IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

VALERIE JANE POE, as Administratrix
Of the Estate of Dorothy Louise Poe,
Plaintiff Below,

Petitioner,

v. No. 25-ICA-45

JAMES W. TAYLOR,
Defendant Below,

Respondent.

PETITIONER'S REPLY BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

(Civil Action No. 23-C-1089)

Submitted By:

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I. SUMMARY OF ARGUMENT

West Virginia Code § 41-5-11 is a statute that permits the institution of a suit in equity to impeach a will that has been admitted to probate or to establish a will that has been refused to probate with six months of entry of the order of the county commission admitting or refusing the will to probate. The circuit court erred by concluding that this statute bars the probate of a will after six months of the order of the county commission closing the estate and that Petitioner's Complaint to recover the property from the heirs at law was likewise barred after six months of the order of the county commission closing the estate. West Virginia Code § 41-5-11 is not a statute of limitations barring the probate of a will. The county commission properly reopened the estate, admitted the will to probate using the *ex parte* procedure, and appointed Petitioner Valerie Jane Poe as Administratrix C.T.A. There is no statute of limitations barring the probate of a will.

II. ARGUMENT

1. West Virginia Code § 41-5-11 is not a statute of limitation that bars the probate of a last will and testament after entry of an order of the county commission closing the estate.

The circuit court misapplied West Virginia Code § 41-5-11 to dismiss Petitioner's Complaint. West Virginia Code § 41-5-11 is a statute concerning the impeachment of a will admitted to probate or establishment of a will refused to probate by the county commission. In such a case, an interested party must file a complaint within six months from the date of the order of the county commission admitting

the will to probate or refusing the will to probate. W. Va. Code § 41-5-11. West Virginia Code § 41-5-11 does not apply to bar the county commission from probating a will after an estate has been closed by order of the county commission.

West Virginia Code § 41-5-11 states:

> After a judgment or order entered as aforesaid in a proceeding for probate ex parte, 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... . If the judgment or order was entered by the circuit court on appeal from the county commission, such complaint shall be filed within six months from the date thereof, and if the judgment or order was entered by the county commission and there was no appeal therefrom, such complaint shall be filed within six months from the date of such order of the county commission.

W. Va. Code § 41-5-11.

West Virginia Code § 41-5-11 clearly references the probate *ex parte* and probate in solemn form proceedings. It sets forth the limitations of appealing an order from a proceeding for probate *ex parte* or probate in solemn form by parties not present for that proceeding. All references to a "judgment or order" in Article 5 of Chapter 41 of the West Virginia Code are in reference to the order entered following a proceeding for probate *ex parte* or probate in solemn form "admitting or refusing to admit the will to probate." W. Va. Code §§ 41-5-5, 41-5-7, and 41-5-10, *see also* 41-5-9, 41-5-11, and 41-5-12. No sections of Article 5 of Chapter 41 reference an order closing the estate or order approving final settlement.

Here, the Estate of Dorothy L. Poe was initially opened as an intestate estate. There was no order admitting or refusing a will to probate at that time as no will had been offered for probate. These

sections do not operate to bar the probate of a will after an intestate estate has been opened by order of the county commission. Just as a subsequently dated will revoking prior wills can be probated at any time, a will can be probated revoking an intestate administration. W. Va. Code § 44-1-6. Intestacy or intestate succession only applies to those parts of a decedent's estate that was not effectively disposed of by will: "Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this code, except as modified by the decedent's will." W. Va. Code § 42-1-2(a). "The law favors testacy over intestacy." Syl. Pt. 8, In re Estate of Teubert, 171 W. Va. 226, 298 S.E.2d 456 (1982).

The circuit court below concluded that "Defendants are entitled to dismissal because this action was filed outside of the six month time frame to file a Complaint to establish the will following the Kanawha County Commission's entry of its Final Order closing the Estate." (App. 108 ¶18). "Pursuant to the requirements of W. Va. Code § 41-5-11, a Complaint to establish a will must be filed within six months of the county commission's final order." (App. 109-110 ¶21). This is a clear misinterpretation of the law.

"The sole purpose of the proceedings permitted under the provisions of Code, 41-5-11, is the determination of the validity of a challenged instrument purporting to be a will." Syl. Pt. 3, Mauzy v. Nelson, 147 W.Va. 764, 131 S.E.2d 389 (1963), *quoting* Canterberry v. Canterberry, 118 W. Va. 182, 189 S.E. 139 (1936).

The case of In re Winzenrith's Will clearly supports the position that the probate of a will is not a will contest under West Virginia Code § 41-5-11. "The probate of the will dated July 15, 1932, although regular in every way and now final, cannot be asserted as a bar to the probate of the later will dated July 1, 1936." In re Winzenrith's Will, 133 W. Va. 267, 272, 55 S.E.2d 897, 900 (1949). In Winzenrith, a subsequently dated will was submitted for probate three years after the first will was admitted to probate by order of the county commission. Id. at 268. The county commission *refused* for probate the second will, and the petitioner therein appealed. Id. The Court reversed and ordered the county commission to hold a hearing in solemn form or *ex parte*, if the parties agreed, concerning admitting the subsequent will to probate. Id. at 278.

Petitioner is not impeaching a probated will or attempting to establish a will refused for probate. The Last Will and Testament of Dorothy Louise Poe dated November 14, 2008 has already been established as it was admitted to probate by order of the county commission on August 30, 2023, and the Estate was reopened. (App. 035, 042). Petitioner's complaint seeks the return of assets received by the heirs at law in excess of what they were devised and bequeathed under the probated will so that Petitioner can distribute those assets in accordance with the terms of the Will. (App. 019).

When Respondent James W. Taylor qualified as Administrator of the Estate of Dorothy Louise Poe and the estate was first opened on October 7, 2021, the Estate was opened as an intestate estate. (App. 021). Respondent did not tender a will for probate, therefore there

was no order entered by the county commission admitting a will to probate or refusing a will to probate that could have been challenged by complaint pursuant to West Virginia Code § 41-5-11.

The circuit court's conclusion that West Virginia Code § 41-5-11 applies to intestate estates would create an absurdity. West Virginia Code § 41-5-11 states that "Any complaint filed under this section shall be in the circuit court of the county wherein probate of the will was allowed or denied." W. Va. Code § 41-5-11. If the circuit court's interpretation of West Virginia Code § 41-5-11 is correct, then the probate of a will within six months of the grant of administration of an intestate estate would have to be challenged by filing a circuit court action to supplant the intestate estate, even when there is no challenge to the validity of the will that has been tendered for probate. That is not the law and the circuit court has erred.

"The purpose of the requirement that a bill of complaint be filed within two years (now six months) of the date of probate is to accelerate the settlement of estates. We have no doubt that a suit to impeach a will must be commenced within two years (now six months) *from the date of the order of probate entered by the county court*." McKinley v. Queen, 125 W. Va. 619, 626, 25 S.E.2d 763, 767 (1943)(emphasis added). While the purpose of the will contest statute may be to accelerate the settlement of estates, the statute just does not apply to the situation herein as Petitioner is not attempting to establish a will that was refused for probate by the county commission. The will was admitted for probate by the county

commission. Petitioner's complaint was a proceeding in equity for the return of assets.

2. There is no statute barring the probate of a last will and testament after entry of an order of the county commission closing an estate.

There is no statute of limitation barring the probate of a last will and testament in West Virginia. "If no statutes have been passed which, either by their express terms or by fair construction, apply to a delay in filing a will or in presenting it for probate, there is no limit to the time within which a will may be filed or presented for probate; and accordingly a delay in propounding a will for probate does not prevent the court from admitting it to probate." 3 Page on Wills, § 26.26, n.1, *citing* In re Winzenrith's Will, 133 W. Va. 267, 55 S.E.2d 897 (1949). It is the West Virginia Legislature's prerogative to provide for a statute of limitations barring the late probate of a will and it has not enacted such a statute of limitations.

Respondent broadly claims "there are no means under West Virginia law for reopening an estate that has been fully administered under the laws of intestacy following a final order of settlement by the county commission." Respondent's Brief p.8. Respondent has cited no statute that prohibits an estate from being reopened, whether testate or intestate. Estates are routinely reopened to administer property of a decedent that had not been located prior to the closure of the estate. For example, reopening an estate is sometimes necessary in order to take control of a decedent's bank deposit account or investment account that had not been located prior to closure of the

estate. If the estate could not be reopened, it would be impossible to get control of those accounts in such a situation. The Supreme Court has acknowledged that an estate can be reopened in certain instances. Williamson v. Gane, 176 W. Va. 443, 446, 345 S.E.2d 318, 321 (1986).

Respondent also more specifically contends that "There is no law allowing for the probate of a later found will after an estate has been fully and properly administered." Respondent's Brief p.9. That is incorrect. The statute setting forth the probate *ex parte* procedure provides that "At, or **at any time after, the production of a will**, any person may move the county court having jurisdiction, or the clerk thereof in the vacation of the court, for the probate of such will, and the court or the clerk thereof, as the case may be, may, without notice to any party, proceed to hear and determine the motion and **admit the will to probate, or reject the same.**" W. Va. Code § 41-5-10 (emphasis added). The statute setting forth the probate in solemn form procedure provides that "The county court, sitting in a regular or special session, shall hear and determine all proceedings to admit a will to probate in solemn form. Upon or **at any time after the production of a will**, any person may offer the will for probate in solemn form by filing in the county court having jurisdiction a petition duly verified by affidavit...." W. Va. Code § 41-5-5 (emphasis added). Accordingly, the county commission or clerk may admit a will to probate at any time as there is no other statute restricting admission.

Respondent cites to West Virginia Code § 44-4-18 for the proposition that the final settlement (accounting) of the estate bars

the subsequent probate of a will of the decedent because it is "binding and conclusive upon every beneficiary of the estate *who has had notice* that the report has been laid before the fiduciary commissioner for settlement." Respondent's Brief p.10 *quoting* W. Va. Code § 44-4-18 (emphasis added). It is clear that the will beneficiaries, who were not parties to the prior estate administration, could not have received notice of the settlement report of Respondent and therefore the report is not binding and conclusive upon them.

The final settlement does not foreclose actions against the personal representative for fraud, conversion, or other misdeeds. *See* Rodgers v. Rodgers, 184 W. Va. 82, 399 S.E.2d 664 (1990); Haudenschilt v. Haudenschilt, 129 W. Va. 92, 39 S.E.2d 328 (1946). Where a personal representative "has settled an account under the provisions of article four, chapter forty-four of this code, a suit to hold such fiduciary or his sureties liable for any balance stated in such account to be in his hands shall be brought within ten years after the account has been confirmed." W. Va. Code § 55-2-7. The final settlement does not prevent unpaid creditors from attempting to collect debts from the heirs or beneficiaries who received distributions of estate assets. W. Va. Code § 44-2-27(a). A creditor may collect a debt of the decedent from an heir or devisee who inherited real estate from the decedent or sold real estate of the decedent. W. Va. Code §§ 44-8-5; 44-8-6. The final settlement does not prevent a minor, a convict, or an incapacitated person from filing a complaint to impeach or *establish* a

will within one year of the person gaining capacity. W. Va. Code § 41-5-12.

In the Williamson case, the Court acknowledged that "new" heirs at law had an ownership interest in real estate of the intestate decedent. After the Court struck down a statute that restricted illegitimate children's rights to inherit from the father in Adkins v. McEldowney, 167 W.Va. 469, 280 S.E.2d 231 (1981), on equal protection grounds, the Court in Williamson was presented with the question whether the Adkins holding was retroactive concerning the devolution of title to the intestate decedent's real estate. Williamson v. Gane, 176 W. Va. 443, 444, 345 S.E.2d 318, 320 (1986).

In Williamson, the Court held that Adkins was "fully retroactive where there has been no justifiable and detrimental reliance upon the law invalidated therein; where the subject property has not been transferred to an innocent purchaser for value; or where the estate administration is subject to further resolution." Williamson at 446. This case is important because it shows that the Court permitted estates to be reopened in accordance with Adkins in certain instances in light of these "new" heirs at law.[1] This is not unlike this case in which the beneficiaries under the newly probated will have an ownership interest in the estate assets.

It is important to note that the final settlement is an accounting by the personal representative of his official actions in collecting assets of the decedent, paying claims of the decedent, and

[1] The Court also stated that the law was fully retroactive in all cases in which the estate administration was still open.

ultimately distributing the remaining amount to the heirs or beneficiaries. If an interested party fails to object to this accounting, then the accounting becomes final and cannot be challenged except in limited circumstances. Respondent's claim that the will beneficiaries had notice of his filing of the settlement report is not true because the will had not yet been probated and they did not know that they were beneficiaries of Dorothy L. Poe. The filing of the settlement report and the closing of the estate relieves the personal representative of his or her duties. It does not foreclose any and all actions concerning the estate. Regardless, the will beneficiaries are not challenging the settlement report (accounting) made by Respondent or the administration of the Estate by Respondent. Petitioner, as Administratrix C.T.A. filed the proceeding in equity for return of assets received by the heirs at law in excess of their shares under the will.

Respondent has cited to no statute that limits the time-period for admitting a will to probate. "Statutes of limitations, as other statutes, are created solely by legislative enactment and not by judicial decision. Courts have no power with respect to such legislation except to construe and apply the statute." State v. Butcher, No. 19-0756, 2020 W. Va. LEXIS 853, *9 (Dec. 7, 2020)(Memorandum Decision), *quoting* Morgan v. Grace Hosp., Inc., 149 W. Va. 783, 799, 149 S.E.2d 156, 165 (1965)(Haymond J., dissenting).

The Legislature has provided various statutes of limitations limiting the timeframe of various claims against the personal representative, the distributees, bona fide purchasers of

real estate, and others. Notably, there is no statute of limitations on the probate of a will.

Respondent claims that though bona fide purchasers are protected under W. Va. Code § 41-5-19 and 20, heirs and potential devisees are not protected "against the turmoil that is created when someone attempts to probate a will that is found months, years, or decades later." Respondent's Brief p.12. If no estate is ever opened for a decedent, a will could be probated possibly decades after the person's death. Thus the same issues Respondent warns against in a closed estate are applicable to a situation in which an estate is not timely opened. The same situation may arise when a person dies a resident of another state owning real estate in West Virginia and no ancillary administration is ever done. Nevertheless, the Court considered this issue in the Williamson case, and such persons may have equitable defenses for any improvements made, including laches. Williamson v. Gane, 176 W. Va. 443, 446, 345 S.E.2d 318, 322 (1986).

Respondent creates a straw man argument claiming "Petitioner insists that [personal representatives, distributees, and bona fide purchasers of estate assets] should no longer be protected once a will has been discovered, even if the decedent's estate was closed many years prior." Respondent's Brief p.12. Petitioner has never insisted those parties are due no protections, and there are statues of limitation that provide those parties with protections. For instance: the personal representative's actions in the administration of the estate are protected by the approval of the final settlement (W. Va. Code § 44-4-18); title of real estate of bona fide purchasers

is protected (W. Va. Code §§ 41-5-19, 41-5-20); and distributees are protected from decedent's creditors after two years following distribution W. Va. Code § 44-2-27(a)). The late probate of a will does not create any uncertainty to the personal representative, creditors, or bona fide purchasers of real estate as Respondent claims. They are all protected by statutes of limitations.

The West Virginia Legislature could have created a statute of limitations to prevent the late probate of a will but it has not done so. Even though the West Virginia Legislature has emphasized its interest in finalizing and accelerating the settlement of estates, the Legislature has competing interests such as upholding the testator's will, the interests of justice, rights of beneficiaries under the will, and the rights of minors and incapacitated persons. Accordingly, the Legislature has seen fit not to set a statute of limitations on probating a will. The prohibition of filing of a will after an estate has closed would prevent the testator's last wishes from being fulfilled and would harm the beneficiaries under the will, as they would not receive the property that the testator wanted them to have.

Respondent warns that no statute of limitations on the probate of wills invites "a flood of dubious "newly discovered" wills." Respondent's Brief p.13. Even assuming *arguendo* that is not the law as it stands today, a will must still meet the statutory requirements to be valid. It either must be entirely in the handwriting of the testator, or it must be witnessed by two persons who also sign the will. If the will is attested, the signatures must

be notarized. If not attested, then the witnesses must acknowledge their signatures when the will is tendered for probate.

The will of Dorothy L. Poe certainly does not appear "dubious." It was drafted by a well-known estate planning attorney, Greg R. Lord, it was properly witnessed, and the signatures were notarized with seal. (App. 039-040). Dorothy L. Poe executed the Will in 2008, long before her death in 2021. (App. 039; 022). Petitioner as Administratrix C.T.A. of the Estate of Dorothy Louise Poe does not seek to undo the entire estate administration but only seeks to recover some of the assets distributed to the heirs at law so she can redistribute those assets in accordance with the decedent's wishes as set forth in her Will.

III. CONCLUSION

The circuit court erred in applying the statute of limitations set forth in West Virginia Code § 41-5-11 to bar Petitioner's Complaint for the return of funds to be distributed in accordance with the probated will. West Virginia Code § 41-5-11 is not a statute of limitations that bars the probate of a will. West Virginia Code § 41-5-11 applies to bar the impeachment of a will admitted for probate or establishment of a will refused for probate by order of the county commission. There is no statute of limitations on the probate of a will in West Virginia. Accordingly, the fact that an intestate estate for Dorothy Louise Poe has been opened, has been fully administered, and has been closed, is not a bar to the probate of her subsequently found Will which was admitted for probate by order of the county commission. Likewise, it is not a bar to a suit in

equity for return of assets of the Estate for distribution in accordance with the terms of the will. The Court should reverse the circuit court's Order and remand the case for further proceedings.

VALERIE JANE POE, as
Administratrix of the Estate
of Dorothy Louise Poe,

By Counsel

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CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner Valerie Jane Poe, as Administratrix of the Estate of Dorothy Louise Poe, certifies that on May 19, 2025, the "**Petitioner's Reply Brief**" was served upon the parties via File & ServeXpress to the following counsel of record:

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