlement proceeds, yet he did not. The Monroe County Commission was required to give effect to the expressed intention in the will, which provided for the receipt of such miscellaneous assets in its residuary clause. The Commission did not do that, and that erroneous decision was, some two years later, affirmed by the Circuit Court.

The West Virginia Supreme Court has recognized that “[t]he cardinal rule in the construction of wills is that [169 W. Va. 380] the testator’s intention controls, unless it is contrary to some positive rule of law or principle of public policy.” Emmert v. Old National Bank of Martinsburg, W. Va., 246 S.E. 2d 236, 241 (1978). Here, the Testator’s intent was clearly not contrary to any positive rule of law or principle of public policy, and, that being the case, his clearly expressed intention controlled and should have been given effect.

Therefore, based upon the foregoing, Petitioner asserts that the Court’s decision to affirm the Order of the Monroe County Commission was both clearly erroneous, and an abuse of the Court’s discretion constituting reversible error.

**2. The Circuit Court erred by failing to enforce the clear and express intention of the Testator, Oscar Darago, as set forth in his will.**

Again, as set forth above, Oscar Darago’s will was very clear, and unambiguous. It

provided for the specific bequest of the Testator's real estate to the Respondent, Rodney Darago. It further provided that bank accounts which were solely in Testator's name to be divided equally between the Testator's children, and also provided for the entire residue of his estate, with the exception of personal property, to be divided "equally, share and share alike" to his remaining three children. It is clear that it was the express intention of the Testator that all liquid assets, with the exception of the "Merrill Lynch Fund", be divided equally between his three children, including any forthcoming future assets as anticipated by the residuary clause.

The Testator's intentions were thus very specific. Certain tracts of real estate, along with certain personal property, were to go to certain children; the Merrill Lynch Fund was to be divided 25%, 25%, and 50%, respectively; and everything else, including any future liquid assets anticipated, would fall into the residuary clause to be divided equally between the three children. The proceeds of the Mountain View Pipeline settlement were anticipated by Oscar Darago prior to his death as evidenced by the actions he undertook. The Testator did not specifically provide otherwise in his will, those proceeds would fall into the checking account provision, assuming they were received during his life, or else in the residuary clause provision, as in the instant situation. The Testator could have specifically expressed his intention that Rodney Darago receive the settlement proceeds, yet he did not. The Monroe County Commission was required to give effect to the expressed intention in the will, which provided for the receipt of such miscellaneous assets in its residuary clause. The Commission did not do that, and that erroneous decision was, some two years later, affirmed by the Circuit Court.

The West Virginia Supreme Court has recognized that “[t]he cardinal rule in the construction of wills is that [169 W. Va. 380] the testator’s intention controls, unless it is contrary to some positive rule of law or principle of public policy.” Emmert v. Old National Bank of Martinsburg, W. Va., 246 S.E. 2d 236, 241 (1978). Here, the Testator’s intent was clearly not contrary to any positive rule of law or principle of public policy, and, that being the case, his clearly expressed intention controlled and should have been given effect.

Therefore, based upon the foregoing, Petitioner asserts that the Court’s failure to recognize and enforce the Testator’s clear intention as required, was both clearly erroneous, and an abuse of the Court’s discretion constituting reversible error.

**3. The Circuit Court erred by concluding that the resolution of the issue rested upon the date that the title to the pipeline easement passed to Mountain Valley Pipeline.**

Petitioner asserts that the Circuit Court erred by concluding that the resolution of the issue rested upon the date that the title to the pipeline easement passed to Mountain Valley Pipeline. Here, the Testator was very clear that his intention was that all liquid assets, other than the Merrill Lynch Fund, be divided equally between his three children. This included any forthcoming future assets such as anticipated by the residuary clause. The Testator himself had entered into the contract for which the settlement proceeds were eventually paid into his estate following his death. He clearly anticipated receiving those proceeds which would have been placed into his checking account had he lived, and therefore, upon his death, would’ve passed pursuant to the residuary clause of his his will. Had his intention been otherwise, he would’ve

expressly stated such.

As the West Virginia Supreme Court held in Syl. Pt. 3, Couch v. Eastham, 29 W. Va. 784, S.E. 23 (1887),

“When the will affords no satisfactory clue to the real intentions of the testator, the court must from necessity resort to legal presumptions and rules of construction. But such rules yield to the intention of the testator apparent in the will, and have no application when the intention thus appears.” Keller v. Keller, 287 S. E. 2d 508, 169 W. Va. 372 (W. Va. 1982).

Here, the intention of the testator is clear, therefore the Circuit Court should not have resorted to legal presumptions and rules of construction, but rather should’ve “yield[ed] to the intention of the testator apparent in the will”. It was improper for the court to surmise that the date that the easement passed to Mountain Valley Pipeline was the controlling factor in resolving the issue of how the settlement proceeds should be dispersed.

Therefore, based upon the foregoing, Petitioner asserts that the Court’s conclusion that the settlement proceeds passed with the real estate, and that the resolution of the issue rested upon the date that the title to the pipeline easement passed to Mountain Valley Pipeline, rather than the Testator’s clearly expressed intent that such proceeds were to be treated as liquid assets and pass to each heir equally under the residuary clause of the will, was both clearly erroneous, and an abuse of the Court’s discretion constituting reversible error.

**4. The Circuit Court erred by failing to remand the matter back to the Monroe**

**County Commission for further proceedings inasmuch as, in its Order, the Court specifically stated that the file before the Monroe County Commission did not contain much information concerning the matter, or the basis for the Commission’s decision.**

Petitioner lastly asserts that the Circuit Court erred by failing to remand the matter back to the Monroe County Commission for further proceedings. The matter was decided by the Monroe County Commission on December 2, 2020, but the Circuit Court didn’t rule on Petitioner’s appeal until November 9, 2022. In Paragraph 3 of the Circuit Court’s “ Order Affirming County Commission”, the Court specifically stated that:

“ The file before the Monroe County Commission does not contain much information concerning this matter, or the basis for the Monroe County Commission’s decision. Most of the information in the file is contained in the pleadings filed by the parties, and the file does not contain much factual or documentary evidence, other than that as alluded to in the pleadings. There is no record as to testimony or other matters considered below.”

Therefore, by the Court’s own admission, it rendered its decision in this matter based upon a paucity of information, and an incomplete record.

Petitioner asserts that the Circuit Court, at the very least, had an obligation to remand the matter to the Monroe County Commission for further proceedings in order that the record might be more fully developed, and the basis upon which any decisions made would be more clear. Petitioner further asserts that the Circuit Court was in no position to render a decision in this matter based upon the incomplete record before it, and by so doing committed reversible error.

## CONCLUSION

WHEREFORE, for the reasons set forth above, the Petitioner, Jeffrey Darago, prays that this Honorable Court enter an Order reversing the Circuit Court's Order Affirming County Commission, with instructions to proceed as ordered by this Court.

Respectfully Submitted,  
By Counsel,

/s/ John H. Bryan  
John H. Bryan, State Bar ID # 10259  
411 Main Street  
P.O. Box 366  
Union, WV 24983  
(304) 772-4999  
[jhb@johnbryanlaw.com](mailto:jhb@johnbryanlaw.com)

INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Jeffrey Darago,  
Plaintiff Below, Petitioner

vs.) No. 22-ICA-269

Rodney Darago,  
Cathy Reeser,  
Defendants Below, Respondents

**CERTIFICATE OF SERVICE**

I, John H. Bryan, do hereby certify that I have delivered a true copy of the foregoing  
PETITIONER'S BRIEF upon counsel of record via the West Virginia E-filing System, this the  
9th day of March 2022, and addressed as follows:

Jeffrey A. Pritt  
Pritt Law Firm, PLLC  
PO Box 708  
Union, WV 24983

Susan D. Cobb  
Fiduciary Commissioner  
2344 Moncove Lake Road  
Gap Mills, WV 24941

/s/ John H. Bryan  
JOHN H. BRYAN