AIN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-0602

HOMER DYE,
Plaintiff Below, Petitioner,

v.

COUNTY COMMISSION OF MARION COUNTY,
Defendant Below, Respondent.

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

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR APPEAL

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ASSIGNMENT OF ERROR

1. The Circuit Court committed reversible error in denying Homer Dye's appeal of the County Commission's decision to enter the Order Voiding Will of Record by ruling that Homer Dye had received proper due process, the County Commission had the authority to void the Will, and the County Commission acted timely where no notice was provided to Homer Dye of the intent to consider or enter the Order, the Fiduciary Supervisor acted without authority and on behalf of third-parties, exigent circumstances did not exist and did not provide grounds for the Order; the County Commission did not provide any authority for its actions; and the County Commission acted more than six months after admitting the Will to probate.

STATEMENT OF THE CASE

This case arises from the Estate of Oras Delmus Dye ("Oras Dye") and the probate of a holographic will attributed to him. Oras Dye died on December 25, 2015. R. 46. He did not have a surviving spouse but had six surviving children. Oras Dye's children are not parties to this action.

On or about December 15, 2013, Oras Dye signed a holographic will. R. 8-9. That holographic will is hereinafter referred to herein as the "Will." Pursuant to the Will, Oras Dye gifted, bequeathed, and devised his entire estate to Homer Dye, Petitioner herein. Id. Oras Dye signed the Will and it was witnessed by Homer Dye and Amber McClain. Id.

I. Factual and Procedural Background Regarding Probate and the County Commission of Marion County

Homer Dye sought to start the probate process on or about January 6, 2016. R. 2. At that time, he submitted the Will to the Clerk of the County Commission of Marion County, West Virginia ("Clerk") and the County Commission of Marion County, West Virginia ("County Commission"). The Clerk did not accept the Will at that time but did allow it to be lodged for review. R. 39, 46. Cynthia A. Danley, Deputy Supervisor from the Office of the Fiduciary Supervisors, Marion County, sent Homer Dye a letter dated January 21, 2016 explaining the non-

acceptance. R. 53. In that letter, Ms. Danley advised Homer Dye that the Will could not be proven because it was not signed by two, disinterested witnesses. Id. Further, Oras Dye's children had "indicated that one of them wishes to be appointed as Administrator of the Estate." Id. The letter finally informed Homer Dye that if he did not respond in seven days, then one of the heirs at law would be appointed. Id.

Soon after receiving the letter, Homer Dye came to the Marion County Courthouse. From the record, it is unclear who he met with. According to the County Commission's response, he met with David A. Glance, Fiduciary Supervisor ("Fiduciary Supervisor"). R. 46. At that time, the Fiduciary Supervisor gave Homer Dye form affidavits titled "Proof of Holographic Will." Id. However, according to the Order Voiding Will of Record, written by the Fiduciary Supervisor, the Clerk provided Homer Dye with these affidavits. R. 68. Regardless of who provided him the affidavits, such person was an employee of the County Commission.

After receiving those affidavits, Homer Dye contacted two witnesses, Alicia Healey and Yvonne Shaw, to complete them. R. 10-11. The two witnesses did in fact complete the affidavits. The affidavits stated that the signer had known Oras Dye, was acquainted with his handwriting, and that the handwriting set forth in the Will is Oras Dye's handwriting. Id.

Homer Dye provided the Proof of Holographic Will affidavits of Alicia Healey and Yvonne Shaw to the Office of the Fiduciary Supervisors. At that time, said office accepted the Will and admitted it to probate. The County Commission accepted the Will to probate on February 4, 2016. R. 69, ¶ 2. The Clerk recorded the Will in Will Book No. 147, at page 228. R. 66.

After the recording of the Will, the Fiduciary Supervisor, decided he wanted to conduct his own, independent investigation of the Will. Ms. Danley sent a letter dated February 23, 2016

regarding this desire. R. 44. She stated, "Mr. Glance . . . wishes to contact the witnesses who signed the Affidavits for Proving The Holographic Will[]" and asked for addresses for the witnesses. Id.

Mr. Glance did in fact conduct his own independent investigation to disprove the affidavits that had been provided to Homer Dye. He sent a letter dated March 1, 2016, to Alicia Healey and Yvonne Shaw. R. 59. In that letter, Mr. Glance states:

> You have recently sworn, under oath, in Affidavits concerning the handwritten Will of Oras Dye.
>
> Before additional litigation takes place over this Will, I want to make sure of your position in this matter. The Will is printed and then signed by Oras Dye.
>
> Is it your sworn testimony that the printed Will was ALL done by Oras Dye? Or is it your sworn testimony that the signature on the Will is that of Oras Dye and you do not know who printed the Will. This is an important difference under West Virginia law, so I need you to sign the enclosed form and return it to our office.

Id. To that letter, Mr. Glance attached a document for the witness to sign depending on whether the witness intended her affidavit to verify only the signature on the Will or that the Will was completely in Oras Dye's handwriting. R. 60. Both witnesses signed indicating that they were only attesting to the signature of Oras Dye and returned the forms to Mr. Glance. R. 61-63.

Homer Dye's counsel, being undersigned counsel, sent Ms. Danley a letter dated April 18, 2016 regarding the situation. R. 57. In it, undersigned counsel stated that the issue regarding the validity of the Will had been resolved because the Will had been admitted to probate. Id. Further, Homer Dye had been appointed as executor on February 4, 2016. Id. There had also been indication in Ms. Danley's letter that the Will was invalid but undersigned counsel's letter clarified that Homer Dye's position was that the Will was valid as a holographic will. Id.

Mr. Glance responded to the April 18, 2016 letter indicating that he did not believe the Will was valid. R. 58. In that letter, he discusses how he followed up with the witnesses and

"their responses did not affirm their Affidavits." Id. Mr. Glance informed undersigned counsel that he "was in the process of meeting with the Prosecutor's office to have an Order prepared for the County Commission, voiding the Will of record." Id. The letter went on to place the burden of proof on Homer Dye to prove the Will and said he would wait twenty days before taking any action. Id. Finally, Mr. Glance stated that he was also sending a copy of everything "to the Heirs at Law of Oras Dye, and by a copy of this letter, asking them to file their written position on the Holographic Will within the next twenty (20) days." Id.

Over the next four months, no party took any action. Homer Dye did not respond to the April 18, 2016 letter, believing he had already proven the Will, as evidenced by its recording and his appointment as executor. Further, Oras Dye's children, being the heirs at law, never filed a written position. R. 69, ¶ 9.

On October 5, 2016, Mr. Glance finally followed up on his April 18, 2016 letter. R. 66. At that time, he provided the heirs at law, Homer Dye, and undersigned counsel with an order of the County Commission voiding the Will. Id. Such order was titled "Order Voiding Will of Record." Importantly, and a key to the case, is that this was not a proposed order. Rather, this was an order that he had the County Commission enter *ex parte*.

A review of the Order Voiding Will of Record establishes several facts. R. 67. There is an admission that Mr. Glance conducted his own independent investigation of the Will. R. 68. Mr. Glance never received a response to his April 18, 2016 letter from Oras Dye's children. R. 69. However, the catalyst for him taking his *ex parte* action was that Oras Dye's children met with him "the week of September 20, 2016, and expressed their concern that Homer Dye was trying to sell the real estate of their father" based upon the Will. R. 69, ¶ 9. The County Commission concluded that the Will was not wholly in Oras Dye's handwriting and "rescinded,

cancelled, annulled and held for naught" the Will. R. 70. It further "rescinded, cancelled, annulled and held for naught" the appointment of Homer Dye as executor of the estate. Id.

II. Procedural Background before the Circuit Court of Marion County

Homer Dye filed his appeal from the Order Voiding Will of Record on November 2, 2016. R. 1. The County Commission answered on December 27, 2016. Id. No scheduling order or briefing schedule was entered. Then, on July 19, 2018, the Circuit Court issued a Rule 41(b) notice for a hearing on dismissal. Id. Homer Dye responded and a hearing was held on or about August 22, 2018. Id. A memorandum of law in support of the petition was filed on July 9, 2019, and a response was filed on August 2, 2019. Id. A hearing was scheduled for February 11, 2020. Id. By letter dated May 20, 2020, the Circuit Court informed the parties of its decision and directed the County Commission to prepare an order. Id. Such order was entered on July 1, 2020 and appealed therefrom. Id.

SUMMARY OF THE ARGUMENT

The Court should overturn the Circuit Court's Final Order Denying Appeal from County Commission, order that the Order Voiding Will of Record is invalid, and hold that the Will is valid. Such decision is proper based upon the lack of due process afforded to Homer Dye, the lack of authority held by the County Commission to void the Will, and the untimeliness of the County Commission's actions.

Homer Dye's due process argument is straight-forward. The Fiduciary Supervisor submitted a proposed order to void the Will to the County Commission *ex parte*. No notice of hearing was provided to Homer Dye and no copy of this proposed order was provided to him. Rather, the first time he received the proposed order was after it had been entered by the County Commission as the Order Voiding Will of Record. Given that the County Commission had

accepted the Will to probate, before taking any action to void the Will, the County Commission should have given Homer Dye notice and an opportunity to be heard.

Such due process rights are even more important because the Fiduciary Supervisor was not acting as a neutral party. He had taken actions to benefit the intestate heirs of Oras Dye. Further, he conducted his own investigation to disprove the validity of the Will. Finally, he never required the intestate heirs of Oras Dye to take any action to protect their interests.

The County Commission's actions are also improper because it did not have authority to act in the manner that it did. No statutory authority exists that allows the County Commission to void a will that it has already admitted to probate. The County Commission exceeded the bounds of its authority when it entered the Order Voiding Will of Record.

The County Commission's actions should also be considered untimely. An interested party only had six months to seek impeachment of a will and to the extent the County Commission has the same authority, it should be bound to that deadline. The Order Voiding Will of Record was entered eight months after the County Commission had accepted the Will to probate. Therefore, such order should be considered untimely and held invalid.

Based upon the foregoing, the Court should reverse the Circuit Court's Final Order Denying Appeal from County Commission. Further, it should order that the Order Voiding Will of Record is invalid and hold that the Will is valid.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner does not request oral argument in this Appeal because he believes "the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument." W. Va. R. App. P. 18(a)(4).

ARGUMENT

I. Standard Of Review

There are no questions of fact at issue in this case, only questions of law. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, [the Court applies] a de novo standard of review." Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415, syl. pt 1. (1995).

II. The Circuit Court erred in not granting Homer Dye's appeal and striking the Order Voiding Will of Record when Homer Dye did not receive proper due process, the County Commission acted without authority, and the County Commission acted untimely.

Homer Dye's argument rests on three grounds. First, he was not afforded any due process before the County Commission entered its Order Voiding Will of Record because he received no notice or hearing. Further, the Fiduciary Supervisor was not acting neutrally, therefore necessitating a hearing. Second, the County Commission did not have the authority to void the Will after it had already admitted the Will to probate. And third, the County Commission's actions were untimely as it waited eight months after it admitted the Will to probate to void it.

1. The Circuit Court erred in holding that Homer Dye had received adequate notice to satisfy his due process requirements because no actual notice of the proposed order was provided, and the fiduciary supervisor was improperly involved.

Homer Dye was entitled to more due process than he received prior to the County Commission entering its Order Voiding Will of Record. In fact, Homer Dye did not receive any notice from the County Commission of its intention to consider such order. To the extent that he received any notice at all, it was from the Fiduciary Supervisor in the form of an April 26, 2016 letter. Such letter was not proper notice and did not provide an appropriate opportunity to be heard.

The other problem with considering the Fiduciary Supervisor's letter as proper notice is that he had taken an adverse position to Homer Dye. The Fiduciary Supervisor had acted on

behalf of the intestate heirs and undertaken an independent investigation to disprove the Will. Therefore, the Fiduciary Supervisor's letter could not be considered an extension of the County Commission, which was acting as a neutral, decision-making body.

A. The County Commission itself did not provide notice of its intent to void the Will and such notice was forthcoming had it followed the rules set forth in the West Virginia Code.

One of the Petitioner's key complaints against the actions of the County Commission is that he did not receive proper notice or an opportunity to be heard prior to the County Commission voiding the Will. There is no dispute that the County Commission itself provided neither notice nor an opportunity to be heard before it entered the Order Voiding Will of Record. Further, had the County Commission required Oras Dye's children to properly challenge the Will, then there would have been notice.

i. The Fiduciary Supervisor's April 25, 2016 letter did not provide sufficient or proper notice to Homer Dye.

The Circuit Court improperly places great weight on the April 25, 2016 letter from the Fiduciary Supervisor to counsel for Homer Dye. In that letter, the Fiduciary Supervisor states that unless he receives additional evidence that the Will was wholly in Oras Dye's handwriting, he was going to meet with the Marion County "Prosecutor's office to have an Order prepared for the County Commission, voiding the Will of record." R. 58. No motion or petition was attached to this letter. Id. Rather, it was just the Fiduciary Supervisor's representation that he was going to have an order prepared. Id.

The Circuit Court considers this letter adequate notice and places the blame on Homer Dye and his counsel for not responding. However, no effort is made to determine why this letter would be proper or adequate notice. In terms of claims against an estate, "[t]he general scheme of the probate statutes reflect a legislative intent that a claimant be given notice and an

opportunity to be heard before a claim is rejected on the merits." Hose v. Estate of Hose, 230 W. Va. 61, 67, 736 S.E.2d 61, 67 (2012). Due process principles require giving a claimant notice and opportunity to be heard before a rejection occurs. Id. In this case, there was no opportunity to be heard before the County Commission, given that the County Commission never gave any notice of its intent. This is especially problematic given the Fiduciary Supervisor's non-independent role and his exceeding of his powers.

The April 25, 2016 cannot be considered adequate notice of anything. It is not a motion or similar pleading to the County Commission. It is not even a proposed order. It is simply a letter stating what the Fiduciary Supervisor intends to do, which was prepare an order. Notably, the Fiduciary Supervisor does not have the power to enter such order. Therefore, any entry of that order would require it to be presented to the County Commission, thereby creating grounds for notice to interested parties.

The Fiduciary Supervisor did in fact prepare an order and present it to the County Commission. However, he neglected to inform Homer Dye of this presentation **until after the fact**. It is unclear exactly when, but sometime in September or October 2016, the Fiduciary Supervisor presented a proposed order to the County Commission. The County Commission entered that order on October 5, 2016. R. 82-83. It was only after the order was entered did the Fiduciary Supervisor send a copy to Homer Dye. R. 66.

This action by the Fiduciary Supervisor of presenting an *ex parte* order to the County Commission is the exact type of situations that due process is designed to avoid. Nothing (other than his lack of authority) would have prevented the Fiduciary Supervisor from filing a motion or petition to set aside the Will and providing a copy of the same to Homer Dye. The Fiduciary Supervisor likely could have satisfied due process by providing a copy of the proposed order to

Homer Dye prior to the meeting of the County Commission and notifying him of the date of the meeting. The Fiduciary Supervisor did not do that but rather he simply provided an *ex parte* order to the County Commission and intentionally did not notify Homer Dye of his actions.

The Circuit Court takes the position that Homer Dye should have responded to the April 26, 2016 letter and that he did not take advantage of his due process by not doing so. Such position ignores the factual situation at the time that the Fiduciary Supervisor sent the April 26, 2016. By that time, the Will had already been accepted to probate by the County Commission on February 4, 2016. R. 69. Homer Dye had already met his burden by providing, at the request of the Fiduciary Supervisor, two affidavits proving that his brother's will was wholly in his own handwriting. If anyone wanted to overturn the decision to admit the Will to probate, then that was going to be that person's burden. Essentially what the Fiduciary Supervisor was asking in the April 26, 2016 letter was for Homer Dye to prove his case twice.

The complete lack of notice from the County Commission violates Homer Dye's due process rights. The County Commission could have noticed the Fiduciary Supervisor's proposed order for hearing, but it failed to do that. Instead, it acted *ex parte* solely based upon the Fiduciary Supervisor's request, which was for the benefit of the children of Oras Dye. These actions cause the Order Voiding Will of Record to be inappropriate and void. Finally, what is also frustrating is that had the County Commission and the Fiduciary Supervisor required Oras Dye's children to exercise their rights on their own (if they so desired), then Homer Dye would have received notice and a hearing on the Will.

ii. Had the County Commission and the Fiduciary Supervisor required the children of Oras Dye to exercise their right to object to the Will, then Homer Dye would have received notice and a hearing.

There is no requirement in the West Virginia Code ("Code") for notice to Homer Dye about the Order Voiding Will of Record because there is no provision in the Code for a county commission to take such an action. See infra Section II(2). However, the Code does have notice provisions for when an objection is made to the probate of a will.

In this case, the children of Homer Dye had an opportunity to object to the County Commission's admission of the Will to probate. A "person entitled to contest the probate of a will" may appear before the county commission and object to the probate of the will so long as such objection is made before the county commission "has made an order admitting or refusing to admit the will to probate[.]" W. Va. Code § 41-5-10. Once that objection is made, then the county commission shall issue process on such objection "and the proceeding thereafter shall be heard before the county court only, and in all respects in the same manner as if the will had been offered for probate in solemn form[.]" Id.

Usually, opponents of a will are not able to challenge it before the county commission because they do not have notice of the issue before the county commission enters an order admitting the will to probate. However, in this case, Oras Dye's children could have acted before the County Commission. As evidenced by Ms. Danley's January 21, 2016 letter, Oras Dye's children had "indicated that one of them wishes to be appointed as Administrator of the Estate." R. 53. At that time, any of the children could have objected to the Will and forced a hearing before the County Commission. See W. Va. Code § 41-5-10. If that had occurred, then the County Commission would have been required to issue process on the objection and scheduled a hearing.

There is clearly a due process requirement set forth for objections to the entry of an order admitting a will to probate. Such requirements are issuance of notice of process and scheduling of a hearing. Hose, 230 W. Va. at 67, 736 S.E.2d at 67. If the County Commission was going to void its order admitting the Will to probate, then it should have at least followed the same notice and hearing requirements that would have been in place for an objection to the original order. It of course did not do that and instead provided no notice of its intentions, merely relying upon the Fiduciary Supervisor to provide notice of his intentions. Of course, the Fiduciary Supervisor's authority and intentions to take any action were improper and, therefore, his notice was not sufficient to satisfy the County Commission's notice requirements.

B. In finding that due process requirements had been met, the Circuit Court did not place any consideration on the lack of authority held by the Fiduciary Supervisor or that he was not a neutral extension of the County Commission.

The Circuit Court's findings regarding due process are also incorrect regarding the Fiduciary Supervisor. The first problem is that the Fiduciary Supervisor did not have the authority to act as he did, basically as an investigator and arbitrator of the validity of the Will. Second, the Fiduciary Supervisor was not a disinterested person but was clearly acting for the benefit of Oras Dye's children so that they did not have to take any action themselves.

i. The Fiduciary Supervisor did not have the authority to act in the manner that he did.

It is never explained why the Fiduciary Supervisor's authority extends to the authority to act regarding the probate of wills. Chapter 41, Article 5 of the West Virginia Code sets forth the mechanisms for admitting a last will and testament to probate. Nowhere in such Article is a fiduciary supervisor mentioned. Rather, the primary mechanism for the submission of a last will and testament is held by the clerk of the county commission and by the county commission. W. Va. Code § 41-5-10.

A fiduciary supervisor is primarily interested in the oversight of fiduciaries and the administration of estates. "The fiduciary supervisor shall have general supervision of all fiduciary matters and of the fiduciaries or personal representatives thereof and of all fiduciary commissioners and of all matters referred to such commissioners and shall make all ex parte settlements of the accounts of such fiduciaries except as to those matters referred to fiduciary commissioners for settlement." W. Va. Code § 44-3A-3. This code section only relates to fiduciaries and the administration of estates; it does not extend to production and probate of a last will and testament. Therefore, a fiduciary commissioner has no statutory authority regarding the probate of a last will and testament.

Assuming *arguendo* that a county commission may utilize a fiduciary supervisor to consider if a last will and testament is proper, that still does not give the fiduciary supervisor power to act unilaterally. Although not directly on point, Hose v. Estate of Hose, 230 W. Va. 61, 63, 736 S.E.2d 61, 63 (2012), is instructive. In that case, the plaintiffs sought to file a claim against the Estate of Larry B. Hose. Id. at 66, 736 S.E.2d at 66. To do that, they filed an affidavit with the clerk of the county commission as required by the claims statute. Id. The fiduciary supervisor refused to "accept the affidavit on the grounds that it was insufficient in giving notice of a claim." Id. The Court found that nothing in the statute gave "the Fiduciary Supervisor authority to summarily refuse to acknowledge the filing of an affidavit." Id. at 67, 736 S.E.2d at 67. Rather, the fiduciary supervisor had to accept the affidavit. Id. Then, if a counter affidavit was filed, the fiduciary supervisor was to refer the matter to a fiduciary commissioner for a hearing on the claim. Id.

The Court summarized its findings under the controlling statute as follows:

> First, it does not grant the Fiduciary Supervisor authority to reject a claim. Second, the statute requires a claim be objected to by specific persons, which do

> not include the Fiduciary Supervisor. Third, when a proper objection is made to a claim, the claimant must be given an opportunity to provide additional information to prove a claim at a hearing.

Id. The Court recognized that the claims process under the "statutes reflect[s] a legislative intent that a claimant be given notice and an opportunity to be heard before a claim is rejected on its merits." Id. The Court concluded that even if the fiduciary supervisor could reject a claim, "due principles would require giving the Plaintiffs notice and an opportunity to be heard before such rejection occurred." Id.

Hose dealt with claims against an estate as opposed to the probate of a will. However, its lessons are applicable here. The controlling statute limited the fiduciary supervisor's power. The fiduciary supervisor could not simply reject an affidavit; he did not have the power to do that. Further, even if he did, he needed to provide notice and an opportunity to be heard.

In this case, the fiduciary supervisor has even less power. Chapter 41, Article 5 of the Code provides no power to the fiduciary supervisor to oversee the probate of wills. Further, it does not provide any power for the fiduciary supervisor to reject an affidavit or go out and seek to disprove it. Yet, the Fiduciary Supervisor did all those things in this case. He did not believe the affidavits provided by Homer Dye, so similarly to the fiduciary supervisor in Hose, he rejected them. R. 44. To disprove them, he contacted the affiants and provided them documents to change their story. R. 59. This occurred even though the likely Fiduciary Supervisor prepared the affidavits in the first place. R. 46. Then, once the affiants sent back the information, he, along with the prosecutor, prepared the Order Voiding Will of Record. R. 58. The Fiduciary Supervisor provided no notice that he was presenting such an order and did not provide a copy of the order. Rather, he presented it to the County Commission on October 5, 2016; had it sign off on it, and only then sent it to Homer Dye. R. 66-67.

The Court in Hose concluded that a fiduciary supervisor's actions were not valid if he did not have the statutory authority to take such actions. Hose at 67, 736 S.E.2d at 67. Then, even if the fiduciary supervisor had such statutory authority, he still had to provide due process to the party to be harmed. Id. This due process needed to be notice and opportunity to be heard. Id. Given that the Fiduciary Supervisor had no power to invalidate a will, his actions in securing the Order Voiding Will of Record are grounds to overturn that decision. Additionally, if the Fiduciary Supervisor did have such authority, there needed to be a mechanism for Homer Dye to receive notice and be heard. No such notice was provided as the Fiduciary Supervisor never provided a copy of his proposed order to Homer Dye or notified him of a hearing before the County Commission. Such lack of notice and opportunity to be heard provides additional grounds to set aside the Order Voiding Will of Record.

ii. The Fiduciary Supervisor was acting improperly as an advocate for the children of Oras Dye.

In its findings, the Circuit Court tends to treat the Fiduciary Supervisor as an extension of the County Commission. The Fiduciary Supervisor is an agent of the County Commission. See W. Va. Code § 44-3A-3. For that reason, the Fiduciary Supervisor should be neutral in his actions. He clearly was not in this case and that taints any action taken unilaterally by him.

A review of the case establishes that the Fiduciary Supervisor is acting on behalf of Oras Dye's children. Homer Dye lodged the Will on January 6, 2016. R. 39. It was lodged pending an interpretation as a holographic will by the Fiduciary Supervisor. Id. On January 21, 2016, Cynthia A. Danley sent a letter to Homer Dye detailing the Fiduciary Supervisor's opinion of the Will. R. 53. That opinion did not try to validate the Will as a holographic will. Id. Rather, it treated it as a non-holographic will requiring witnesses. Id.

Instead of pointing out how Homer Dye could validate the Will, the Fiduciary Supervisor or his deputy instead stated that the children of Oras Dye contacted their office. Id. The letter stated, "The children of Oras D. Dye have indicated that one of them wishes to be appointed as Administrator of the Estate. If after seven days have passed and I have not heard from you, one of the heirs at law will be appointed." Id. The Fiduciary Supervisor treated the Will as a non-holographic will and one possible reason from the January 21, 2016 letter was to benefit Oras Dye's children.

In response to the January 21, 2016 letter, Homer Dye went to the Marion County Courthouse. At that time, someone at the courthouse provided him with form affidavits titled "Proof of Holographic Will." R. 46. That may have been the Fiduciary Supervisor or an employee of the Clerk's office. R. 46, 68. Those affidavits "given to all persons tendering a holographic will for probate in Marion County[,] West Virginia." Id. Homer Dye, following the instructions provided him, contacted two witnesses, Alicia Healey and Yvonne Shaw, to complete those forms. R. 10-11. The two witnesses completed the affidavits and Homer Dye returned them to the courthouse. Based upon those affidavits, the County Commission admitted the Will to probate on February 4, 2016. R. 69.

The affidavits provided by Homer Dye were insufficient for the Fiduciary Supervisor. He wanted to contact the witnesses himself. R. 44. The Fiduciary Supervisor did in fact undertake that action and sent documents to Alicia A. Healey and Yvonne Shaw by letter dated March 1, 2016. R. 59. The Fiduciary Supervisor alluded to "additional litigation" in his letter and that before that happened, he wanted to make sure of the witnesses' position. Id. Attached to the letter was a document stating the following:

> With respect to the Handwritten Will of Oras Dye:
> (1) My Affidavit was only intended to verify that the signature on the handwritten

Will was that of Oras Dye and I cannot say who printed the actual will.

_____
Signature

(2) My Affidavit was intended to verify that the printed Will and signature on the handwritten Will are wholly in the handwriting of Oras Dye.

_____
Signature

Please sign #1 or #2 as to which is a truthful statement.

R. 60. Both witnesses signed option number two and returned the documents to the Fiduciary Supervisor. R. 61-63. The Fiduciary Supervisor and the County Commission considered this an investigation. R. 68. Based upon the record, the Fiduciary Supervisor himself decided he needed to undertake this investigation. R. 44.

After receiving the documents back from the witnesses, the Fiduciary Supervisor decided to meet "with the Prosecutor's office to have an Order prepared for the County Commission, voiding the Will of record." R. 58. He informed Homer Dye, via counsel, of this by letter dated April 26, 2016. Id. In that letter, he states, "Since your client has the burden of proving the Will of record was 'wholly in the handwriting of Oras Dye,' I will wait twenty (20) days before taking any action." Id. Of course, Homer Dye already proved such fact through the affidavits and the Will was accepted by the County Commission. R. 69, ¶ 2. It was only after the Fiduciary Supervisor undertook his investigation that a doubt was raised.

In that same letter, the Fiduciary Supervisor, for the first time, asks Oras Dye's children to take some action. He asks "them to file their written position on the Holographic Will in the next twenty (20) days." Id. Oras Dye's children never responded. R. 82, ¶ 9.

During the week of September 20, 2016, the children of Oras Dye met with the Fiduciary Supervisor. At that time, they "expressed their concern that . . . Homer Dye was trying to sell the real estate" owned by Oras Dye at the time of his death. Id. Based on this, the Fiduciary

Supervisor caused the County Commission to enter the Order Voiding Will of Record on October 5, 2016. R. 67.

All of the actions taken by the Fiduciary Supervisor were designed to benefit and were on behalf of the children of Oras Dye. Moreover, the Fiduciary Supervisor took it upon himself to take those actions instead of having the children utilize their own remedies. He was the one who interpreted the Will not as a holographic will but as a non-holographic will after it was first lodged. Then, after Homer Dye provided evidence that the Will was a valid holographic will, the Fiduciary Supervisor engaged in an investigation to disprove such evidence. Once the Fiduciary Supervisor completed his investigation, he shifted the burden to Homer Dye to prove the Will (that the County Commission had already admitted to probate.) Finally, when the children of Oras Dye expressed concern that the Will was not valid, he simply had an order prepared and submitted to the County Commission *ex parte* for entry. Oras Dye's children never had to take any action to argue their interests – they had the Fiduciary Supervisor to argue on their behalf.

In addition to the Fiduciary Supervisor acting on behalf of the children of Oras Dye, he never held them to the same standard as Homer Dye. Much is made of Homer Dye not responding to the April 26, 2016 letter. Yet, in that same letter, the Fiduciary Supervisor asked the children to make their position known. They never did. The County Commission had already admitted the Will to probate at the time of the letter. R. 69, ¶ 2. Therefore, the burden was on the children to challenge it, as permitted by West Virginia Code § 41-5-11. The Fiduciary Supervisor never made the children do that and instead blamed Homer Dye for not responding to his inquiry.

The Fiduciary Supervisor's actions create an additional cloud over the alleged due process that was afforded Homer Dye. His actions tended to benefit the children of Oras Dye to

the detriment of Homer Dye. The Fiduciary Supervisor was not a neutral party in this endeavor and, therefore, his *ex parte* submission of an order to the County Commission should have been balanced by notice and a right to a hearing before the County Commission. At that point, Homer Dye and the children of Oras Dye, the true parties in interest, could have appeared and presented their cases to the County Commission. Such lack of due process causes the Order Voiding Will of Record to fail. In addition to due process concerns, the scope of the County Commission's authority is also an issue.

2. The Circuit Court's order should be reversed because the County Commission did not have the authority or standing to set aside the Will.

The County Commission did not have the authority to void the Will and did not identify any such authority in its Order Voiding Will Of Record. R. 67. Further, it did not have standing to set aside such Will. Therefore, the Court should reverse the Circuit Court's order and hold that the County Commission's Order Voiding Will Of Record is invalid and improper.

A. The West Virginia Code does not provide for a mechanism for the County Commission to unilaterally void the Will.

Homer Dye sought to submit the Will to probate via the *ex parte* procedure provided by the West Virginia Code. See W. Va. Code § 41-5-10. Under the *ex parte* procedure, any person may move the county commission or its clerk for the probate a will that has been produced. Id. Then, "[t]he probate of, or refusal to probate, any will, so made by the clerk, shall be reported by him to the court at its next regular session, and, if no objection be made thereto, and none appear to the court, the court shall confirm the same." Id. Based upon this provision, a county commission **shall** confirm the probate of a will accepted by the clerk unless an objection is made or an objection appears to the county commission. See Terry v. Sencindiver, 153 W. Va. 651, 651, 171 S.E.2d 480, 480 (1969) ("The word 'shall', in the absence of language in the statute

showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation.")

In this case, the County Commission did in fact confirm the Clerk's decision to admit the Will to probate. As set forth in the Order Voiding Will Of Record, the County Commission made a finding "[t]hat on February 4, 2016, the Marion County Commission admitted a Holographic Will of Oras D. Dye to probate, based upon the affidavits of Yvonne Shaw and Alicia Healey." R. 69, ¶ 2. The Will was recorded in Will Book No. 147, at page 228.

Once the County Commission admitted the Will to probate, id., its work regarding the Will was complete. Nothing in West Virginia Code § 41-5-10 provides a mechanism for a county commission to revisit its order. Further, the County Commission provided no basis for its authority in its Order Voiding Will Of Record.

Although the County Commission did not have the power to revise its order admitting the Will to probate, there were mechanisms for interested parties to seek to set aside the Will. After a county commission enters an order admitting a will to probate, "any person interested who was not a party to the proceeding, or any person who was not a party to a proceeding for probate in solemn form, may proceed by complaint to impeach or establish the will[.]" W. Va. Code § 41-5-11. This complaint is to be filed in the "circuit court of the county wherein probate of the will was allowed or denied." Id.

The Code's mechanism for challenging an order admitting a will to probate further supports the argument that once the order is entered, the presiding county commission is done. The Code envisions the circuit court taking over disputes regarding a will after the county commission has made its decision. In this case, the County Commission has undertaken unilateral resolution of that dispute through the actions of its Fiduciary Supervisor.

The lack of authority for the County Commission's actions is fatal to its Order Voiding Will Of Record. West Virginia Code § 41-5-10 provides a finality to a county commission's order admitting a will to probate. Once the county commission enters that order, it is up to other parties to challenge it; the county commission itself does not have the authority to take up such challenge. And there is good reason for that: the county commission itself does not have a dog in the fight, specifically lacking standing to seek to impeach a will.

B. The lack of authority for the County Commission to void a will once it has entered an order admitting such will to probate is consistent with the County Commission's lack of standing.

The jurisdictional requirement of standing supports a holding that the County Commission had no further interest or power over the Will once it has entered its order admitting the Will to probate. "Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an "injury-in-fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court." Syl. Pt. 5, Findley v. State Farm Mut. Auto. Ins. Co., 213 W. Va. 80, 84, 576 S.E.2d 807, 811 (2002).

The County Commission cannot establish that it has suffered any injury-in-fact. It is not an heir of Oras Dye, under the Will, the laws of intestacy, or any other will. The County Commission has no legally protected interest in the distribution of the Estate of Oras Dye, and, consequently, did not and cannot suffer any injury-in-fact. With the County Commission's lack of any injury-in-fact, it makes sense that the West Virginia Code does not provide it with a mechanism to revisit the order admitting the Will to probate.

The County Commission did not have any statutory authority to enter its Order Voiding Will Of Record. This lack of authority is in addition to the due process problems already detailed. This combination of lack of authority coupled with lack of notice supports Homer Dye's request that the Court reverse the Circuit Court's holding and hold that the Order Voiding Will Of Record was improper and should be stricken. To the extent there may have been authority, it is unestablished how the County Commission's entry of such order was timely.

3. The Court should reverse the Circuit Court's order because the County Commission's actions were untimely.

Part of the problem of reviewing the County Commission's actions is that because it did not act under any statutory authority, there is no basis to determine that it acted appropriately. One of the arguments against the County Commission's actions is that it acted untimely given other timeframes related to the probate of wills.

A party who desires to challenge a county commission's order admitting a will to probate has six months to file a complaint in circuit court. W. Va. Code § 41-5-11. The statute is clear that "[i]f no such complaint be filed within the time prescribed, the judgment or order shall be forever binding." Id. The purpose of this requirement "is to accelerate settlement of estates." McKinley v. Queen, 125 W. Va. 619, 25 S.E.2d 763, 764 (1943). It also differs from a statute of limitation because it does not merely bar the remedy but extinguishes the right of action. Weese v. Weese, 134 W. Va. 233, 240, 58 S.E.2d 801, 806 (1950), *overruled in part by* Barone v. Barone, 170 W. Va. 407, 294 S.E.2d 260 (1982).

Assuming *arguendo* that the County Commission could set aside its own order admitting a will to probate, there must be some time limit on such action. The six-month time limit set forth in West Virginia Code § 41-5-11 is a logical deadline. The legislature previously set the deadline in West Virginia Code § 41-5-11 at two years with the goal of helping ensure

settlements of estates happened quickly. See Barone, 170 W. Va. at 409, 294 S.E.2d at 262. Such deadline also helps ensure that wills are not contested years later and there is certainty regarding the probate process.

The legislature continued to further this goal of acceleration by amending West Virginia Code § 41-5-11 in the 1990s. In 1993, the legislature reduced that period to one year. W. Va. Code § 41-5-11 (1993). Then, in just the next year, the legislature reduced the filing period to the current six-month deadline. W. Va. Code § 41-5-11 (1994). These reductions in the time to file for impeach of a will further limited the ability to set aside a will that had already been admitted to probate.

In this case, the County Commission admitted the Will to probate on February 4, 2016. R. 69. On October 5, 2016, it entered its Order Voiding Will of Record. No objection was filed with the County Commission in the interim. Therefore, over eight months separated the County Commission's entry of an order admitting the Will to probate and its entry of the Order Voiding Will of Record.

If potential heirs of an estate only have six months to impeach a will, then it makes no sense to allow a county commission even more time to set aside a will on its own volition. The County Commission had no interest in who Oras Dye's heirs were; it most certainly was not one. If the County Commission has the authority to set aside its own order admitting a will to probate, then it should be subject to the same deadlines established for impeaching a will. If that deadline is used, then the County Commission's actions were late. As the County Commission's entry of the Order Voiding Will of Record was untimely, the Court should reverse the Circuit Court's holding.

CONCLUSION AND REQUEST FOR RELIEF

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

Dated this 2nd day of November 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of November, 2020, the foregoing ***Petitioner's Brief In Support Of Petition For Appeal*** and ***Joint Appendix*** were deposited in the U.S. Mail, first class postage prepaid, addressed to all other parties to this appeal as follows:

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